

Chavez v Murabito

2020 NY Slip Op 34993(U)

June 16, 2020

Supreme Court, Westchester County

Docket Number: Index No. 52121/2019

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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CAMERON CHAVEZ,
Plaintiff, Index No. 52121/2019
- against - Motion Seq. 1 & 2

JAMES R. MURABITO and JAMES J. MURABITO,
Defendants. **DECISION & ORDER**

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JAMES R. MURABITO and JAMES J. MURABITO,
Plaintiff,
- against -

ADRIAN R. GRANT and EBO LOGISTICS LLC,
Defendants.

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In an action to recover damages for personal injuries (1) the plaintiff moves for partial summary judgment on the issue of liability pursuant to CPLR 3212; and (2) the third-party defendants move for summary judgment dismissing the third-party complaint:

Papers Considered

- 1. Notice of Motion/Affirmation of Michael Z. Huguenot, Esq./Exhibits A-G;
- 2. Notice of Motion/Affirmation of Kevin Gerard Maguire, Esq./Exhibits A-H;
- 3. Affirmation of George M. Lesnett, Esq. in Opposition;
- 4. Affirmation of George M. Lesnett, Esq. in Opposition;
- 5. Reply Affirmation of Michael Z. Huguenot, Esq.;
- 6. Reply Affirmation of Kevin Gerard Maguire, Esq.

Factual and Procedural Background

Plaintiff was a passenger in a vehicle operated by the defendant James R. Murabito and owned by the defendant James J. Murabito, which was involved in an accident on December 29, 2018, with a vehicle operated by the third party defendant Adrian R. Grant and owned by the third party defendant Ebo Logistics LLC.

The Murabito vehicle was traveling at a high rate of speed on northbound 195. James R. Murabito testified that he drank four to six beers earlier in the evening. As he attempted to change lanes to pass a truck, he hit a pothole and struck a wall, became

Chavez v. Murabito, Index No. 52121/2019

airborne, crashed into the truck, and skidded down the highway upside down. Murabito was arrested and convicted of driving while intoxicated and reckless driving.

Plaintiff commenced this action against the defendants with the filing of a summons and complaint. The Murabitos commenced a third-party action against Grant, the operator of the truck, and EBO Logistics.

Plaintiff moves for partial summary judgment on the issue of liability arguing that the accident was solely caused by the actions of Murabito. In opposition, the Murabitos argue that issues of fact exist as to plaintiff's negligence.

Grant and Ebo Logistics move for summary judgment dismissing the third-party complaint on the grounds that Grant was not negligent and that Murabito was the sole proximate cause of the accident. In opposition, the Murabitos argue that an issue of fact exists as to whether Grant exercised reasonable care in seeing what there was to be seen.

Discussion

The 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 (*see Winegrad v N. Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562).

"An innocent passenger . . . who, in support of [his or] her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation" (*Siegel v Terrusa*, 222 AD2d 428, 428-429 [2d Dept 1995]; *Pandey v Parikh*, 57 AD3d 634, 635 [2d Dept 2008]). "To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 324-325 [2018]).

Plaintiff demonstrated entitlement to partial summary judgment on the issue of liability. Moreover, third party defendants demonstrated entitlement to summary judgment dismissing the third-party complaint.

The evidence demonstrates that prior to the accident plaintiff and Murabito were at a restaurant in Larchmont celebrating Murabito's mother's 50th birthday. Plaintiff was the DJ. Plaintiff testified that he only had one alcoholic drink at the party. He arrived at the party with his own parents. At the end of the party, his parents took his DJ equipment home while plaintiff had plans to go out with Murabito. He testified that because he was

Chavez v. Murabito, Index No. 52121/2019

in the DJ booth, he did not spend much time with Murabito during the party. After leaving the restaurant, they drove to Murabito's apartment in New Rochelle and stayed longer than expected. During the drive from Larchmont to New Rochelle, plaintiff testified that Murabito's driving was fine. While at Murabito's apartment, plaintiff did not observe Murabito drink any alcohol and plaintiff did not consume any alcohol. Murabito did not show any signs of being intoxicated. Plaintiff decided to just go home instead of going out and Murabito drove him home. As they drove through the tolls on northbound I95, plaintiff testified that Murabito was driving very fast. He asked Murabito to slow down. Approximately thirty seconds later the accident occurred.

Murabito testified that he had four to six beers at the party. He confirmed that plaintiff was in the DJ booth, however, he testified that they were drinking beer together. Murabito testified that he and plaintiff took an Uber back to his apartment in New Rochelle where they stayed for thirty minutes. Plaintiff then wanted to go home so Murabito drove plaintiff in his father's BMW. Murabito testified that he was driving approximately 70 to 80 mph on northbound I95. He was attempting to pass Grant's truck, which he testified was traveling at 55 mph in the middle lane, when he struck a pothole which caused his vehicle to hit a wall and the truck. At some point, the vehicle turned upside down and all of the airbags deployed.

Plaintiff and third party defendants established that the accident was solely caused when Murabito, while driving at an excessive speed, lost control of the vehicle, and struck a wall, collided with Grant's truck, went airborne, and overturned. Third party defendants also demonstrated that Grant was driving within the speed limit and that the accident was solely caused by the actions of Murabito.

In opposition, the Murabitos failed to raise a triable issue of fact (*see Mughal v Rajput*, 106 AD3d 886 [2d Dept 2013]; *Siegel v Terrusa*, 222 AD2d 428; *Pandey v Parikh*, 57 AD3d 634). While a passenger in a vehicle is required to exercise reasonable care for his or her own safety (*see Posner v Hendler*, 302 AD2d 509 [2d Dept 2003]), the Court finds that plaintiff demonstrated, as a matter of law, that he exercised reasonable care under the circumstances (*c.f. Posner v Hendler*, 302 AD2d 509 [finding an issue of fact as to the passenger's comparative negligence where the passenger failed to protest the driver's conduct or request that she be let out of the vehicle]). In opposition, Murabito failed to raise a triable issue of fact as to plaintiff's comparative negligence

Chavez v. Murabito, Index No. 52121/2019

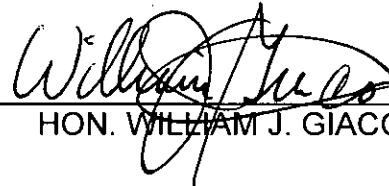
Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is **GRANTED** (motion sequence #1); and it is further

ORDERED that the third-party defendants' motion for summary judgment dismissing the third-party complaint is **GRANTED** and the third-party complaint is **DISMISSED** (motion sequence #2).

Counsel for all parties are directed to appear in the **Compliance Part, room 800**, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York
June 16, 2020



HON. WILLIAM J. GIACOMO, J.S.C.