

**Agustin v Berger**

2020 NY Slip Op 34033(U)

December 7, 2020

Supreme Court, Kings County

Docket Number: 503484/18

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 503484/18  
Motion Date: 10-5-2020  
Mot. Seq. No.: 5-6

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ISRAEL AGUSTIN,

Plaintiff,

-against-

**DECISION/ORDER**

ALBERT BERGER, EAN HOLDINGS LLC  
ANTHONY V SANTIAGO and BEN & NINO  
AUTOBODY CORP.,

Defendants.

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Upon NYSEF Item Nos. 75-139, the motion and cross-motion are decided as follows:

In this action to recover damages for personal injuries, the plaintiff, ISRAEL AGUSTIN, moves for order pursuant to CPLR 3212 granting him partial summary judgment on the issue of liability against all defendants except defendant EAN HOLDINGS LLC since the action insofar as asserted against EAN has been discontinued. Defendants Anthony V. Santiago and Ben and Nino Auto Body Corp., cross-move pursuant to CPLR §3212 for an order granting them summary judgment dismissing plaintiff's complaint insofar as asserted against them. The motion and cross motion are consolidated for disposition.

This action arises out of a motor vehicle accident that occurred on December 14, 2017. The evidentiary materials that plaintiff submitted in support of his motion include his own deposition testimony, the deposition testimony of defendant ALBERT BERGER and a copy of an uncertified police report concerning the accident. At his deposition, the plaintiff testified that at the time of the accident, he was operating an electric bicycle and was on his way back from making a delivery for his employer. He was riding the bicycle on Avenue U in Brooklyn on the right side of the street in a space he described as being the space where bicycles travel apart from that portion of the roadway for moving traffic. As he was travelling on Avenue U, he observed a

parked car to his right open its door. The car door opened approximately 1 meter in front of his bicycle. He immediately applied the brakes on the bicycle but could not avoid striking the car door. After striking the door, he was thrown in the air and to the left. Before he made contact with the ground, he was struck by a truck which he believed came from behind him. He did not see the truck before it struck him and did not know what part of the truck came into contact with him. He was not even sure if it was a truck that struck him.

At his deposition, defendant Albert Berger admitted opening his car door prior to the accident but denied seeing the plaintiff or the other vehicle involved in the accident prior thereto. He was unsure if the plaintiff's bicycle made contact with the door to his car but believed that after he opened the door, the plaintiff swerved to the left and almost immediately came into contact with the truck.

Defendant Berger testified that the operator of truck was in the driving lane and was "where he was supposed to be." After the accident, the truck immediately stopped. He testified that the truck was not going fast because he was able to "stop right on the money" and there were no skid marks. He first saw the plaintiff when he was "flying into the tow truck" and first saw the truck when he was "hitting the guy on the bike".

After the accident the police arrived at the scene, took statements from the drivers and filled out a MV-104 Police accident Report. The police report describes the accident as follows:

AT T/P/O WHILE BICYCLIST WAS RIDING - ON STREET  
ALONGSIDE PARKED CARS, V2 WHICH WAS PARKED  
THEN SUDDENLY OPENED HIS DRIVERS SIDE DOOR  
CAUSING BICYCLIST TO - STRIKE- V2. BICYCLIST THEN  
FELL INTO W/B TRAFFIC LANE WHERE V3 WHO WAS  
DRIVING STRAIGHT DID STRIKE BICYCLISTS BODY  
CAUSING PAIN / INJURIES TO ENTIRE BODY. OFFICERS  
DID NOT WITNESS ACCIDENT....

Defendants ANTHONY V SANTIAGO and BEN & NINO AUTOBODY CORP.

apparently have not yet appeared for a deposition. In their answer, however, defendant Santiago admitted operating the truck that was involved in the accident and defendant Ben and Nino Autobody Corp. admitted ownership of the truck.

Plaintiff contends, *inter alia*, that the evidence demonstrates that defendant Berger violated Vehicle and Traffic Law § 1214 and is therefore negligent as a matter of law. Plaintiff also claims that the evidence demonstrates that in the exercise of reasonable care, he could not have avoided the accident. Defendants Santiago and Ben & Nino Autobody Corp. contend that the evidence demonstrates their freedom from negligence as a matter of law as the accident from their perspective was unavoidable.

The evidence that the plaintiff submitted in support of his motion, including his own deposition testimony and the deposition testimony of defendant Berger, established his prima facie entitlement to judgment as a matter of law against defendants Berger. The evidence established that defendant Berger violated Vehicle and Traffic Law § 1214 by opening the door on the side of his car adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, he should have seen (*see Rincon v. Renaud*, 186 A.D.3d 1551, 131 N.Y.S.3d 75, 76; *Montesinos v. Cote*, 46 A.D.3d 774, 848 N.Y.S.2d 329; *Williams v. Persaud*, 19 A.D.3d 686, 798 N.Y.S.2d 495; *cf. Price v. Tasber*, 145 A.D.3d 810, 811, 43 N.Y.S.3d 120; *Williams v. Persaud*, 19 A.D.3d 686, 798 N.Y.S.2d 495). The evidence submitted in opposition to the motion failed to raise a triable issue of fact as to defendant Berger's liability and did not raise a triable issue of fact as to plaintiff's own negligence.

The plaintiff did not, however, establish his prima facie entitlement to summary judgment against defendants Santiago and Ben & Nino Autobody Corp. The admissible proof did not establish as a matter of law that defendant Santiago could have avoided the accident in the exercise of reasonable care. A proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case and failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers (*see, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Finally, defendants Santiago and Ben & Nino Autobody Corp. did not establish, as a matter of law, their entitlement to summary judgment dismissing the action insofar as asserted against them. Their submissions did not demonstrate their freedom from negligence as a matter of law. Indeed, no admissible proof was submitted as to the actions of defendant Santiago prior to the accident. For this reason, their motion must also be denied regardless of the sufficiency of the opposing papers (*see, Winegrad, supra.*).

Accordingly, it is hereby

**ORDERED** that the branch of plaintiff's motion for partial summary judgment against defendant Berger on the issue of liability is **GRANTED**. It is further

**ORDERED** that the defenses raised by defendants that plaintiff's own negligence contributed to the accident are stricken. It is further

**ORDERED** that the branch of plaintiff's motion seeking summary judgment against defendants Santiago and Ben & Nino Autobody Corp. is **DENIED** ; and it is further

**ORDERED** the cross-motion is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 7, 2020



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020