

Martorano v Santiago
2022 NY Slip Op 32270(U)
January 3, 2022
Supreme Court, Bronx County
Docket Number: Index No. 26716-2019E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 31**

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ANTHONY MARTORANO

Index No. 26716-2019e

Plaintiff,

-against-

Hon. VERONICA HUMMEL

JUSTIN SANTIAGO, LORNA CUEBAS, LUIS CERDA,

Acting Justice Supreme Court

ANTHONY MONSERRATE and DANNY MEJIA

Mot. Seq.1

Defendants.

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In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF regarding the motion of defendants LORNA CUEBAS and LUIS CERDA (the moving defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross-claims alleged against them.

This action arises out of a three-car collision which occurred on January 15, 2019, on Myrtle Avenue in Queens N.Y. (the Accident). The lead vehicle was owned and driven by defendant Santiago (the Santiago Vehicle). The second vehicle was owned by defendant Cuebas and driven by defendant driver Cerda (the moving defendants), and plaintiff was a passenger in the car (the Moving Defendants' Vehicle). The third vehicle was owned by defendant Monserrate and driven by defendant driver Mejia (the Monserrate Vehicle). From the record, it appears that service of the complaint was not attempted on defendant driver Mejia, and neither defendant Monserrate nor defendant driver Mejia have appeared in this action.

In support of the motion, the moving defendants submit: the pleadings; the deposition transcripts of plaintiff, the driver of the Santiago Vehicle (Santiago), and the driver of the Moving Defendants' Vehicle, (defendant driver Cerda); an affidavit by defendant driver Cerda; a certified copy of the police report; and defendant Santiago's response to post-deposition discovery demands. In opposition, defendant Santiago submits an attorney's affirmation and an uncertified copy of the MV-104 report completed by him. Plaintiff, in opposition, submits an attorney's affirmation and photographs of the Accident scene.

Plaintiff testified that he was a passenger in the Moving Defendants' Vehicle. Just prior to the Accident, the car was travelling from George Street to Park Land South. The Moving Defendants' Vehicle made a right turn onto Myrtle Avenue and there was nothing obstructing the view. The Moving Defendants' Vehicle stopped

at several lights and plaintiff could not estimate the speed of travel. Plaintiff did not see the co-defendants' vehicles prior to the Accident. Plaintiff testified that he was looking ahead when "basically ...the car just came out of nowhere and hit us... we T-boned him". Prior to the Accident, plaintiff stated, there was "a flash", where he saw the Santiago Vehicle doing "an illegal U-turn", with no time to think. The Santiago Vehicle was horizontal prior to impact. Plaintiff saw the other vehicle when it was $\frac{1}{4}$ a car length away. Nothing about the driving of the Moving Defendants' Vehicle concerned plaintiff.

Co-defendant Santiago testified that his vehicle was parked on Myrtle Avenue and he was in the process of making a U-turn when the Accident happened. He put his left turn signal on, looked right and left and the from the parking spot, turned into the eastbound lane. He did not see the Moving Defendants' Vehicle before impact. He stated the Accident happened about five seconds from when he began to pull out of the spot, the last time he looked straight ahead was at the beginning of the five seconds, and he was a little more than halfway completed the U-turn at the time of impact. He estimated that $\frac{1}{3}$ of his vehicle had crossed the yellow line onto the opposite direction of Myrtle Avenue, the front third, when the Accident occurred and stated that the front wheels had crossed the double yellow line. He did not see Moving Defendants' Vehicle before impact but completed an accident report wherein he indicated that the Moving Defendants' Vehicle was travelling at a high rate of speed. Because of the impact with the Moving Defendants' Vehicle, the Santiago Vehicle spun around and stuck the Monserrate Vehicle which was travelling in the opposite lane.

The driver of the Moving Defendants' Vehicle, defendant driver Cerda, testified and submits an affidavit that both provide, in sum and substance, that at the time of the Accident, he had passed the Jackie Robinson Parkway, a few blocks after Union Turnpike on Myrtle Avenue. Traffic was divided by a double yellow line. He had been travelling for less than ten minutes and his highest rate of speed was approximately 20 mph, traffic conditions were moderate, and the weather was clear. His view was unobstructed. As he passed the ramp to Jackie Robinson Parkway, there were parked cars on both sides of Myrtle Avenue. Defendant driver Cerda did not see any parked vehicles with turn signals on in the opposite lane before the Accident. The Accident occurred as he was driving straight on the street and the Santiago Vehicle tried to pull a U-Turn in front of his vehicle. Defendant driver Cerda first saw the Santiago Vehicle when it was right in front of him, he was driving within the speed limit at approximately 15-20 mph, and there was contact with the Santiago Vehicle. Prior to the Accident, he did not hear any honking or other noise. Defendant driver Cerda states that he did not have time to do anything to avoid the collision, due to the sudden nature of the Santiago Vehicle abruptly making a U-Turn across the double yellow line into his path of travel when it was too close for him to stop or take evasive action. There was no

negligence defendant driver Cerda's part, and no mechanical problems with his vehicle. The Accident was solely caused by the negligence of the Santiago Vehicle. The moving defendants also submit photographs and a Google map.

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 N.Y.2d 851 [1985]). The failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*, see also, *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 N.Y.2d 557 [1980]).

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a *prima facie* showing that moving defendant is free from fault (*Hilago v Vasquez*, 187 A.D.3d 683, 684 [1st Dep't 2020]; *Harrigan v Sow*, 165 A.D.3d 463, 464 [1st Dep't 2018]). In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor-vehicle-collision case, therefore, the driver must demonstrate, *prima facie*, that said defendant kept the proper lookout, or that defendant's alleged negligence, if any, did not contribute to the accident (*Hilago*, 187 A.D.3d at 684; *Harrigan*, 165 A.D.3d at 464).

Vehicle and Traffic Law §1160(e), provides that, "U-turns shall be made from and to that portion of the highway nearest the marked center line." Additionally, Vehicle and Traffic Law §1143 states, "The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed."

The Moving Defendants' evidence based on the parties' testimony is uncontradicted with respect to the fact that defendant driver Santiago made a U-turn from a parking spot and onto the roadway into the path of the Moving Defendants' Vehicle, which was traveling straight. The uncontracted testimony of the defendant driver Cerda further shows that the driver of the Moving Defendants' Vehicle was driving within the speed limit, undistracted, and looking straight ahead. Plaintiff does not state that defendant driver Cerda was speeding and confirms that the other vehicle appeared suddenly in the path of the car in which plaintiff was travelling.

Furthermore, nothing in the testimony of defendant Santiago contradicts these facts and, in fact, defendant Santiago did not see the Moving Defendants' Vehicle until impact. Based on the parties' uncontradicted testimony, therefore, moving defendants set forth a *prima facie* showing that defendant driver Cerda was without negligence and his actions did not contribute to causing the Accident.

In opposition, plaintiff and defendant Santiago fail to generate an issue of fact. The argument made in the opposition papers that defendant driver Cerda negligently failed to evade the collision is speculative (*see Jenkins v Alexander*, 9 A.D.3d 286, 288 [1st Dep't 2018]; *Hidalgo v Vasquez, supra*), and no other evidence was proffered to support the claim that moving defendant failed to take reasonable steps to avoid the collision (*Hidalgo v Vasquez, supra*). As for plaintiff's and defendant Santiago's reliance on attorney's affirmations, not based on personal knowledge, in opposition to the motion, said affirmations fail to generate an issue of fact as to the cause of the accident as the affirmations have no probative value (*Thompson v Pizzaro*, 155 A.D.3d 423 [1st Dep't 2017]; *Bendik v Dybowski*, 227 A.D.2d 228 [1st Dep't 1996]; *see Brown v Nocella*, 149 A.D.3d 470 [1st Dep't 2017]). Simply stated, the extent that plaintiff and co-defendant in the opposition papers speculate that the Moving Defendants' vehicle was speeding, there is no sworn testimony or other competent evidence to support that allegation.

As for the certified police report and MV 104-form, even assuming an evidentiary foundation is established for both, the statements by defendant Santiago therein are self-serving and not subject to a hearsay exception, and are therefore hearsay. As the only evidence submitted in opposition to the motion, this hearsay evidence is not sufficient to generate an issue of fact. While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment "where it is the only evidence upon which the opposition to summary judgment is predicated" (*Medouze v Plaza Construction, LLC*, 199 AD3d 465 [1st Dep't 2021]; *Gonzalez v 1225 Odgen Deli Grocery Corp.*, 158 A.D.3d 582 [1st Dep't 2018]; *compare Dong v Cruz-Marté*, 189 A.D.3d 613 [1st Dep't 2020]; *Patton v Genito*, 2021 WL 1733203 [Sup. Ct. Bronx County 2021]).

In addition, upon a search of the record, the court grants non-moving defendants Anthony Monserrate and Danny Mejia summary judgment dismissing the complaint as against them. Defendant Mejia was never served in the action. Furthermore, the evidence on record establishes that there is no proof that any action by defendant Monserrate or defendant Mejia was negligent or contributed to causing the Accident, and said defendants were not required to anticipate that the Santiago Vehicle would cross-over into their lane of traffic (*see Dunham v Hilco*

Constr. Co., 89 N.Y.2d 425[1996]; *Estate of Mirjani v DeVito*, 135 A.D.3d 616 [1st Dep’t 2016]). The evidence submitted herein shows that defendant Santiago’s actions were the sole cause of the Accident.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants LORNA CUEBAS and LUIS CERDA (the moving defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross-claims alleged against them is granted; and it is further

ORDERED that the court, upon search of the record, grants defendants ANTHONY MONSERRATE and DANNY MEJIA (Monserrate defendants) summary judgment dismissing the complaint and all cross-claims against them; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint and all cross-claims against the moving defendants and the Monserrate defendants and severing the remaining action; and it is further

ORDERED that the caption in this action shall henceforth read as:

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ANTHONY MARTORANO
Plaintiff,
-against-
JUSTIN SANTIAGO,
Defendant.
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This constitutes the decision and order of the court.

Dated: January 3, 2022

Hon. s/Hon. Veronica G. Hummel/signed 01/03/2022
VERONICA G. HUMMEL, A.J.S.C.

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1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT