

Vidal v Mesa

2007 NY Slip Op 32679(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0027855/2003

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-10-07
ADJ. DATE 3-27-07
Mot. Seq. # 003 - MG
#004 - MD

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Plaintiffs,	:	Atty for Deft Ford Credit Titling Trust
	:	437 Madison Avenue
	:	New York, New York 10022
- against -	:	
	:	THEODORE A. STAMAS, ESQ.
	:	Attorney for Defendant Conti
JOAQUIN MESA, CYNTHIA CONTI and	:	One Old Country Road, Suite 115
FORD CREDIT TITLING TRUST,	:	Carle Place, New York 11514
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	:	Attorney for Defendant Mesa
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Upon the following papers numbered 1 to 18 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 12; Answering Affidavits and supporting papers 13 - 14; Replying Affidavits and supporting papers 15 - 18; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Ford Credit Titling Company for summary judgment dismissing the complaint and cross claims asserted against it is granted; and it is further

ORDERED that the cross motion by plaintiffs for summary judgment on the issue of liability against defendant Joaquin Mesa is denied.

Plaintiff John Vidal (“Vidal”), and his wife suing derivatively, commenced this action against defendants seeking damages for injuries he allegedly sustained on September 15, 2003 as a result of a

motor vehicle accident on Route 112 and Barone Drive in Coram, New York. In the area of the accident, Route 112 is a two-way roadway separated by a double yellow line with lanes of traffic traveling north and south. It is undisputed that defendant Joaquin Mesa (“Mesa”) was driving his SUV southbound on Route 112, when he rear-ended the car owned by Vidal’s employer. It is also undisputed that the impact of the rear-end collision pushed the Vidal vehicle across the double yellow line into the northbound lane of traffic where it was hit by the SUV operated by defendant Cynthia Conti and leased from defendant Fred Credit Titling Trust (“Ford Credit”).

During his deposition, Mesa testified that he had been following the Vidal vehicle for a few miles when it suddenly stopped to make a left turn. Mesa also testified that he applied the brakes and turned the steering wheel, but was not able to avoid colliding with the Vidal vehicle.

Vidal testified that he stopped to make a left turn on to Barone Drive. While stopped and waiting to turn, he was hit in the rear by the Mesa vehicle, pushed into the northbound lane of traffic and came to a stop facing southeast. Vidal testified that after he was stopped for a about four seconds, his vehicle was hit on the passenger side by the Conti vehicle.

Conti testified that the Vidal vehicle suddenly crossed the double yellow lines in front of her, she applied her brakes, but did not have enough time to prevent the front of her SUV from hitting the passenger side of the Vidal vehicle. Conti also testified that the collision happened so quickly she did not have time to take any other evasive action, i.e., she did not turn her steering wheel or blow her horn.

In support of the motion, Ford Credit argues that Conti was faced with an emergency situation when the Vidal vehicle suddenly entered her lane after being rear-ended by the Mesa vehicle. Ford Credit maintains that Conti reacted reasonably under the circumstances. Thus, Ford Credit argues, that neither it nor Conti should be held liable for the accident and the plaintiffs’ alleged injuries.

A driver is not required to anticipate that a vehicle will cross over a double yellow line into oncoming traffic (*see, Guevara v Zaharakis*, 303 AD2d 555, 756 NYS2d 465 [2003]; *Velez v Diaz*, 227 AD2d 615, 643 NYS2d 614 [1996]; *Williams v Econ*, 221 AD2d 429, 633 NYS2d 392 [1995]; *Greifer v Schneider*, 215 AD2d 354, 626 NYS2d 218 [1995]). A cross-over scenario presents an emergency situation and the actions of a driver confronted with such a situation must be judged in that context (*see, Williams v Econ. supra; Greifer v Schneider, supra*).

Here, Conti was presented with an instantaneous cross-over emergency, not of her own making. Based on the deposition testimony of the parties involved, only a few seconds elapsed between the time she saw the Vidal vehicle cross over the double yellow line and the time she applied her brakes in an attempt to avoid the collision. Under the circumstances, Conti had no obligation to exercise her best judgment and any error in her judgment is not sufficient to constitute negligence (*see, Guevara v Zaharakis, supra; Velez v Diaz, supra; Williams v Econ, supra*).

The opinion in the affidavit of plaintiffs’ accident reconstructionist is insufficient to raise a question of fact as to the reasonableness of Conti’s actions. First, it is noted that the expert did not visit the accident, which is a basis for rejecting his affidavit (*see, Kasner v Pathmark Stores, Inc.*, 18 AD3d 440, 794 NYS2d 418 [2005]). Moreover, according to plaintiffs’ reconstruction expert, Conti had

between 3.9 and 5.3 seconds to safely stop her vehicle. The reconstructionist opines that having failed to safely stop her vehicle, “Conti was inattentive and/or exceeding the legal speed limit of 40 mph immediately prior to the collision with the [Vidal vehicle].” While the court does not quarrel with the expert’s mathematical calculations, it is noted that he relies on Vidal’s estimate that his vehicle was stopped for four seconds before being hit by Conti’s vehicle as an established fact; Conti, on the other hand, testified that the Vidal vehicle suddenly made a left turn in front of her.

Furthermore, in response, Ford Credit has offered the affidavit of its own expert who concludes that the purported four-second stop does not comport with the available data in the record. The expert for Ford Credit opines that the speed at which Mesa testified he was traveling at the time his vehicle rear-ended the Vidal vehicle, i.e., approximately 40mph, would have caused the Vidal vehicle to continue on a forward trajectory to the opposite side of the northbound lanes if it had not been hit by the Conti vehicle. The expert expresses the opinion that the only way the Vidal vehicle could have ended up stopped only one-half to three-quarters of the way into the northbound lane as the testimony indicates, was for Conti’s vehicle to have intercepted its forward motion, causing the Conti vehicle to continue forward for approximately one and one-half car lengths and the Vidal vehicle to be driven backwards and rotated in a counterclockwise direction.

Thus, the opinion of the plaintiffs’ reconstructionist based on the four-second estimate, is wholly speculative, as is his assessment that Conti was either inattentive or speeding, and therefore insufficient to defeat Ford Credit’s summary judgment motion (*see, McCain v Larosa*, 41 AD3d 792, 838 NYS2d 663 [2007]; *Horton v Warden*, 32 AD3d 370, 819 NYS2d 356 [2006]; *Davis v Pimm*, 228 AD2d 885, 664 NYS2d 401 [1996]). In any event, in the absence of evidence specifically demonstrating how a reduction in speed or other evasive action would have permitted Conti to avoid the Vidal vehicle, the expert’s opinion is “at best, indicative of an error in judgment in responding to the emergency created by [Vidal’s] vehicle, which is not sufficient to constitute negligence” (*Lamey v County of Cortland*, 285 AD2d 885, 727 NYS2d 551 [2001]).

Hence, in light of the determination herein, Ford Credit, whose liability is premised solely upon its status as title owner of the vehicle pursuant to section 388 of the Vehicle and Traffic Law in effect at the time the instant action was commenced, cannot be held vicariously liable (*see, Hassett v Budget Rent A Car of Florida, Inc.*, 209 AD2d 471, 619 NYS2d 284 [1994]). Accordingly, the motion by Ford Credit is granted and the complaint and any cross claims asserted against it are hereby severed and dismissed.

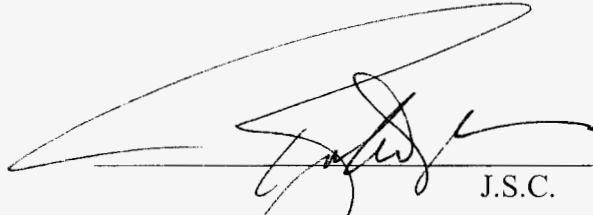
The court will now address the relief sought by the plaintiffs for summary judgment against Mesa. First, it is noted that the cross motion is in actuality a motion, as Mesa has not moved for any affirmative relief (*see, Terio v Spodek*, 25 AD3d 781, 785, 809 NYS2d 145 [2006]; *Mango v Long Is. Jewish-Hillside Med. Ctr.* 123 AD2d 843, 844, 507 NYS2d 456 [1986] [“A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party”]).

Furthermore, CPLR 3212(a) provides that, unless the court fixes a deadline for filing a summary judgment motion, such motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on “good cause” shown. Here, the note of issue was filed on October 3, 2006. Therefore, any motion for summary judgment had to be made by January 31, 2007. Plaintiffs, without

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leave of court, moved for summary judgment on February 22, 2007, and have not offered any reason for the delay. Hence, the court is without discretion to consider the plaintiffs' late motion, whether meritorious or not (*see, Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Espejo v Hiro Real Estate Co.*, 19 AD3d 360, 796 NYS2d 162 [2005]; *Thompson v New York City Board of Education*, 10 AD3d 650, 781 NYS2d 617 [2004]). Accordingly, the cross motion by plaintiffs for summary judgment must be denied.

Dated: AUG 23 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION