

Vasquez v Maimone

2007 NY Slip Op 32979(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0000972/2006

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.



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 7-25-07
ADJ. DATE 8-8-07
Mot. Seq. #001 - MG

-----X
MARDEN VASQUEZ, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 MARK MAIMONE, ANDREA MAIMONE and :
 ERICA HESSE. :
 :
 :
 Defendants. :
 :
-----X

SARISOHN, SARISOHN, CARNER, et al.
Attorneys for Plaintiff
350 Veterans Memorial Highway
Commack, New York 11725

ROBERT P. TUSA, ESQ.
Attorney for Defendants Maimone
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

RICHARD T. LAU & ASSOCIATES
Attorneys for Defendant Hesse
P.O. Box 9040
Jericho, New York 11753-9040

Upon the following papers numbered 1 to 19 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Answering Affidavits and supporting papers 13-16; 17; Replying Affidavits and supporting papers 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by plaintiff, Marden Vasquez, pursuant to CPLR 3212 for summary judgment on the issue of liability as against defendants Mark Maimone, Andrea Maimone and Erica Hesse, is granted. Upon service of a copy of this order with notice of entry, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in two separate accidents. The first accident occurred on July 7, 2004 on Brewster Street near the intersection of School Street, Glen Cove, New York, wherein plaintiff alleges the vehicle he was driving had come to a full stop at Brewster Street. While he was waiting for the red light to change to green, his vehicle was struck in the rear by a vehicle operated by Andrea Maimone. Mark Maimone was the owner of that vehicle. Plaintiff claims in his bill of particulars that as a result of this accident, he sustained injury to his neck, back and left shoulder consisting of traumatically induced impingement syndrome; subdeltoid bursitis of the left shoulder which required surgical intervention on December 14, 2005; central disc herniation at L5-S1; and bulging discs at C3-4, C4-5, C5-6 and C6-7 with mild thecal sac compression, most prominent at C3-4.

The second accident occurred on July 25, 2005 at or near the intersection of Glen Cove Road and Glen Head Road in Glen Cove, New York wherein plaintiff alleges the vehicle he was driving had come to a full stop at Glen Cove Road. While waiting for the red light to change to green, his vehicle was struck in the rear by the vehicle operated by Erica Hesse. Carol Hesse was the owner/lessee of that vehicle. Plaintiff claims in his bill of particulars that as a result of this accident he sustained a traumatically induced torn labrum, partial tear of the rotator cuff and impingement of the left shoulder which required surgical intervention on December 14, 2005; left sided disc herniation at C4-5 with impingement upon the ventral subarachnoid space superimposed upon pre-existing bulging discs at C3-4, C4-5, C5-6 and C6-7; and aggravation of pre-existing lumbar spine injury.

Plaintiff Marden Vasquez now seeks summary judgment on the issue of liability as against defendants as a matter of law. Defendant Erica Hesse opposes the motion. Defendants Mark Maimone and Andrea Maimone oppose plaintiff's motion on a limited basis. Counsel for the Maimone defendants sets forth that she cannot set forth a good faith basis upon which to oppose plaintiff's motion, however, she states, the Maimone defendants do not waive their right to proceed to a jury trial on the issue of damages with regard to both accidents. This limited opposition by the Maimone defendants, however, is not accompanied by an affidavit of service as required by CPLR §2103, but because plaintiff acknowledges receipt of the same in the Reply, this court will consider the opposition as submitted.

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 from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [1999]; *see also*, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent

explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see, Rainford v Han*, 18 AD3d 638; 795 NYS2d 645 [2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart, supra*).

With regard to plaintiff's motion for summary judgment on the issue of liability for the subject accidents, plaintiff has submitted copies of the pleadings and answers; copies of the bills of particulars; copies of the transcripts of the examinations before trial of Andrea Maimone and Erica Hesse; and the affidavit of Marden Vasquez.

Turning to the first accident of July 7, 2004, plaintiff sets forth in his affidavit that his vehicle had come to a full stop on Brewster Street at its intersection with School Street, Glen Cove, New York. While remaining stopped and waiting for the red traffic light to change to green, his vehicle was struck in the rear by a vehicle driven by Andrea Maimone.

At her examination before trial, Andrea Maimone testified she was operating her father's vehicle with his permission on July 7, 2003. It was a sunny day. When she first saw plaintiff's car before the impact, she was about twenty feet behind it and was traveling about thirty five miles per hour. At the time of impact, she estimated her vehicle to be traveling under thirty five miles per hour. She did not know if plaintiff's vehicle was stopped or moving, but testified it was stopped in the left travel lane when she impacted the Vasquez vehicle. She did not know how long the Vasquez vehicle had been stopped when the impact occurred, but there was no one in front of him. She braked hard and her foot was on the brake at the time of impact. She did not know the color of the traffic light before the impact occurred. She described the impact as medium. She did not know the name of the street where the accident occurred. She testified there was a police officer who had pulled a car over across from where the accident occurred. She was looking at the police officer or that incident at or about the time this accident occurred. She did not remember if looking at that scene across the way had anything to do with the accident. She stated that after the accident, she got out of her car and "basically was just apologizing and asking if he was ok, general freaking out." She then called the police.

Based upon the forgoing, it is determined plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability by demonstrating that defendant Andrea Maimone's vehicle struck plaintiff's vehicle in the rear while plaintiff's vehicle was stopped at a traffic light. Defendant Maimone has not come forward with a reasonable explanation to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see, Rainford v Han*, 18 AD3d 638; 795 NYS2d 645 [2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart, supra*). In that counsel for the Maimone defendants sets forth in her affirmation that she does not have a good faith basis upon which to oppose plaintiff's motion, and has submitted no evidence in opposition to plaintiff's motion, it is further determined the Maimone defendants have not come forward with admissible evidence to rebut plaintiff's prima facie showing of entitlement to summary judgment as a matter of law on the issue of liability.

Accordingly, plaintiff's motion for summary judgment is granted on the issue of liability as against Andrea Maimone and Mark Maimone.

Turning to the second accident, plaintiff set forth in his supporting affidavit that on July 25, 2005, his vehicle was at a full stop on Glen Cove Road at the intersection of Glen Head Road, Glen Cove, New York when his vehicle was struck in the rear by a vehicle driven by Erica Hesse.

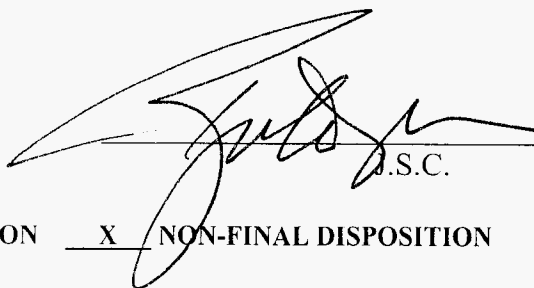
Plaintiff submitted the transcript of the examination before trial of Erica Hesse who testified that at the time of the accident she was driving an automobile leased by her mother, Carol Hesse. She described the weather as sunny and clear and the roads as dry. She was heading southbound on Glen Cove Road in the left travel lane. Plaintiff was in the travel lane ahead of her traveling southbound also. She saw plaintiff's vehicle come to a complete stop for a red traffic light and stopped behind him. They were stopped for less than a minute. Mr. Vasquez's vehicle was still stopped when, she states, a bug fell from her visor. While she was trying to get the bug off her, her foot came off the brake pedal. Her car then began to move forward about five miles an hour and struck plaintiff's vehicle in the rear. She described the impact as a light tap. There were no skid marks on the roadway.

Based upon the foregoing, it is determined that plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability against defendant Hesse who admitted striking plaintiff's vehicle in the rear while it was stopped, having become distracted by the bug. This distraction from the road constitutes negligence (*Pampris v Egnasher*, 20 AD3d 746, 799 NYS2d 309 [3rd Dept 2005]).

It is further determined that defendant Hesse, in opposing plaintiff's motion, has failed to raise a triable issue of fact concerning the issue of negligence. Defendant Hesse has not submitted an affidavit setting forth other facts or circumstances, or a reasonable explanation to excuse the collision by providing a non-negligent explanation for the happening of the collision (*see, Rainford v Han*, supra; *Thoman v Rivera*, supra; *Power v Hupart*, supra). It is noted that defendant Hesse submitted a copy of the transcript of the examination before trial of Marden Vasquez wherein he testified that within seconds prior to the impact to the rear of his car, he looked into his rear view mirror and saw defendant Hesse's Jeep approaching and that defendant Hesse was talking on her cell phone. Defendant Hesse does not dispute this testimony by plaintiff. Therefore, defendant Hesse has failed to raise a factual issue to preclude summary judgment. In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). In that defendant Hesse has raised no triable issue of fact, summary judgment is granted to plaintiff.

Accordingly, that part of plaintiff's motion (001) which seeks summary judgment on the issue of liability as against defendant Erica Hesse is granted.

Dated: SEP 04 2007



 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION