

Malak v Wynder

2007 NY Slip Op 30041(U)

March 9, 2007

Supreme Court, Richmond County

Docket Number: 0012330

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

PART DCM 3

Index No.: 12330/2004
Motion No.: 3, 4, 6, 7

GLEN MALAK, an infant by his mother and natural
guardian, HENNY MALAK and HENNY MALAK,
Individually
HON. JOSEPH J. MALTESE

,

Plaintiffs

against

Action 1

CHRISTOPHER R. WYNDER, TRACY H. WYNDER,
DANIELLE M. PASCALE, MARGARITA PASCALE,
PAUL J. BABICKI and MARY ERMOLAEV,

Defendants.

Index No.: 100801/2005

PAUL J. BABICKI and MARY ERMOLAEV,

Plaintiffs

against

Action 2

DANIELLE M. PASCALE, MARAGARITA PASCALE,
CHRISTOPHER R. WYNDER, TRACI WYNDER, GLEN E.
MALAK and HENRY T. MALAK,

Defendants.

The following items were considered in the review of these motions for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 3, 6, 7
Answering Affidavits	2, 2(a), 8, 9
Replying Affidavits	4, 5, 10, 11, 12
Exhibits	Attached to Papers

Other

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In this four vehicle accident occurring on the upper level of the Verrazano Bridge on April 10, 2004, various summary judgment motions have been made concerning liability and the issue of “serious injury” threshold. The plaintiff in Action Number 1, Glenn Malak was the operator of the first vehicle in the chain accident. Defendant, Paul Babicki, was the operator of the second vehicle, which was owned by his mother, co-defendant Mary Ermolaev, who was a passenger in the vehicle. The third vehicle was operated by Danielle Pascale, while the final vehicle in the chain was operated by the Wynder defendants.

In motion number 3, the defendant, Paul Babicki, moves for an order pursuant to CPLR § 3212 granting summary judgment on liability only as well on threshold. The plaintiff, Glenn Malak, opposes this motion. On December 6, 2005 the defendant, Paul Babicki, was deposed and he testified that at the time of the accident, he was driving the car owned by his mother, co-defendant Mary Ermolaev. Mary Ermolaev was a passenger in the vehicle when the accident took place on the upper level of the Verrazano Narrows Bridge. He testified that his vehicle was stopped for several seconds before the accident occurred which involved two impacts. The first was to his rear, then the second was his vehicle being pushed into the vehicle in front of his. As such, liability cannot be attached to the the Babicki/Ermolaev defendants and the plaintiff Malak’s complaint is dismissed against Paul Babicki and Mary Ermolaev. Additionally, all cross claims in action number 1, and all counter-claims in action number 2 are dismissed. The court did not address the issue of threshold with respect to motion number 3.

“A rear end collision with a stationary vehicle creates a prima facie case of liability in favor of the operator of the stationary vehicle unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident” (*Ramrattan v. Pondfield Trip Service, Inc.*, 269 AD2d 513 [2d Dept 2000], citing *Mundo v. City of Yonkers*, 249 AD2d 522, 523 [2d Dept 1998]). Moreover, the Appellate Division, Second Department has held that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability against the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Argiro v. Norfolk Contract Carrier, Inc.*, 275 AD2d 384 [2d Dept 2000]). Here, it is undisputed that the Babicki/Ermolaev vehicle was stopped when it was struck in the rear by a vehicle and pushed into the plaintiff’s vehicle. As such, liability cannot be attached to the the Babicki/Ermolaev defendants and the plaintiff Malak’s complaint is dismissed against Paul Babicki. Additionally, all cross claims in action number 1, and all counter-claims in action number 2 are dismissed. The court did not address the issue of threshold with respect to motion number 3.

In motion number 4, the defendant Mary Ermolaev, the owner of and passenger in the vehicle operated by defendant, Paul Babicki, at the time of the accident moves for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability only. The plaintiff opposes this motion. Here, a passenger in a stationary vehicle struck in the rear by another, is entitled to same rules regarding liability as the driver of the stationary vehicle (*Siegel v. Terrusa* 222 A.D.2d 428 [2d Dept 1995]). The testimony of Mary Ermolaev was that while the vehicle that she was a passenger in was topped, it was struck in the rear. Accordingly, liability cannot attach to defendant Ermolaev and her summary judgment motion is granted dismissing this action against her.

In motion number 6, Glenn Malak and Henny T. Malak s/h/a Henry T. Malak as defendants in action number 2, move this court for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint of Paul Babicki and Mary Ermolaev against them. The plaintiffs in action number 2, Paul Babicki and Mary Ermolaev, oppose this motion. In a deposition, Glenn Malak testified that while traveling in the left lane of the upper level of the Verrazano Bridge he slowed down and brought his vehicle to a complete stop. Five to six seconds later, his vehicle was struck in the rear and pushed forward, but it did not contact the vehicle in front of him. About three seconds later, there was another impact to the rear of his vehicle and then about two to three seconds after that there was the third and final impact to his vehicle. Paul Babicki's testimony was that while he was stopped, his vehicle was struck in the rear and pushed into the vehicle in front of his. Mary Ermolaev's testimony was the same. As the vehicle operated by Glenn Malak was the first car, he cannot be liable to the cars behind him unless there is a showing that he negligently stopped (*Ramrattan v. Pondfield Trip Service, Inc.*, 269 AD2d 513 [2d Dept 2000]). Here, based upon the depositions, there has been no showing and summary judgment is appropriate in this action. Accordingly, the motion of Glenn Malak and Henny T. Malak, as defendants in action number 2, for summary judgment and the complaint brought by Paul Babicki and Mary Ermolaev as against the moving defendants is dismissed.

In motion number 7 defendants, Danielle Pascale and Margarita Pascale, in action number 1, move this court for two orders pursuant to CPLR § 3212. The first for summary judgment in their favor based upon liability, and the second based upon the argument that the plaintiff, Glenn Malak, failed to suffer a serious injury as defined by the insurance law. On May 31, 2006, the defendant, Danielle Pascale, was deposed and testified that her vehicle was struck in the rear by a heavy impact was propelled into the vehicle in front of her. Defendants, Christopher Wynder and Traci Wynder, were also deposed on December 6, 2005 and both stated that their vehicle struck the vehicle operated by Danielle Pascale in the rear. As Danielle Pascale's vehicle was struck in the rear, she cannot be found liable to any of the other parties in this action, and summary judgment is appropriate in this action on behalf of both Danielle Pascale and Margarita Pascale. Accordingly, the defendants' motions are granted on the issue of liability. The court did not examine whether the plaintiff, Glenn Malak, suffered a serious injury as defined by the insurance law.

Accordingly, it is hereby:

ORDERED, that motion number 3, seeking summary judgment to Paul Babicki as defendant in action number 1, is granted based upon liability only, and Glen Malak's complaint is dismissed against him. The Court did not address whether or not Glen Malak sustained a serious injury defined by the insurance law; and it is further

ORDERED, that motion number 4, seeking summary judgment to Mary Ermolaev as defendant in action number 1, is granted based upon liability only and Glen Malak's complaint is dismissed against her; and it is further

ORDERED, that motion number 6, seeking summary judgment on behalf of Glenn Malak and Henny T. Malak s/h/a Henry T. Malak as defendants in action number 2, is granted and the complaint of Paul Babicki and Mary Ermolaev is dismissed as against them; and it is further

ORDERED, that motion number 7, seeking summary judgment on behalf of Danielle Pascale in both actions is granted and both complaints are dismissed against her; and it is further

ORDERED, that all remaining parties return to DCM 3 at 9:30 AM on **April 23, 2007** for a pre-trial settlement conference.

DATED: March 9, 2007

Joseph J. Maltese
Justice of the Supreme Court