

Torres v J. Bros. Trucking LLC

2023 NY Slip Op 32278(U)

June 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 520041/2020

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of June, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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JOSE MIGUEL TORRES,

Index No.: 520041/2020

Plaintiff,

-against

DECISION AND ORDER

J. BROTHERS TRUCKING LLC AND CHRISTOPHER JESUS PRADO,

Motions Sequence #2

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

| | |
|---|--------|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 50-62, |
| Opposing Affidavits (Affirmations)..... | 79-87, |
| Reply Affidavits (Affirmations) | 88, 89 |

Upon the foregoing papers, and without opposition, the Court finds as follows:

Plaintiff Jose Miguel Torres (the "Plaintiff") alleges that on July 28, 2020, he was a pedestrian crossing the street at 730 Coney Island Avenue, between the intersection of Cortelyou Road and Ave C when Defendant driver Christopher Jesus Prado (the "Defendant Prado"), while driving a vehicle owned by Defendant J Brothers Trucking, LLC ("J Brothers"), struck the Plaintiff. Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting them summary judgment dismissing the Plaintiff's claims against them. The Defendants argue that they are not liable for the alleged incident as the Plaintiff crossed the street mid-block outside of the crosswalk and walked into the Defendants' moving vehicle. In support of this

position, the Defendants rely on the depositions of the Plaintiff, Defendant Prado, a signed statement from a non-party Mohammad Alam and google maps of the intersection.¹

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff argues that the Defendants have failed to meet their prima facie burden as Defendant Prado did not offer an explanation regarding his failure to see the Plaintiff prior to the accident. Also, the Plaintiff argues that there are issues of fact regarding the accident given the Plaintiff's deposition testimony. The Plaintiff also objects to the Defendants' relying on a signed statement from non-party Mohammed Alam as that statement was not admissible.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

¹ The Defendants also sought to submit the deposition of non-party Mohammad Alam (NYSCEF Doc. 93) after the Defendants had submitted their reply affirmation and after the parties had stipulated (NYSCEF Doc. 91) that the motion had been fully briefed and ready for oral argument. In general, new evidence cannot be relied on by a movant after a motion is made and the other party has opposed the motion. *See Lee v. L. Offs. of Kim & Bae, P.C.*, 161 AD3d 964, 965, 77 N.Y.S.3d 676, 678 [2d Dept 2018].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

In support of their application, the Defendants rely on the depositions of the Plaintiff, Defendant Prado, a signed statement from a non-party Mohammad Alam² and google maps of the intersection. Defendant Prado sat for a deposition on March 11, 2022 (NYSCEF Doc. 58). When asked whether he had intended to make a left turn at the traffic signal prior to the incident, Defendant Prado stated, “[y]es.” When asked what the traffic conditions were like at the time, Defendant Prado stated, “[i]t was light.” When asked where his vehicle was when the incident occurred, Defendant Prado stated, “[f]ully in the left turn lane.” (Page 28). When asked how long he had been travelling in the left turn lane prior to the accident, Defendant Prado stated, “[s]econds.” (Page 29). When asked if there were any vehicles in front of his when the accident

² The letter submitted by the Defendants of non-party Mohammad Alam is not sworn and as a result inadmissible. See *Gao v. City of New York*, 145 AD3d 939, 940, 43 N.Y.S.3d 493, 494 [2d Dept 2016]. [CPLR 2106].

occurred, Defendant Prado stated, “[n]o.” (Page 30). When asked what color the traffic light was when he first entered the left turning lane, Defendant Prado stated, “[r]ed.” (Page 30). When asked if the left turn arrow was red at the moment of contract, Defendant Prado stated, “[l]eft turn, yes.” (Page 32). When asked whether he was slowing down when the accident occurred, Defendant Prado stated “[s]lowing down.” When asked if he saw the pedestrian [Plaintiff] prior to the accident occurring, Defendant Prado stated, “[n]o.” (Page 33). When asked what part of his vehicle made contact with the Plaintiff, Defendant Prado stated, “[t]he pedestrian made contact with my vehicle right side, passenger side, last tire.” (Page 33).

The Plaintiff sat for a deposition on January 27, 2022 (NYSCEF Doc. 57). When asked about the traffic signal at the cross-walk, the Plaintiff stated, “[a]t the moment I was about to cross the light was on red.” (Page 34). When asked if traffic was heavy or light when he crossed the street, the Plaintiff stated, “[t]here wasn't much because the light was on red and all the cars had to stop.” (Page 35). When asked what his pace was as he crossed the street, the Plaintiff stated, “I was walking at a normal pace because the light was on red and all the cars were stopped at both lane.” (Page 38). When asked if he stopped and looked at the traffic light and observed that it was red, the Plaintiff stated, “[y]es, I waited for the light to be red, all the cars had stopped.” The Plaintiff then stated that, “I crossed over the two lanes and then I stopped at that area. I stopped right there at the division with the yellow lines and waiting to cross over and that's when the car struck me.” (Page 39). When asked if the accident occurred in front of the auto glass store, the Plaintiff stated “[t]he thing is that the car dragged me, dragged me right in front of that store.” (Page 40).

As a result, a material issue of fact exists as to what occurred at the time of the incident.

Contrary to the plaintiff's contention, Hersh's affidavit was not incredible as a matter of law, “as it was not ‘impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory.’”

(*Zapata v. Buitriago*, 107 A.D.3d 977, 979, 969 N.Y.S.2d 79, quoting *People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500). To the extent that Hersh's affidavit contradicted the description of the accident in a certified police accident report, which is not attributed to an identified source, such a contradiction reflects "a classic dispute of fact" (*Ramos v. Rojas*, 37 A.D.3d 291, 292, 830 N.Y.S.2d 109), and is not a basis to categorically reject Hersh's affidavit as unworthy of belief or incredible as a matter of law (see *Colon v. Woolco Foods Inc.*, 177 A.D.3d 498, 498, 110 N.Y.S.3d 551; *Imamkhodjaev v. Kartvelishvili*, 44 A.D.3d 619, 620–621, 843 N.Y.S.2d 160; *Ramos v. Rojas*, 37 A.D.3d at 292, 830 N.Y.S.2d 109).

Joseph-Felix v. Hersh, 208 AD3d 571, 573, 173 N.Y.S.3d 591, 594 [2d Dept 2022].

In opposition, the plaintiff submitted, among other things, his own affidavit, in which he gave a completely different version of the events preceding the accident. The plaintiff's evidence raised a triable issue of fact as to whether the defendant driver, who was obligated to keep a proper lookout, see what was there to be seen through the reasonable use of his senses, and avoid colliding with other vehicles (see *Nesbitt v Gallant*, 149 AD3d 763, 763-764 [2017]; *Fried v Misser*, 115 AD3d 910, 911 [2014]), was indeed at fault in the happening of the accident.

Hassan v. Brauns Express, Inc., 209 AD3d 631, 632–33, 174 N.Y.S.3d 860 [2d Dept 2022].

The testimony of the Plaintiff and Defendant Prado raises clear issues of fact regarding how the incident occurred. See *Houslin v. New York City Transit Auth.*, 212 AD3d 790, 183 N.Y.S.3d 443 [2d Dept 2023]; *Colon v. Woolco Foods Inc.*, 177 AD3d 498, 498, 110 N.Y.S.3d 551 [2d Dept 2019]; *Ramos v. Rojas*, 37 AD3d 291, 292, 830 N.Y.S.2d 109, 110 [1st 2007]. Moreover, even accepting Alam's testimony as true, it would not change this result. Accordingly, the Defendants' motion for summary judgment is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #2) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.