

Lugo v EAN Holdings, LLC

2020 NY Slip Op 32359(U)

July 17, 2020

Supreme Court, New York County

Docket Number: 153475/2018

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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JASMINE LUGO, JASMINE GONZALEZ,

INDEX NO. 153475/2018

Plaintiff,

MOTION DATE 5/11/2020

- v -

MOTION SEQ. NO. 002

EAN HOLDINGS, LLC, SEMAJ MCKAY, MANUEL LEWIN
LANCE LEWIN, AWAIS WARRAICH

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for RENEW/REARGUE.

Upon the forgoing documents, it is ORDERED that plaintiffs’ Motion, Motion Sequence 002, to reargue and renew the court’s decision of September 23, 2019, on the issue of whether plaintiffs suffered a serious injury as defined by Insurance Law 5102, and upon granting reargument, to issue an Order denying defendants’ motion for summary judgment which resulted in the Court’s order dismissing the complaint and granting summary judgment as to liability to the plaintiffs is granted.

The suit at bar stems from an incident that occurred on January 26, 2018 and allegedly injured plaintiff Jasmine Lugo and her daughter plaintiff Jasmine Gonzalez. In a September 23, 2019 Decision/Order, this court granted defendants’ motion, motion sequence 001, for summary judgment, pursuant to CPLR 3212, on the issue of serious injury and dismissed plaintiffs’ complaint. Here, plaintiffs argue that the court erred in finding that defendants met their initial burden in finding that plaintiffs suffered from degeneration (Mot at 8-9, ¶¶ 22-26). Further,

plaintiffs move for renewal on the basis that it has produced the additional medical record “which merely clarifies the findings already set forth in his prior affirmation” (*id.* at 1, ¶1(b)).

CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. “A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep’t 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted). A motion to renew under CPLR 2221(e), is intended to draw the Court’s attention to new or additional facts that were unavailable at the time the parties filed the original motion and the moving party must offer a valid excuse of unavailability for not submitting the additional facts upon original application (*Lee v Ogden Allied Maintenance Corp.*, 226 AD2d 226 [1st Dep’t 1996]).

Here, the Court finds that it did overlook or misapprehend the facts or law or mistakenly arrive to its decision. The Appellate Division, First Department has found that where plaintiff’s own medical records do not reveal any degenerative conditions, plaintiff need not “submit evidence from a medical expert detailing why degenerative conditions were not the cause of [their] reported symptoms” (*Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019] citing *Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]; *Bonilla v Vargas-Nunez*, 147 AD3d 461 [1st Dept 2017]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff’s doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by

the preexisting degenerative conditions, which were in plaintiff's own medical records, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, any record of plaintiffs' alleged degenerative conditions were submitted solely by defendants. Plaintiffs' doctors did not reveal any such degeneration that would warrant dismissal pursuant to the Court of Appeals decision in *Rosa v Delacruz*. Thus, plaintiffs' motion for leave to reargue defendants' motion for summary judgment which resulted in the Court's order dated September 23, 2019 dismissing the complaint on the basis that both plaintiffs did not sustain a "serious injury" as defined by Insurance Law § 5102(d), and upon reargument, denying defendants' motion is granted.

Upon leave to renew, the Court grants summary judgment on the issue of liability in favor of plaintiffs. In motion sequence 001, the Court denied plaintiffs' cross-motion on the issue of liability as moot. Given that the Court has reversed its ruling in motion sequence 001 which dismissed plaintiffs' complaint, the Court shall now examine the branch of plaintiffs' cross-motion on the issue of liability on the merits. Plaintiffs move for summary judgment as to the liability of plaintiffs Jasmine Lugo and Jasmine Gonzalez as blameless passengers in the underlying accident and to strike the affirmative defense of culpable conduct on the part of plaintiffs, including contributory negligence or assumption of risk, of each defendant.

This action stems from an incident which occurred on January 26, 2018, plaintiffs Jasmine Lugo and Jasmine Gonzalez were passengers in an Uber vehicle owned and operated by Awais W. Warraich which was involved in a four-vehicle accident on the Harlem River Drive/FDR Drive in the County, City, and State of New York. The accident occurred when

defendant McKay was changing from the middle lane into the right lane, and was struck by the vehicle operated by defendant Lewin, causing defendant McKay to lose control of his vehicle, hitting into a guard rail on the right side of the road, proceeding back into traffic, and hitting the vehicle operated by defendant Warraich in which plaintiffs were rear passengers, which then caused the Warraich vehicle to spin and lose control, also hitting into the guard rail (Mot 001, Exh A). Plaintiffs attach the Police Accident Report, the deposition of plaintiff Lugo, the deposition of plaintiff Gonzalez, the deposition of defendant McKay, and the deposition of defendant Lewin (Mot 001, Exh A, B, C, H, & K).

Summary Judgment in favor of the plaintiff is warranted where the defendant's own conduct inculpates him (*Uragrizza v Schmieder*, 46 NY2d 471 [1979]). "It is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles" (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001] citing *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1990]).

Here, plaintiffs have testified that defendants were solely responsible for causing the underlying accident and that plaintiffs were backseat passengers of the Uber when it was struck from behind (Mot, Exh H at 11-3; Exh K at 8-11). In opposition defendants fail to raise an issue of fact or provide a non-negligent explanation for the collision. Thus, the court finds that plaintiffs are free from any liability, and absent any issue of fact, plaintiff's motion for summary judgment on the issue of liability finding plaintiffs blameless passengers in the underlying accident and to strike the affirmative defense of culpable conduct on the part of plaintiffs, including contributory negligence or assumption of risk, of each defendant is granted.

Accordingly, it is

ORDERED that plaintiff's motion to reargue is granted and, upon reargument, the Court vacates its prior order, dated September 23, 2019; and it is further

ORDERED that defendants' motion for summary judgment seeking dismissal of this action as against them is denied in its entirety; and it is further

ORDERED that this action is restored to active status; and it is further

ORDERED that plaintiffs' motion for an order finding that plaintiffs are free from any liability and to strike the affirmative defense of culpable conduct on the part of plaintiffs, including contributory negligence or assumption of risk, of each defendant is granted; and it is further

ORDERED that, within thirty days of entry, plaintiffs shall serve a copy of this order upon all parties, together with notice of entry.

This Constitutes the Decision/Order of the Court.

7/17/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE