

Gonzalez v Garcia

2021 NY Slip Op 33997(U)

May 25, 2021

Supreme Court, Westchester County

Docket Number: Index No. 50576/2021

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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

-----X
JESUS GOMEZ GONZALEZ and ANYA SKRYABINA,

Plaintiffs,

DECISION and ORDER
Motion Sequence No. 1
Index No. 50576/2021

-against-

ELIJAH GARCIA and
APPLE INTERCOM AND ELECTRONICS, INC.,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with plaintiffs' motion for an order granting them summary judgment against defendants on the issue of liability, and dismissing defendants' affirmative defense of culpable conduct and comparative negligence:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Statement of Material Facts, Affirmation, Exhibits 1 - 4	1
Statement of Material Facts, Affirmation in Opposition, Exhibits	2
Reply Affirmation	3

This personal injury action, commenced by summons and complaint filed January 18, 2021, involves an accident between a car and a pedestrian that occurred on October 26, 2020, at the intersection of Third Avenue and East 104th Street in New York County, at approximately 9:15 a.m. Plaintiff Jesus Gomez Gonzalez was a pedestrian crossing the street when he was knocked down by a vehicle operated by defendant Elijah Garcia and owned by defendant Apple Intercom and Electronics, Inc. Plaintiff Anya Skryabina brings a derivative claim. In the answer filed in response to the complaint, defendants include the affirmative defenses of culpable

conduct and comparative negligence.

In support of plaintiffs' present motion for partial summary judgment on the issue of defendants' liability, and to dismiss the affirmative defenses relating to culpable conduct on plaintiff's part, plaintiff Gonzalez asserts that he was walking his bicycle across Third Avenue at its intersection with 104th Street, from the northeast corner to the northwest corner, within a marked crosswalk, with the green light and walk signal in his favor, when he was struck by defendants' vehicle. Garcia's vehicle had been traveling eastbound on 104th Street and was turning left onto Third Avenue when his vehicle made contact with Gonzalez. According to Gonzalez's affidavit,

"I saw the defendants' vehicle moving forward into the intersection quadrant from East 104th Street. It then suddenly accelerated into a left-hand turn from East 104th Street onto Third Avenue and headed towards my position. I reacted by immediately freezing and then attempting to jump back, but there was inadequate time to safely avoid contact. I was still within the marked pedestrian crosswalk, fully within the crosswalk with the "WALK" signal still in my favor, when the front end of the defendants' vehicle struck me on my left side. Prior to the impact, I did not hear the sound of a horn, or screeching tires.

"I recall two separate impacts occurring with my body. Upon the first impact, which was very hard, the front passenger side corner of the defendants' vehicle struck my left knee and the left side of my body and knocked me down onto the pavement and on top of my bicycle. The defendants' vehicle did not stop after the first impact, and approximately 1 to 2 seconds later, there was a second impact, also very hard, when the front passenger side tire struck and pushed into my left knee and the bicycle, squeezing my body against the bicycle."

It is undisputed that plaintiff, as a pedestrian, had the right of way. It is also undisputed that based on the information provided to the reporting police officer, defendant was ticketed for a violation of New York City Administrative Code § 19-190, failure to yield right-of-way to a pedestrian in a crosswalk.

In opposition, defendants submit the affidavit of Garcia, who states that

“the traffic light was green so I began making a left-turn onto 3rd Avenue at approximately four miles per hour. While I was making a left-turn onto 3rd Avenue, the front passenger's side of my vehicle lightly tapped plaintiff Jesus Gomez Gonzalez's bicycle, which he was walking with on his left hand side. However, my vehicle never came into contact with the plaintiff, Jesus Gomez Gonzalez. The impact to the front of plaintiff Jesus Gomez Gonzalez's bicycle was very light as my vehicle was only traveling at approximately four miles per hour.”

Garcia goes on to assert that Gonzalez then asked him for money and said not to call the police, and that they walked to an ATM, but once there, Garcia decided to call the police, and informed Gonzalez that he would not pay the \$400 he was demanding. He does not deny that Gonzalez was knocked down.

Analysis

In order to be awarded summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, with evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The evidence must be viewed in the light most favorable to the opponents of the motion, and every favorable inference must be afforded to the non-movants (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]). Here, viewing the evidence in the light most favorable to defendants, and affording them every viable favorable inference, a right to partial summary judgment on the issue of defendant's liability has been demonstrated, as has a right to dismissal of the affirmative defenses relating to culpable conduct or comparative negligence on plaintiff's part.

“[P]laintiff established, prima facie, his entitlement to judgment as a matter of law on the issue of liability by presenting proof that he was walking within a crosswalk and that he looked for approaching traffic before he began to cross” (*Hamilton v Kong*, 93 AD3d 821, 821-822 [2d

Dept 2012]; *see also Gaston v Vertsberger*, 176 AD3d 919, 919-920 [2d Dept 2019]). The evidentiary materials submitted in opposition to this motion do not establish the existence of issues of fact as to defendants' liability. The assertion by Garcia that his vehicle made direct contact only with Gonzalez's bicycle rather than directly striking Gonzalez's body, and that the impact was very light, even accepted as true for these purposes, does not alter his liability. Those assertions, as well as Garcia's claims of the interaction that immediately followed, have relevance only as to the issue of Gonzalez's damages. A protest that a vehicle weighing more than a ton merely "lightly tapped" a pedestrian or his bicycle cannot serve to negate the fact of the accident, especially when there is no dispute that the pedestrian was knocked to the ground as a result.

While the absence of comparative negligence need not be established by plaintiffs seeking partial summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]), the Gonzalez affidavit also makes a prima facie showing of his lack of comparative negligence or culpable conduct, and nothing in Garcia's affidavit demonstrates the existence of any issue of fact on those points.

Nor do defendants establish that plaintiffs' motion for summary judgment was premature, since they failed to demonstrate that facts essential to oppose to the motion were exclusively within the knowledge and control of plaintiffs (*Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 [2d Dept 2012]).

This determination does not eliminate defendants' right to discovery and a trial on the issue of damages.

Based upon the foregoing, it is hereby

ORDERED that the motion for an order pursuant to CPLR 3212 granting partial summary judgment to plaintiffs and against defendant on the issue of liability, and dismissing defendants' affirmative defenses raising the issues of culpable conduct and comparative negligence, is granted, and it is further

ORDERED that the parties are directed to appear in the Preliminary Conference Part, at a time and manner of which they will be notified by that Part.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
May 25, 2021


HON. TERRY JANE RUDERMAN, J.S.C.