

Vasquez v Khan

2007 NY Slip Op 33837(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0117711/2004

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

VINCENTE M. VASQUEZ

INDEX NO. 117711/04

MOTION DATE 9-26-07

- v -

MOTION SEQ. NO. 003

**SHAFIQ ASLAM KHAN, JOSEPH ROMITO,
CHRISTINA A. ROMITO, and HYON CHONG
SHIN a/k/a SUK CHONG SHIN
a/k/a JONG H. SHIN**

MOTION CAL. NO. ~~117~~ 130

The following papers, numbered 1 to 3, were read on this motion by plaintiffs for summary judgment on the issue of liability.

Notice of Motion – Affidavits – Exhibits

Answering Affidavits – Exhibits (Memo)

Affirmation in Reply

Cross-Motion: Yes No

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

1

2

3

This is an action to recover damages for injuries allegedly sustained as a result of a four car accident, which occurred on March 13, 2002 at approximately 6:40 p.m., on the westbound Long Island Expressway near the Van Dam Street Exit in Queens, New York. Defendants Joseph G. Romito and Christina A. Romito, move pursuant to CPLR § 3212 for summary judgment on the issue of liability. The movants aver that their vehicle was stopped behind a vehicle operated by Shafiq Khan when it was struck from behind by a vehicle driven by the plaintiff Vincente Vasquez. Immediately prior to hitting the Romito vehicle, the Vasquez vehicle had been hit from behind by a vehicle driven by Hyon Chong Shin, starting this four car accident.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320

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(1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra.

In support of his motion, the defendant proffers the pleadings, the deposition testimony of Vasquez, Khan, Shin and Christina Romito, as well as the New York City Police report made in conjunction with this case. The plaintiff's papers in opposition consist only of an attorney's affirmation, with references to the deposition transcripts of plaintiff and defendants. Of course, affirmations of attorneys who claim no personal knowledge of the accident are without probative value on motions such as these. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority., 12 AD3d 316 (1st Dept. 2004). They may, however, serve as vehicles 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. The plaintiff opposes the relief sought, arguing that Romito may have been traveling too closely to the Khan vehicle when she was struck by his car. He also argues out that it is unclear if Romito had come to a complete stop before being struck by plaintiff's car which had been propelled forward from the impact with Shin.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

The motion must be granted since the Romito defendants have demonstrated, by proof in admissible form, the absence of any triable issues of fact and the right to judgment as a matter of law. See Kosson v Algaze, supra;

Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra.

It is well settled that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Malone v Morillo, 6 AD3d 324 (1st Dept. 2004); Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). “[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages.” Johnson v Phillips, 261 AD2d 269, 271 (1st Dept. 1999). Thus, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. See Somers v Conklin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); Grimes-Carrion v Carroll, 13 AD3d 125 (1st Dept. 2004); Johnson v Phillips, supra.

The plaintiff correctly argues that a non-negligent explanation maybe made out, in some circumstances, by showing that the front vehicle stopped short. See Sawhey v Bailey, 13 AD3d 203 (1st Dept. 2004); Martin v Pullafico, 272 AD2d 305 (2nd Dept. 2000); Corrado v DeJesus, 264 AD2d 577 (1st Dept. 1999). However, the First Department has repeatedly held that “an assertion that the lead vehicle ‘stopped suddenly’ is generally insufficient to rebut the presumption of negligence on the part of the offending vehicle.” Francisco v Schoepfer, supra at 276; see Ferguson v Honda Lease Trust, 34 AD3d 356 (1st Dept. 2006); Woodley v Ramirez, 25 AD3d 451 (1st Dept. 2006); Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001). Thus, even crediting the plaintiff’s argument that Romito may have been following too closely the Khan car, this alone is insufficient to defeat the motion. The evidence submitted establishes that Romito did not swerve in front of Vasquez or cut him off. In fact there is no proof offered to support the theory that Romito herself ever came to a sudden stop. Compare Myers v Crestwood Metals Corp., 40 AD3d 75 (1st Dept 2007); Lebron v ISEI Corp., 6 AD3d 215 (1st Dept. 2004); Evans v Fox Trucking Inc., 309 AD2d 618 (1st Dept 2003). Since plaintiff has failed to establish a non-negligent explanation for the collision or raise any triable issues with regard to the liability of Romito, the movants’ motion for summary judgment must be granted.

Here, the Romito's have submitted the complete transcripts of all the parties. These submissions establish that as she was stopped or stopping behind the Khan vehicle, Romito was struck from behind by Vasquez, who in turn had been hit by Shin. The proof offered by Vasquez does not support his claim that Romito caused the accident. Contrary to the plaintiff's assertions, the testimony cited does not establish a non-negligent explanation for the collision to rebut the presumption of negligence. Nor is the New York City Police Department report helpful to plaintiff. In the First Department, police reports are admissible as business records (CPLR 4518[a]) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d392 (1st Dept. 2003); Yeargans v Yeargans, 24 AD2d 280 (1st Dept. 1965). If the information contained in the report came from witnesses not engaged in the police business in the course of which the report was made, or it came from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., supra; Yeargans v Yeargans, supra; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Connors v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). While the driver of an offending vehicle is required to provide the responding police officer with proof of registration of the vehicle (see Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]), he or she has no duty to report the circumstances or the causes of the accident. See Cover v Cohen, 61 NY2d 261 (1984); Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); see also Mooney v Qsowiecky, 235 AD2d 603 (3rd Dept. 1997). Indeed, the First Department has consistently held that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980).

Accordingly, the defendants Joseph G. Romito and Christina A. Romito's motion for summary judgment on the issue of liability is granted.

For these reasons and upon the foregoing papers as well as oral argument

held, it is,

ORDERED that the motion by Joseph G. Romito and Christina A. Romito for summary judgment on the issue of liability is granted and the complaint and any cross-claims against those defendants are dismissed, and the Clerk is directed to enter judgment in favor of those defendants only, and it is further,

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

ORDERED that the parties shall appear for a pre-trial conference on December 18, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

Dated: November 20, 2007

FILED
NOV 29 2007
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Deborah A. Kaplan
Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN

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