

Pomper v Singh

2007 NY Slip Op 31375(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0028742/2005

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 3-21-07
ADJ. DATE 4-4-07
Mot. Seq. # 005 - MG
006 - XMG

-----X
MARIANNE POMPER and ARTHUR POMPER, :
: :
: :
Plaintiffs, :
: :
- against - :
: :
JATINAER SINGH, B-1 TRUCKING, INC. :
and JESSICA MALFA, :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 30 read on this and cross motion for summary judgment _____; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 23; Answering Affidavits and supporting papers 24 - 27; Replying Affidavits and supporting papers 28 - 30; 31 - 34; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiffs for an order pursuant to CPLR 3212 granting them partial summary judgment against defendants Singh and B-1 Trucking, Inc. on the issue of liability and setting this matter down for an immediate assessment of damages is granted; and it is further

ORDERED that this cross motion by defendant Jessica Malfa for an order pursuant to CPLR 3212 granting her partial summary judgment dismissing the cross claims of co-defendants Singh and B-1 Trucking, Inc. on liability grounds is also granted.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Marianne Pomper as a result of a motor vehicle accident which occurred on the east bound lane of Sunrise Highway at its intersection with Albany Avenue, North Amityville, New

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York on September 23, 2005. The accident allegedly happened when the truck owned by defendant B-1 Trucking and operated by defendant Singh collided with the vehicle owned and operated by co-defendant Jessica Malfa, and in which Mrs. Pomper was riding at the time. By Order dated February 7, 2007 (Pitts, J), this action was joined for the purposes of trial without consolidation with a related action entitled "**Jessica Malfa, Plaintiff against B-1 Trucking Company and Singh Jatinder, Defendants**" and filed under Index No.: 06-017835, Supreme Court, Queens County. Said order also directed that the Clerk of Queens County transfer the file for the related action to the Suffolk County Clerk upon service of the order with notice of entry. To date, the parties have not filed an RJI for the related action in Supreme Court, Suffolk County and the computerized records maintained by the Unified Court System (e-courts at WebCivil Supreme) reflects that a pre-note of issue compliance conference is scheduled before Hon. Marguerite A. Grays, Part 4, Supreme Court, Queens County for August 8, 2007.

Plaintiffs move at this time for an order granting them summary judgment against defendants Singh and B-1 Trucking on liability grounds and for an assessment of damages. Plaintiffs contend that they are entitled to summary judgment on liability grounds as Mrs. Pomper was a passenger in the Malfa vehicle at the time of the accident. They also argue that defendant Singh, which was proceeding northbound on Albany Avenue, caused the accident first, by traveling through a red light at Route 27, and then by stopping in the intersection in front of the Malfa vehicle which was proceeding eastbound on Route 27. In support, they submit, inter alia, the pleadings; plaintiffs' deposition testimony; and the testimony of defendant Jessica Malfa.

Defendant Jessica Malfa cross moves for summary judgment dismissing the complaint against her on liability grounds. Defendant Malfa contends that co-defendants Singh and B-1 Trucking bear sole liability for the accident claiming that the truck operated by Singh, which was traveling northbound on Albany Avenue, suddenly went through a red light at the intersection of Route 27, and then stopped directly in front of her. Defendant Malfa also argues that she did not have enough time to avoid the collision as only a few seconds had elapsed from the time that Singh had improperly entered the intersection in front of her. In support of the cross motion, defendant Malfa submits, inter alia, the deposition testimony of non-party witness, Keri A. Shea.

In opposition to these motions, defendants Singh and B-1 Trucking submit the affirmation of counsel. Defendants assert that summary judgment should be denied on the basis that co-defendant Malfa's actions raise an issue of fact as to whether she was partly liable for the accident. In response, plaintiffs and defendant Malfa have filed reply papers.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610, 563 NYS2d 449 [1990]). However, mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue of fact (*Gilbert Frank Corp. v Federal Ins. Corp.*, 70

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NY2d 966, 525 NYS2d 793 [1988]; *Rebecchi v Whitmore, supra*).

Vehicle and Traffic Law § 1110 provides that the driver of a vehicle shall obey the instructions of any official traffic control device, and Vehicle and Traffic Law § 1111 (d)(1) provides, in part, that all vehicles must stop when faced with a steady circular traffic signal before entering an intersection, and remain standing until an indication to proceed is shown. Vehicle and Traffic Law § 1111 (a)(1) provides that vehicles faced with a steady circular green signal may proceed straight through or turn right or left at an intersection, unless a sign provides otherwise. Also, the failure of a driver to stop at a red light constitutes negligence as a matter of law (*Carpio v Leahy Mechanical Corp.*, 30 AD3d 554, 826 NYS2d 762 [2d Dept 2006]). Further, a driver with the right of way is entitled to anticipate that another driver will obey the traffic laws that require him to yield the right of way (*Bongiovi v Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]).

Mrs. Pomper testified to the effect that she was a passenger in defendant Malfa's vehicle at the time of the accident. As the Malfa vehicle approached the intersection while proceeding eastbound on Route 27, Mrs. Pomper observed that traffic on both sides of the Malfa vehicle was also moving. She also observed that co-defendants' truck was in the intersection only a few seconds prior to the impact. Mrs. Pomper further testified that there were no other vehicles in the intersection at the time, and that all other traffic in co-defendants' direction of travel on Albany Avenue was stopped.

Ms. Malfa testified to the effect that Mrs. Pomper was a passenger in her vehicle at the time of the accident. On September 23, 2005, she was operating her vehicle in the middle lane of Sunrise Highway, traveling approximately 50 miles per hour, when she approached the intersection of Sunrise Highway and Albany Avenue. Sunrise Highway in the area where the accident occurred has three lanes for vehicle travel in each direction and the intersection is controlled by a traffic light. When she first observed the traffic signal controlling the intersection, the light was green for vehicles traveling in her direction, and that it remained green at all times prior to the collision. When her vehicle was approximately 20 feet from the intersection, she observed defendants' white truck proceed from Albany Avenue across Route 27 and directly into her path. Ms. Malfa further testified that she applied her brakes heavily in an effort to stop her vehicle, but that she was unable to avoid the collision.

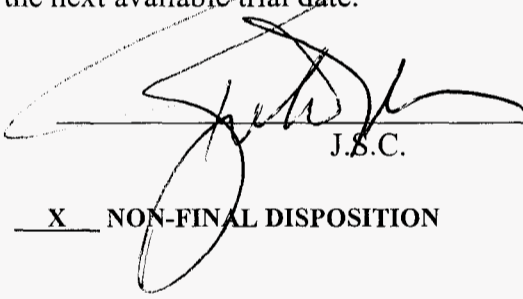
Ms. Shea testified to the effect that she was a witness to the accident. Prior to the accident, she was traveling eastbound on Route 27 approximately four car lengths directly behind the Malfa vehicle. She observed that the Malfa vehicle was traveling approximately 45-55 mph. She also observed that the traffic controller for vehicles traveling in her direction was green just before the Malfa vehicle reached the intersection of Sunrise and Albany Avenue, and that it remained green. After she saw the Singh vehicle pull out of Albany Avenue and enter the intersection ahead, she jammed on her brakes in order to avoid a collision with the Malfa vehicle. Ms. Shea further testified that she provided a statement to the police after the accident.

Defendant Malfa and plaintiffs have established their prima facie entitlement to judgment as a matter of law by presenting undisputed proof that defendant Singh's negligent failure to stop for a red traffic light at Albany Avenue was the sole proximate cause of the accident, and that the Malfa vehicle, in which Mrs. Pomper was riding, legally proceeded with the right of way (*see, Aristizabal v Oswald*,

37 AD3d 503, 829 NYS2d 701 [2d Dept 2007]; *Carpio v Leahy Mechanical Corp., supra*). Since Malfa had the right of way, she was entitled to anticipate that defendant Singh would obey traffic laws which required him to stop (*see, Aristizabal v Oswaldo, supra*). The burden thereupon shifted to defendants Singh and B-1 Trucking to establish any issues of fact so as to preclude the granting of summary judgment (*see, Zuckerman v City of New York, supra*). In opposition to the motion and the cross motion, the conclusory assertions by counsel for defendants Singh and B-1 Trucking, that Malfa could have avoided the accident by sounding her horn or turning her wheel were completely speculative and unsupported by the evidence in the record (*see, Berner v Koegel, 31 AD3d 591, 819 NY2d 89 [2d Dept 2006]; Carpio v Leahy Mechanical Corp., supra*). Moreover, defendants have failed to establish that additional discovery would yield any facts indicating that Malfa was at fault and justify denying the motion and cross motion (*see, Szczotka v Adler, 291 AD2d 444, 737 NYS2d 121 [2d Dept 2002]*). Thus, plaintiffs are entitled to summary judgment against defendants Singh and B-1 Trucking on the issue of liability (*see, Garcia v Tri-County Ambulette Serv., Inc., 282 AD2d 206, 723 NYS2d 163 [1st Dept 2001]*), and co-defendant Malfa, who has demonstrated no liability for the accident, is entitled to summary judgment dismissing the cross claim of defendants Singh and B-1 Trucking against her (*see, Moreback v Mesquita, 17 AD3d 420, 793 NYS2d 148 [2d Dept 2005]; Iqbal v Petrov, 9 AD3d 416, 780 NYS2d 174 [2d Dept 2004]; Diasparra v Smith, 253 AD2d 840, 678 NYS2d 373 [2d Dept 1998]*). Upon searching the record, defendant Malfa is also granted summary judgment dismissing plaintiffs' complaint against her as she has demonstrated that defendants Singh and B-1 were solely liable for the accident (*see, CPLR 3212 [b]; Lestingi v Holland, 297 AD2d 627, 747 NYS2d 522 [2d Dept 2002]*), and the case is to proceed to a determination of damages against defendants Singh and B-1 Trucking (*see, Vehicle and Traffic Law § 388; Hassan v Montouri, 99 NY2d 348, 756 NYS2d 126 [2003]*).

The Clerk is directed to sever and continue this action as to the remaining defendants, Jatinaer Singh and B-1 Trucking, Inc. Plaintiffs are directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available trial date.

Dated: MAY 21 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION