

Gill v LoPiccola

2008 NY Slip Op 33627(U)

December 30, 2008

Sup Ct, Suffolk County

Docket Number: 07-2 159

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9-30-08
MNEMONIC: # 001 - MG
002 - XMD

-----X
CHRISTOPHER W. GILL, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 ANITA LOPICCOLA, ALBERT HANSON and :
 GEORGE ENDLER, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 14 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9; Notice of Cross-Motion and supporting papers (002) 10-12; Answering Affidavits and supporting papers; Replying Affidavits and supporting papers 13-14; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant George Endler III pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that this cross-motion (002) by the plaintiff, Christopher W. Gill (hereinafter plaintiff), pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability as asserted against the defendants Anita LoPiccola and Albert Hanson, is denied without prejudice to renewal upon proper papers within thirty days of the date of this order.

This action seeks to recover damages for personal injuries allegedly sustained by the plaintiff as a passenger in the vehicle operated by the defendant George Endler when the vehicle came into contact with the vehicle owned by the defendant Albert Hanson and

operated by the defendant Anita LoPiccola, on October 8, 2005, on County Road 21 at or near its intersection with Longwood Road, Town of Brookhaven, County of Suffolk in the State of New York.

In motion (001), the defendant George Endler seeks an order granting summary judgment dismissing the complaint asserted against him on the basis that he bears no liability for the accident.

In cross-motion (002), the plaintiff seeks an order granting summary judgment on the issue of liability as asserted against the defendants Anita LoPiccola and Albert Hanson.

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 [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 [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]).

In support of the motion (Seq. #001), George Endler has submitted an attorney's affirmation; an uncertified copy of a Police MV 104 Accident Report; a copy of the summons and complaint and a copy of George Endler's answer with a cross-claim asserted against the co-defendants Anita LoPiccola and Albert Hanson; a copy of the answer served by Anita LoPiccola and Albert Hanson; and copies of the transcripts of the examinations before trial of George Endler and Anita LoPiccola, both dated October 30, 2007.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see, **Lacagnino v Gonzalez**, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; **Hegy v Coller**, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In support of motion (002), the plaintiff has submitted an attorney's affirmation. The motion (002) is deemed insufficient as a matter of law as it is not supported by an affidavit from the plaintiff and a copy of the pleadings as required pursuant to CPLR 3212(b).

Accordingly, motion (002) is denied without prejudice to renewal upon proper papers within thirty days of the date of this order.

At his examination before trial George Endler testified he was operating his 1996 Jeep Grand Cherokee in which the plaintiff, his brother-in-law at the time of the accident, was riding as a passenger in the rear seat. Seated in the front seat was his father-in-law, and also in the rear passenger seat were his wife and Anne Gill. They had just left a wedding reception, and were traveling southbound on County Road 21 when, about the length of a football field ahead, he saw the vehicle being operated by Anita LoPiccola traveling northbound towards him in his southbound lane of travel, with both of its front tires entirely in the southbound lane. It then crossed back into the northbound lane, and when it reached about thirty to fifty feet from his vehicle, it crossed back into the southbound lane coming toward his vehicle. He stated that when he first saw the other vehicle three hundred feet away that he slowed down and pulled off the road to the right on the shoulder. As he resumed driving, and when the other vehicle came back into the southbound lane when it was about thirty to fifty feet from his vehicle, his vehicle was traveling about twenty five to thirty miles per hour. When he saw the other vehicle did not pull back into the northbound lane, he pulled hard to the left and hit the gas. The contact occurred between the two vehicles when he was still in the southbound lane. The front passenger portion of the other vehicle came into contact with the front portion of the right rear passenger door of his vehicle, causing his vehicle to spin about ninety degrees.

Anita LoPiccola testified at her examination before trial that she was involved in the automobile accident on October 8, 2005 and was the driver of a Toyota Avalon owned by her husband, Albert Hanson. She had attended her fortieth high school reunion in Roslyn, (New York), and was driving alone. She stated it was raining heavily, and she had the windshield wipers on full force. She exited the Long Island Expressway at exit 66 and was going in a northerly direction toward Rocky Point on Sills Road which she described as a two lane roadway with one travel lane in each direction, northbound and southbound. She did not know where on the roadway the accident occurred, and had no recollection of the accident except that the air bags deployed and she heard a loud sound. When the accident occurred she was traveling in a northbound direction, and when the air bags deployed, she was in the southbound lane facing north. She had no recollection as to how her vehicle traveled from the northbound lane facing north to the southbound lane facing north. She thought she was traveling about thirty five to forty miles per hour when the impact occurred. After the accident, she went over to the other car, she said, and apologized. She testified that she took Atavan about four hours prior to the accident for an anxiety disorder, and at the reunion she stated she had two glasses of wine. Just before the accident she was feeling very tired. She also stated she did not know if she dozed off before the accident.

New York Vehicle and Traffic Law §1126[a] provides (with few exceptions) that ... "when official markings are in place...no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such marking." It is well settled that crossing a double yellow line into the opposing lane of traffic constitutes negligence as a matter of law unless justified by an emergency situation not of the driver's making (see, **Browne v Castillo**, 288 AD2d 415, 733 NYS2d 494 [2nd Dept 2001]; **Haughey v Noone**, 94 NY2d 858, 691 NYS2d 553 [1980]).

"A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic. Such an event constitutes a classic emergency situation, thus implicating the 'emergency doctrine'" (**Gajjar v Shah et al**, 31 AD3d 377, 817 NYS2d 653 [2nd Dept 2006]). George Endler's evasive action in trying to get his vehicle out of the way of the offending vehicle is deemed reasonable as a matter of law under the circumstance, which were not of his own making. "The emergency doctrine recognized that in a sudden and unexpected circumstance, which left little or no time for thought, an actor could not be expected to adhere to the same accuracy of judgment as someone who had the full opportunity to reflect. Individuals who did not create, or did nothing to contribute to an emergency situation could not be held liable for the repercussions therefrom" (**Caban v Vega**, 226 AD2d 109, 640 NYS2d 58 [1st Dept 1996]).

The defendant George Endler has demonstrated, prima facie, his entitlement to summary judgment dismissing the complaint against him brought by the plaintiff. The plaintiff has failed to submit evidentiary proof in admissible form raising triable issues of material fact as he has submitted only the affirmation of his attorney, who did not personally witness the accident (see, **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, motion (001) by George Endler for summary judgment dismissing the complaint is granted and the complaint as asserted against him is dismissed with prejudice.

Dated: December 30, 2008

J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION