

<b>Miranda v Century Waste Servs., LLC</b>
2022 NY Slip Op 32563(U)
July 27, 2022
Supreme Court, New York County
Docket Number: Index No. 159660/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 13

Justice

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INDEX NO. 159660/2018

DANIEL MIRANDA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

CENTURY WASTE SERVICES, LLC, CHARLES KING

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 82

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

Upon the foregoing documents, it is hereby ORDERED that Defendants Charles King and Century Waste Services, LLC's (hereinafter referred to as "Defendant Century Waste") motion to renew, reargue, resettle, and reconsider this Court's prior Order dated May 6, 2021 (hereinafter referred to as the "Prior Order"), is denied for the reasons set forth below.

On August 7, 2018, Daniel Miranda (hereinafter referred to as "Plaintiff"), commenced this action against defendants by summons and complaint seeking monetary damages for personal injuries resulting from a motor vehicle accident. Plaintiffs contend that the motor vehicle accident seriously injured Plaintiff when a moving vehicle operated by Defendant Charles King made a right turn at the intersection of East 39th Street and 2nd Avenue in New York County. Plaintiff subsequently moved for summary judgment in which Plaintiff provided his own deposition testimony, a copy of the police report which demonstrates that Defendant Charles King received a ticket violating New York City Administration Code §19-190(b), video surveillance of the accident, and an affidavit of Plaintiff confirming that the video surveillance

was a true and accurate depiction of what transpired. Defendant Century Waste opposed Plaintiff's prior motion and cross-moved for summary judgment. According to Defendant Century Waste's prior opposition papers, Plaintiff was the sole proximate cause of the accident as he was on his cell phone, that Defendant Century Waste's truck had the right of way, that the video surveillance constituted inadmissible hearsay, and that Plaintiff failed to establish Defendants' negligence as a matter of law. Plaintiff opposed Defendants' cross-motion and replied to Defendants' opposition. The Court granted Plaintiff's motion for summary judgment on May 6<sup>th</sup>, 2021, and denied Defendant Century Waste's cross-motion for summary judgment. Defendants now file a motion to renew and reargue the Prior Order.

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. The Court may exercise its discretion in determining whether a motion to reargue should be granted on the rationale that the Court "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision". *Sachar v Columbia Pictures Indus., Inc.*, 129 AD3d 420, 421 (1st Dept 2015).

Preliminarily, the Court must address the admissibility of the video surveillance footage. Defendant Century Waste states within their affirmation of support of the motion to renew and reargue that the video is inadmissible hearsay because non-verbal actions are considered statements which are being offered for the truth of the matter asserted. In *People v Parson*, 94 AD3d 577 (1st Dept 2012), a witness testified that a child pointed out of a car window in an agitated manner. "The child's demeanor and conduct did not constitute a non-verbal hearsay declaration because they were not intended to assert facts or convey information". *Id.* at 578 (internal citations omitted). In the instant case, the video of the accident had no intention of

asserting or conveying any information as to constitute a statement for the purposes of hearsay. Rather, the video surveillance is merely portraying the accident in question. Even if the Court were to consider such video as a non-verbal out of court statement, the video surveillance is not being used for the truth of its content. The video surveillance is “admissible ‘for the legitimate nonhearsay purpose of completing the narrative and explaining the events’”. *Id.* at 579. As a strong narrative, the video surveillance further clarifies the facts and circumstances surrounding the litigation. Thus, Defendant Century Wastes’ argument with regards to the video fails.

Further, Defendant Century Waste argues that the Court did not consider Defendant Charles King’s affidavit in coming to the decision in the Prior Order, and as such, disregards that the Plaintiff was allegedly entirely at fault. “Had the Court, as it was required to do, accepted the non-moving party’s version of the facts as true, those facts establish that plaintiff was allegedly entirely at fault for his injuries.” Affirmation in Support of Motion, p. 6-7, ¶18. The affidavit of Charles King, dated August 26, 2020, sets forth that the Plaintiff was not paying attention to his surroundings as he was on his cell phone, resulting in the Plaintiff walking into the Century Waste truck which had the right of way. Defendant Charles King’s affidavit provides that he saw Plaintiff walking on 2<sup>nd</sup> Avenue talking on his cellphone, he confirmed there was no pedestrian in or about to enter the crosswalk, Plaintiff could not have entered the intersection until after the truck had crossed into the crosswalk, Plaintiff was not paying attention as he crossed 39<sup>th</sup> Street, and Plaintiff admitted he was on his phone and didn’t see or hear the truck, and doesn’t know what happened. *See* Notice of Motion, Exh. B, Affidavit of Charles King, ¶ 17.

In *DeFazio v Berley Realty Corp.*, 259 AD2d 266, 266 (1st Dept 1999), a New York County Supreme Court order, which denied Plaintiffs’ motion to renew and vacate a prior order, was upheld as “Plaintiffs’ affidavit of merit, containing little else but conclusory allegations,

failed to make a sufficient showing that the alleged assault was foreseeable, or that it was proximately caused by some breach by defendants of a duty owed by them to Plaintiff”.

Similarly, the affidavit provided by Defendant Charles King was conclusory, and has failed to establish that the Plaintiff was the sole cause of the accident. The statements contained in the affidavit are mere allegations that the Plaintiff was negligent in causing the accident, and do not substantiate any evidence that would support these contentions.

Moreover, there was no misapprehension of fact or law when this Court rendered its initial decision considering the cell phone records. According to Defendant Century Waste, they furnished phone records, and “the Order is entirely devoid of any consideration of these records in reaching a decision”. Affirmation In Support, p.8, ¶26. However, the issue was dispositive as Plaintiff provided a sworn affidavit from an AT&T Legal Compliance Officer which confirms that plaintiff did not make or receive any text messages at the time he was injured.

Finally, Defendant Century Waste provides a dismissal of the ticket issued under New York City Administrative Code §19-190. According to Defendant Century Waste, the decision should be renewed based upon this new evidence. However the ticket was dismissed based upon a procedural basis, and the merits of the ticket were never argued. Thus, this new evidence does not change the outcome of the prior motion. As such, Defendant Century Waste’s motion to reargue and renew is denied.

Accordingly, it is

ORDERED that the defendants’ motion to renew and reargue is denied in its entirety; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.



7/27/2022

DATE

Adam Silvera, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE