

Grimaldi v Vasilakis

2007 NY Slip Op 34236(U)

December 21, 2007

Supreme Court, Nassau County

Docket Number: 0465-06/

Judge: Joseph DeMaro

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOSEPH A. DE MARO

Justice

----- TRIAL /IAS, PART 3

MICHAEL GRIMALDI, as Executor
of the Estate of MILDRED GRIMALDI, Deceased,
and MICHAEL GRIMALDI, Individually,

Plaintiff(s),

MOTION DATE:
November 16, 2007
Index No. 010465/06

-against-

SEQUENCE No. 2

NICHOLAS J. VASILAKIS and LINDA PANETTA,

Defendant(s).

NICHOLAS J. VASILAKIS and LINDA PANETTA,

Third-Party Plaintiff(s),

-against-

ANTHONY GRIMALDI

Third-Party Defendant(s).

The following papers read on this motion:

- Notice of Motion
- Affirmation in Support
- Affirmation in Opposition
- Reply Affirmation

Motion pursuant to CPLR § 3211[a][5], 3212, by the defendants-third-party plaintiff

Nicholas J. Vasilakis and Linda Panetta, for an order dismissing the plaintiff's complaint, is granted.

In May of 2005, third-party defendant Anthony Grimaldi was proceeding eastbound on Sunrise Highway in the vicinity of Massapequa, New York, when he allegedly executed a left hand turn, and attempted to cross over the westbound lanes in order to enter a parking lot located on the south side of the highway (Vasilakis, Dep., 11, 15-16, 20-21, 24).

Before he could complete the turn, and while still in the westbound lanes of traffic, Grimaldi's vehicle came into contract with a vehicle operated by Nicholas J. Vasilakis and owned by Linda Panetta (Vasilakis, Dep., 20-21, 24-26).

Grimaldi's wife, Mildred, was injured in the ensuing collision and died approximately a month after the accident (Cmplt., ¶¶ 2-3). Anthony Grimaldi is apparently under a physical and/or mental disability and is unable to provide evidence in the case (*see*, Order of Brandveen, J., dated March 12, 2007 at p.2).

By summons and complaint dated June, 2005, Vasilakis and Panetta, as plaintiffs, commenced a personal injury against Anthony Grimaldi, and moved for summary judgment in July of 2006 (Vasilakis, et., al. v Grimaldi, Index No. 9286-05).

In June of 2006, and while the Vasilakis-Panetta motion for summary judgment was pending, Michael Grimaldi, as Executor of the Estate of Mildred Grimaldi, commenced a second action – the instant action – against Vasilakis and Panetta, arising out of the same automobile accident [The “Estate” action] (*see*, Defs' Exh., “C”) (Index No., 010465-06).

In October, 2006, and upon Michael Grimaldi's application, the instant Estate action and the prior commenced Vasilakis-Panetta action were consolidated for purposes of joint trial

(Order of Jonas, J., dated October 30, 2006).

Notably, Justice Jonas rejected Grimaldi's request for an adjournment of the summary judgment application in light of the then pending Estate action. Vasilakis opposed a similar request made by Anthony Grimaldi in his opposition to the Vasilakis-Panetta summary judgment motion (Rossi Aff., [Defs' Exh., "G"] ¶ 6; Fein Reply Aff., ¶ 7).

By order dated March 12, 2007, the Court (Brandveen, J.) denied the Vasilakis-Panetta motion, concluding that issues of fact had been presented which precluded summary disposition of the matter (Defs' Exh., "I").

Upon reargument and renewal, however, the Court altered its prior determination by: (1) granting the "Vasilakis-Panetta" motion; and (2) setting the matter down for a trial on the issues of damages (Order of Brandveen, J., dated March 12, 2007; Defs' Exh., "K"). In light of the foregoing order, the Estate action was severed and was "to proceed as directed subject to further order" (Order of DeMaro, J., dated March 21, 2007).

The defendants Vasilakis and Panetta now move in this action, *i.e.*, the "Estate action," to dismiss the Grimaldi complaint on collateral estoppel grounds; or alternatively, for summary judgment.

With respect to the former contention, the defendants argue that Justice Brandveen's prior, March 12, 2007 order definitively resolves the issue of fault as against the Estate plaintiff with respect to the underlying automobile accident. The Court disagrees.

It is settled that the "litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party * * * [while] [t]he party to be precluded from relitigating the issue bears the burden

of demonstrating the absence of a full and fair opportunity to contest the prior determination” (*Buechel v. Bain*, 97 NY2d 295, 303-305 [2001] *see also*, *Launders v. Steinberg*, 9 NY3d 930, 932 [2007]; *Kaufman v. Eli Lilly and Co.*, 65 NY2d 449,455- 456 [1985]; *Laramie Springtree Corp. v. Equity Residential*, 38 AD3d 850, 851).

Significantly, “privity” in this context is " 'an amorphous concept not easy of application' * * * and ' includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action'" (*Buechel v. Bain, supra*, at 304, *quoting from, Matter of Juan C. v. Cortines*, 89 NY2d 659, 667-668 [1997] *see also*, *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Green v. Santa Fe Indus.*, 70 NY2d 244, 253-254 [1987]).

Although the liability issue to be decided in this action is the same as that resolved by Justice Brandvein, it is undisputed that the current plaintiff, Estate of Mildred Grimaldi, was not a party to that prior action.

Non-parties may, in limited circumstances, be bound or collaterally estopped by orders issued in actions to which they have not been made parties – provided that, *inter alia*, they are in “privity” with a party to the action (*see generally, Buechel v. Bain, supra; Matter of Juan C. v. Cortines, supra; D'Arata v. New York Cent. Mut. Fire Ins. Co., supra; Green v. Santa Fe Indus., supra*). Here, the Estate plaintiff was not in privity with Anthony Grimaldi.

Moreover, to the extent that the defendants have addressed the issue of privity, their claims are based on the unelaborated theories that: (1) the current plaintiff is “connected with the [first] action against Anthony Grimaldi,” and (2) more particularly – as set forth in their reply

papers – that the husband and wife relationship between Anthony Grimaldi and his deceased wife, Mildred, constitutes privity (Goodman Reply Aff., ¶ 6).

It has been held, however, that “there is no authority for the proposition that privity can be based solely on the existence of a spousal relationship” (Fernandez v. Cigna Property and Cas. Ins. Co., 188 AD2d 700, 702 *see also*, Molino v. Putnam County, 29 NY2d 44, 48 [1971]; Birnbaum v. Birnbaum, 182 AD2d 382, 384 *cf.*, Samhammer v. Home Mut. Ins. Co. of Binghamton, 120 AD2d 59, 64). The defendants have not cited to relevant case law supporting a contrary conclusion (Goodman Reply Aff., ¶ 6).

Nevertheless, the defendants further assert that even without the application of an estoppel, the relevant evidence establishes as a matter of law that Vasilakis was without fault in the occurrence of the accident. The Court agrees.

Vasilakis and Panetta have demonstrated their *prima facie* entitlement to judgment as a matter of law, by submitting evidence establishing that Anthony Grimaldi attempted to make a left-hand turn across the oncoming, westbound traffic proceeding with the right of way (Guadagno v. Norward, 43 AD3d 1432; Seery v. Mulholland, 41 AD3d 829; Berner v Koegel, 31 AD3d 591, 592).

Specifically, Nicholas Vasilakis’ deposition testimony indicates, in sum and substance, that: he was proceeding westbound at approximately 40 mph on Sunrise Highway; that he first observed the Grimaldi vehicle with its turn signal on, waiting to make a left turn in the eastbound turn lane when he was some 200 feet from the accident site; that the Grimaldi vehicle began to move when he was some ten to twelve feet away from it; and that the impact thereafter occurred “pretty much instantaneous[ly]” or within “a second or two seconds” thereafter (Vasilakis [June

2007] Dep., at 27, 28, 32, 34, 43, 45; Vasilakis [April 2006] Dep., at 16, 19-21).

Under these circumstances, Vasilakis not only had the right of way, but was “thus entitled to anticipate that * * * [Grimaldi] would obey the traffic laws which required him to yield” (*Aristizabal v. Aristizabal*, 37 AD3d 503, 504; *Berner v Koegel*, *supra*; *see*, Vehicle and Traffic Law § 1141; *Exime v. Williams*, ___ AD3d ___, 845 NYS2d 450 [2nd Dept. 2007]; *Rosenberg v. Kotsek*, 41 AD3d 573, 574; *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519, 520, *see also*, *Guadagno v. Norward*, *supra*; *Carabella v. Saad*, 29 AD3d 618; *Galvin v. Zacholl*, 302 AD2d 965, 966).

Although these factors do not definitively preclude a finding of comparative negligence since “[a] driver with a right of way has a corresponding duty to use reasonable care to avoid a collision,” (*Mateiasevici v. Daccordo*, 34 AD3d 651, 652; *Lara v. Simmons*, 29 AD3d 642), there must some evidence of comparative negligence submitted in order to defeat the defendants’ motion (*see*, *Exime v. Williams*, *supra*, 845 NYS2d 450; *Mateiasevici v. Daccordo*, *supra*, at 652).

Here, that evidence is lacking since the plaintiff’s submissions – including the affidavit of his engineering expert – fail to establish the existence of triable issues with respect to Vasilakis’ alleged comparative negligence, *i.e.*, the plaintiff’s speculative claims that Vasilakis may have been speeding or that he could have taken measures to avoid the collision (*see*, *Exime v. Williams*, *supra*, 845 NYS2d 450; *Guadagno v. Norward*, *supra*; *McCain v. Larosa*, 41 AD3d 792, 793; *Carabella v. Saad*, *supra*; *Gabler v. Marly Bldg. Supply Corp.*, *supra*; *see also*, *Mateiasevici v. Daccordo*, *supra*, at 652; *Galvin v. Zacholl*, *supra*, at 966; *Moreback v. Mesquita*, 17 AD3d 420, 421; *Meretskaya v. Logozzo*, 2 AD3d 599, 600; *Borst v Sunnydale*

Farms, 258 AD2d 488).

Further, and notwithstanding counsel's plaintiff's reliance upon the "Noseworthy" doctrine (Noseworthy v City of New York, 298 NY 76 [1948]), the plaintiff "must still establish a prima facie case" (Seery v. Mulholland, supra, 41 AD3d at 840 see, Sawyer v. Dreis & Krump Mfg. Co., 67 NY2d 328, 334 [1986]; Marsch v. Catanzaro, 40 AD3d 941).

Lastly, and upon searching the record, the Court agrees with the unopposed assertion made by third-party defendant Anthony Grimaldi, that the third-party action should now be dismissed (Rossi Aff., ¶¶ 4-5).

Where as here, there is no longer any damage for which Anthony Grimaldi can be compelled to indemnify Vasilakis and Panetta, dismissal of the third-party action is warranted (see, Langan v. Cabela, 289 AD2d 377, 378; DeLuca v. Lett, 173 AD2d 760, 762-763; Scivetti v. Niagara Mohawk Power Corp., 33 AD2d 884; Long Island Women's Health Care Associates v. Haselkorn-Lomansky, 10 Misc.3d 1068(A), 2005 WL 3610336, at 7-8 [Supreme Court, Nassau County 2005]; see, CPLR 1007; Third-Party Cmplt., ¶ 16).

ORDERED that the branch of the motion by the defendants/third-party plaintiffs Nicholas J. Vasilakis and Linda Panetta for summary judgment dismissing the complaint pursuant to CPLR 3212, is granted and it is further,

ORDERED that the third-party complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

ENTERED 
J.S.C.

DEC 27 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: December 21, 2007