

Demaria v Garcia

2007 NY Slip Op 30858(U)

April 10, 2007

Supreme Court, Suffolk County

Docket Number: 0001370/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12/11/06
ADJ. DATE 1/11/07
Mot. Seq. # 001 - MG

-----X
DAVID DEMARIA :
 :
 Plaintiff, :
 :
 - against - :
 :
 JOSE I. GARCIA :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-16; Replying Affidavits and supporting papers 17-18; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on July 4, 2004 when his vehicle was rear-ended by defendant's vehicle on 35th Street approximately fifty feet south of Route 27 in Babylon, New York. The court's computer indicates that the note of issue in this action was filed on October 24, 2006.

Plaintiff now moves summary judgment in his favor on the issue of liability on the grounds that his vehicle was rear-ended by defendant's vehicle. In support of his motion, plaintiff submits the summons and complaint; the answer; plaintiff's bill of particulars; the preliminary conference order; plaintiff's deposition transcript; a motor vehicle accident report;

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photographs of plaintiff's vehicle; physicians reports; and a so-ordered stipulation dated September 26, 2006 (Whelan, J.) executed by counsel for both parties.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*see, Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]; *Barile v Lazzarini*, 222 AD2d 635, 636, 635 NYS2d 694 [2d Dept 1995]). In addition, when a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see, Power v Hupart, supra; Abramowicz v Roberto*, 220 AD2d 374, 631 NYS2d 442 [2d Dept 1995]). Vehicle and Traffic Law § 1129 (a) requires a driver to maintain a safe distance between vehicles: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (*see, Vehicle and Traffic Law § 1129 [a]; Filippazzo v Santiago, supra* at 419-420). Also, a driver of a vehicle must drive his car in the exercise of a duty to see what should be seen and in the exercise of reasonable care to avoid the happening of an accident (*see, DeAngelis v Kirschner*, 171 AD2d 593, 595, 567 NYS2d 457 [1st Dept 1991]).

Plaintiff testified at his deposition that as he was making a right turn into the driveway of a gas station after having proceeded with his right turn signal on and having observed defendant's vehicle sliding into his lane about 25 feet behind him, defendant's vehicle struck plaintiff's vehicle in the rear. Here, plaintiff established, prima facie, that he was entitled to summary judgment on the issue of liability based on his deposition testimony (*see, Mohan v Puthumana*, 302 AD2d 437, 754 NYS2d 902 [2d Dept 2003]; *Gage v Raffensperger*, 234 AD2d 751, 651 NYS2d 214 [3d Dept 1996]).

In opposition to the motion, defendant's counsel contends that the motion should be denied as premature based on the so-ordered stipulation dated September 26, 2006 (Whelan, J.) which states that "[d]efendant to be precluded from testifying at trial if not produced for EBT not less than (30) thirty days prior to trial." Defendant has not yet been deposed and defendant's counsel states in his affirmation that he is still attempting to establish contact with his client so as to reschedule defendant's deposition. In addition, defendant's counsel concedes in his affirmation that "the basic facts of this case make it incumbent upon the defendant to establish an adequate non-negligent explanation for the happening of this rear-end collision" but that defendant will be deprived of such an opportunity if the Court grants the instant motion.

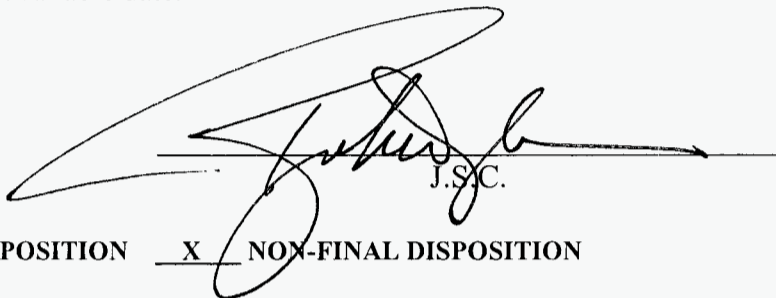
Here, defendant's counsel is reminded that the subject stipulation was for the benefit of

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plaintiff, to obtain defendant's testimony, not for the benefit of defendant's counsel to give him time to contact his client. In any event, defendant's counsel fails to describe or detail his efforts to establish contact with his client or provide the Court with any indication as to when or if this will occur. Defendant's counsel opposes the motion by speculating that his client may have a non-negligent explanation for the accident. An opposing party to a motion for summary judgment must produce evidentiary proof in admissible form; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Therefore, defendant has failed to raise a triable issue of fact.

Accordingly, the instant motion is granted. Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part Calendar for the next available date.

Dated: APR 10 2007


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION