

Maynard v Maynard

2007 NY Slip Op 31549(U)

May 25, 2007

Supreme Court, New York County

Docket Number: 0112652/2004

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

JESSICA MAYNARD, NOEL PADILLA and
JACQUELINE PADILLA

INDEX NO. 112652/2004

MOTION DATE 5-9-07

- v -

MOTION SEQ. NO. 003

HERIBERTO MAYNARD, GARRY RISMAN and
MUSTAPHA ELMAQSUDI

MOTION CAL. NO. 78

The following papers, numbered 1 to 4, were read on this motion by defendant Heriberto Maynard for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits	<u>1</u>
Answering Affidavits – Exhibits (Memo)	<u>2,3</u>
Replying Affidavits (Reply Memo)	<u>4</u>

FILED
JUN 11 2007
NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Cross-Motion: Yes No

The court has reviewed the foregoing papers and finds the following facts to be undisputed. On April 18, 2003, at approximately 8:00 p.m., defendant Heriberto Maynard, driving a Lincoln Continental, made a right-hand turn from the right-hand lane of West 38th Street toward the entrance of a parking garage. He stopped his vehicle before crossing the sidewalk to let pedestrians pass, and was struck in the rear passenger side by a taxi owned by defendant Garry Risman and driven by defendant Mustapha Elmaqsoudi.

Plaintiffs Jessica Maynard and Noel Padilla, passengers in Maynard's vehicle, commenced the instant action against Maynard, Risman and Elmaqsoudi seeking damages for injuries they allegedly sustained in the accident. Plaintiff Jacqueline Padilla asserts derivative claims. Defendant Maynard now moves for summary judgment on the issue of liability, dismissing the complaint as against him. The motion is granted.

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d

557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvaraz v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*.

It is also well settled that "the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front (Johnson v Phillips, 261 AD2d 269, 271 [1st Dept. 1999]), unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for such accident (Grimes-Carrion v Carroll, 13 AD3d 125, 136 [2004])." Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); see Somers v Conklin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006).

In support of his motion, defendant Maynard proffers the pleadings, the police report of the accident, his own deposition testimony and the deposition testimony of Nelaton Rouzeau, a pedestrian who witnessed the accident.

At his deposition, defendant Maynard testified that he was driving eastbound on West 38th Street toward the Quik-Park garage which he uses when he visits that area of Manhattan. He described 38th Street as having two lanes of traffic and one lane of parked cars on either side. His vehicle traveled for two blocks in the right-hand lane on 38th Street before reaching the garage Quik-Park on the right-hand side and halfway between Eight and Ninth Avenues. He was traveling at approximately ten or fifteen miles per hour. Maynard, who had already turned his headlights on, slowed the car further and signaled that he was turning right into the parking garage. He had looked in his rear-view mirror and saw no cars directly behind him, only in the left lane. He passed a white van parked on the right side of 38th Street about one or two car lengths before the entrance to the garage. As he turned toward the garage, he saw pedestrians approaching on the sidewalk, and stopped his vehicle to let them pass. The car was on an angle, the front portion on the sidewalk area. He estimated that the rear tires extended into the street beyond the width of the parked van, and that he was stopped in that position for about 20-30 seconds before the collision.

While waiting for the pedestrians to pass on the sidewalk, Maynard heard screeching for "fifteen seconds" and then heard the van being struck, followed by the collision with his car. He testified that the taxi was already sideways when it came into contact with his car. On the block before, Maynard had passed by that taxi when it was stopped behind and trying to pass a car in front of it. According to Maynard, just before the impact, his brother, plaintiff Noel Padilla, who was seated in the rear seat, saw the same taxi move from the left to the right lane and yelled "watch out." The police arrived ten minutes later while all vehicles were still in the same position.

Eyewitness Nelaton Rouzeau testified that just before the accident, he was walking westbound on the sidewalk on 38th Street on the same side as the garage. There was not much traffic, the area was well-lit and it was not raining. He recalled that Maynard's vehicle was traveling very slowly while turning into the garage while the taxi was traveling at a high rate of speed and attempting to pass a passenger car. Rouzeau heard the taxi's engine and then heard the sound of screeching brakes. The taxi ended up wedged between Maynard's vehicle and the parked van. Rouzeau spoke to the officers who arrived at the scene, and examined the skid marks left by the taxi. Asked at his deposition which driver he believed to be at fault, Rouzeau responded, "definitely it would be the taxicab."

The police report is consistent with the accounts provided by defendant Maynard and Rouzeau, and indicates that the taxi's skid marks measured 25 feet.

With this proof, defendant Maynard has met his burden on the motion.

Defendants Risman and Elmaqsoudi and plaintiff Jessica Maynard oppose the motion. However, they offer no additional proof. They merely present the affirmation of their attorneys, who argue that defendant Maynard was negligent in stopping his vehicle in a manner which blocked traffic in the right-hand lane and that he could have taken steps to avoid the collision. Since the parties' attorneys claim no personal knowledge of the accident, their affirmations are without probative value on this motion. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1st Dept. 2004). While an attorney's affirmation may serve as a vehicle for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563), no attachments are provided.

Thus, the opponents of the motion have failed to come forward with proof in admissible form to raise any triable issue of fact. Specifically, they have failed to come forward with any non-negligent explanation for defendant Elmaqsoudi's collision with the rear of defendant Maynard's vehicle. See Somers v Conklin, supra; Grimes-Carrion v Carroll, supra; Garcia v Bakemark Ingredients (East) Inc., supra.

Moreover, defendants Risman and Elmaqsoudi do not dispute that they have been precluded from offering evidence on the issue of liability at trial for their repeated failure to appear for depositions. As such, they will be unable to present any account of the accident to contradict defendant Maynard's account. Of course, an order of preclusion alone does not warrant the granting of summary judgment on the issue of liability. Rather, the court must determine the effect of the preclusion order in each case. See Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1st Dept. 2004). Mendez v Queens Plumbing Supply, Inc., 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, however, the proof submitted presents no basis to

speculate that cross-examination of defendant Maynard or any other witness at trial would establish that he "had acted in such a way as to cause the accident, such as stopping suddenly or by veering in front of [co-defendant Elmaqsoudi]." Somers v Condlin, supra at 84. Rather, it demonstrates that Maynard drove at a safe rate of speed, signaled his right-hand turn into the garage from the right-hand lane and stopped his car, not suddenly, but slowly to avoid hitting pedestrians on the sidewalk. This proof, which includes the deposition testimony of Rouzeau and the police report showing the lengthy skid marks, further indicates that defendant Elmaqsoudi acted negligently in speeding and failing to maintain a safe distance from the vehicle in front him. See Vehicle and Traffic Law 1129(a); Garcia v Bakemark Ingredients (East) Inc., supra; Johnson v Phillips, supra; Shamah v Richmond County Amulance Service, Inc., 279 AD2d 564 (2nd Dept.2001). Accordingly, defendant Maynard is entitled to summary judgment on the issue of liability.

For these reasons and upon the foregoing papers, it is


ORDERED that motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Heriberto Maynard, and the Clerk is directed to enter judgment in favor of said defendant; and it is further,

ORDERED that the remainder of this action shall continue, and it is further,

ORDERED that the remaining parties shall appear at Mediation-2, 80 Centre St., NY, NY, on July 9, 2007, at 9:30 a.m. as previously scheduled.

This constitutes the Decision and Order of the Court.

Dated: May 25, 2007


 Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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