

<b>Barahona v America Recycle, LLC</b>
2015 NY Slip Op 30111(U)
January 21, 2015
Supreme Court, Queens County
Docket Number: 25091/2012
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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DEMAR RAUL BARAHONA, Index No.: 25091/2012
Plaintiff, Motion Date: 12/19/14
- against - Motion No.: 10
AMERICA RECYCLE, LLC, JORGE ALBERTO Motion Seq.: 4
CEA and JOSE RIVERA,

Defendants.

- - - - - x

The following papers numbered 1 to 18 were read on this motion by plaintiff, Demar Raul Barahona, for an order pursuant to CPLR 3212(a) to renew its prior motion for summary judgment on the issue of liability and upon renewal granting partial summary judgment in favor of plaintiff and against the defendants on the issue of liability and setting the matter down for a trial on damages only; and the cross-motion of defendant, Jorge Alberto Cea, granting partial summary judgment dismissing the plaintiff's complaint against said defendant:

Papers Numbered
Plaintiff's Notice of Motion-Affidavits-Exhibits.....1 - 7
Defendant Cea's Cross-Motion-Affidavits.....8 - 11
Defendant America Recycle and Defendant Rivera's
Affirmation in Opposition to Motion and Cross-Motion...12 - 15
Defendant Cea's Affirmation in Reply.....16 - 18

In this negligence action, the plaintiff, Demar Raul Barahona, seeks to recover damages for personal injuries he allegedly sustained as a result of a two-car motor vehicle accident that occurred on November 6, 2012, on 94th Street at the intersection with 59th Avenue, Queens County, New York. Plaintiff contends that he was a passenger in the vehicle operated by defendant Jorge Alberto Cea which was waiting to make a left turn when the vehicle was struck by a truck owned by defendant America

Recycle, LLC and operated by defendant Jose Rivera. Plaintiff alleges that as a result of the collision he sustained personal injuries of a permanent nature including the need for cervical spine surgery.

The plaintiff, a passenger in the Cea vehicle, commenced this action by filing a summons and complaint on December 19, 2012. Defendants America/Rivera joined issue by serving a verified answer with cross-claims dated April 17, 2013. Plaintiff initially moved, prior to examinations before trial, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages.

In support of the motion, the plaintiff submits an affirmation from counsel, Eric D. Subin, Esq; a copy of the pleadings; and an affidavit from Demar Raul Barahona, dated June 30, 2013 which states as follows:

"On 11/6/2012 I was a passenger in a vehicle being operated by defendant Jorge Alberto Cea that was stopped on 59<sup>th</sup> Avenue at its intersection with 94<sup>th</sup> Street in Queens, New York. The vehicle in which I was a passenger was intending to turn left from 59<sup>th</sup> Avenue onto 94<sup>th</sup> Street but was stopped while waiting for pedestrians to cross 94<sup>th</sup> Street. The vehicle in which I was a passenger was stopped for 5 to 10 seconds waiting to make a left turn onto 94<sup>th</sup> Street. While we were stopped the front of a truck collided with the driver's side rear door of the vehicle in which I was a passenger. I later learned that the truck that collided with the vehicle in which I was a passenger was being driven by defendant Jose Rivera.

Defendant submitted an affidavit from driver Jose Rivera, dated July 29, 2013, in which he stated that he is employed by American By-Products Recyclers, LLC and was a driving a vehicle in the course of his employment on November 6, 2012. He states that 59<sup>th</sup> Avenue is a one-way street with two travel lanes. He states that his vehicle was located in the left lane of 59<sup>th</sup> Avenue and the co-defendant's vehicle was located in the adjacent lane to his right. He states that the accident occurred as he approached the intersection and the Cea vehicle suddenly attempted to make a left turn from the right lane of 59<sup>th</sup> Avenue onto 94<sup>th</sup> Street striking his vehicle. He states that he does not know why the other vehicle made an improper turn into his lane of travel and what role the passenger, Mr. Barahona, may have played in doing so. The police accident report based upon the statements of the drivers at the scene states that Rivera told the officer that Cea made a left turn from the right lane causing him to

strike the Cea vehicle. Cea stated that he had his left turn signal on and was struck on the side of his vehicle.

This Court found in its decision and order dated September 30, 2013 that the proof submitted by the respective parties presented conflicting versions of how the accident occurred. The plaintiff asserts that the Cea vehicle was stopped waiting to make a left turn when it was struck in the rear portion of the vehicle by the Rivera truck which allegedly entered the intersection when it was unsafe to do so. Rivera on the other hand alleges that Cea was in the right lane of 59<sup>th</sup> Avenue and attempted to make a left turn in front of his vehicle from the right lane. The Court found that there was a question of fact as to whether one or both of the defendant's were negligent in the operation of their vehicle.

Therefore, the Court granted the plaintiff/passenger's motion for summary judgment only to the extent of finding no culpable conduct or comparative negligence on the part of plaintiff, an innocent passenger, on the issue of liability (see Brabham v City of New York, 105 AD3d 881 [2d Dept. 2013]; Mello v Narco Cab Corp., 105 AD3d 634 [2d Dept. 2013]).

Plaintiff's counsel now seeks to renew the motion for summary judgment, pursuant to CPLR 2221(e) on the ground that depositions were held after the court rendered its decision and there are now new facts in existence which would change the prior determination.

Jose Rivera, age 43, testified at an examination before trial on June 12, 2014 that he is employed as a driver for "America By-Products," a recycling company. On the date of the accident he was operating a 60,000 pound Mack truck owned by his employer and was picking up used cooking oil from restaurants. He was coming from the Queens Mall on his way to Popeye's Fried Chicken on Junction Boulevard and 59<sup>th</sup> Avenue. He stated that he was proceeding on south on 59<sup>th</sup> Avenue. When he reached the intersection with 94<sup>th</sup> Street he was proceeding at a rate of 20 miles per hour. He stated that the traffic signal was green when he entered the intersection. When he was halfway through the intersection he felt an impact to the front right corner passenger side of the truck. He did not see or hear the vehicle which struck the truck prior to the impact. He had to stop slowly after the impact due to the weight of the oil in the back of the truck. After the impact he exited his vehicle and observed that a Toyota van operated by Mr. Cea struck his vehicle. Rivera testified that the accident occurred when the defendant's vehicle crossed in front of his truck. The front bumper of the truck was

damaged. The rear sliding door of the driver's side of the Cea vehicle was damaged. Rivera told Cea that Rivera's bosses had offered to pay the damage if he did not call the police. Cea declined the offer and the police responded to the scene. Rivera testified that he told his bosses that he did not see the Cea vehicle prior to the accident.

Defendant, Jorge Alberto Cea, age 70, also testified at an examination before trial on June 12, 2014. He stated that on the date of the accident he was driving a Toyota Sedan and the plaintiff was a front seat passenger. He was traveling on 59<sup>th</sup> Avenue planning on making a left turn onto 94<sup>th</sup> Street. He stated that he passed the defendant's truck on the right side of the truck and entered the left lane in front of the truck. The traffic signal was green in his favor as he approached the intersection. He activated his left turn signal entered the intersection and stopped abruptly in the intersection to wait for pedestrians to cross. He testified that while he was waiting his vehicle he heard the sound of screeching tires and then his vehicle was struck in the rear driver's side by the Rivera truck.

Plaintiff's counsel contends that as the testimony of the drivers indicates that they did not see each other prior to the accident that they are both negligent and the plaintiff/passenger should have summary judgment granted in his favor.

Defendant Cea cross-moves for summary judgment dismissing the plaintiff's complaint against him but not the cross-claim of the co-defendant. Counsel asserts that under the plaintiff's version of the accident Cea was stopped for 5 seconds or more waiting to make a left turn when the vehicle he was in was struck in the rear by the Rivera truck.

This Court finds based upon the deposition testimony of the parties and the affidavits submitted by the parties on the prior motion that there has been no testimony presented which changes the court's prior finding that there is a question of fact as to whether one or both defendants were negligent for the happening of the subject accident. As stated in this court's prior decision,

"The proof submitted by the respective parties presents conflicting versions of how the accident occurred. The plaintiff asserts that the Cea vehicle was stopped waiting to make a left turn when it was struck in the rear portion of the vehicle by the Rivera truck which allegedly entered the intersection when it was unsafe to do so. Rivera on the other hand alleges that Cea was in the right lane of 59<sup>th</sup> Avenue and attempted to make a left turn in

front of his vehicle from the right lane. Therefore there is clearly a question of fact as to whether one or both of the defendant's were negligent in the operation of their vehicle." This court also found that any arguments regarding the comparative negligence on the part of the defendants are factual issues for the trial court to determine. The deposition testimony provided in the plaintiff's motion to renew does not change the prior determination of the court.

As to the cross-motion of Cea, the defendant has the burden of establishing, by proof in admissible form, his prima facie entitlement to judgment as a matter of law (see Myers v Ferrara, 56 AD3d 78 [2d Dept. 2008]). This burden may be satisfied only by the defendant's affirmative demonstration of the merit of the defense, rather than merely by reliance on gaps in the plaintiff's case (see DeFalco v BJ's Wholesale Club, Inc., 38 AD3d 824 [2d Dept. 2007]; Cox v Huntington Quadrangle No. 1 Co., 35 AD3d 523[2d dept. 2006]; Pearson v Parkside Ltd. Liab. Co., 27 AD3d 539 [2d Dept. 2006]). Because a motion for summary judgment is a drastic remedy, the motion should not be granted if there are any triable issues of fact.

Here, the plaintiff's prior testimony and affidavits do not preclude the plaintiff from maintaining a claim against defendant Cea who was named by plaintiff as a defendant in this action. As stated above, there are issues presented as to the comparative negligence of defendant Cea. Therefore, Cea has not demonstrated, prima facie, that he is entitled to summary judgment on the issue of negligence and the court will not preclude the plaintiff from testifying as to her version of the accident at trial.

Accordingly, for all of the above stated reasons, the plaintiff's motion to renew is granted and upon reargument this court adheres to the prior decision in its entirety. The plaintiff has not presented any newly discovered facts which provide a reasonable justification for this court to modify its prior decision. The plaintiff has failed to offer any new evidence or arguments which were not offered in the previous motion (see CPLR 2221(e)(3); Estate of Anna K. Essig v. 5670 58 St. Holding Corp., 66 AD3d 822 [2d Dept. 2009]; JP Morgan Chase Bank, N.A. v. Malarkey, 65 AD3d 7[3d Dept. 2009]; Ehrlich v. Ehrlich, 80 AD2d 882 [2d Dept. 1981]). Likewise, for the reasons stated above, the cross-motion by defendant Cea for summary judgment dismissing the plaintiff's complaint against him is denied.

Dated: January 21, 2015  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.