

Perez v Gold

2009 NY Slip Op 32285(U)

September 29, 2009

Supreme Court, New York County

Docket Number: 112431/06

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

ANIBAL PEREZ,

Plaintiff,

-against-

DAVID P. GOLD, NELSON ALAMO and
ROOSEVELT CARABALI,

Defendants.

INDEX NO. 112431/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 82

FILED
OCT 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 4 were read on the motion by Nelson Alamo and Roosevelt Carabali for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1
2, 3
4

Cross-Motion: Yes No

On September 10, 2004, a three-vehicle rear-end collision occurred in the westbound lane of Interstate 95, approximately two-tenths of a mile west of exit 6, in the city of Stamford, in the state of Connecticut. Plaintiff Anibal Perez, who was a passenger in vehicle #2 owned by Roosevelt Carabali and being driven by Nelson Alamo (the Alamo vehicle), was allegedly injured when vehicle #3, being driven by David P. Gold (the Gold vehicle), struck the rear of the Alamo vehicle. Vehicle #1 is not a party to this lawsuit. Perez commenced his negligence action on or about September 6, 2006, to recover damages for alleged personal injuries suffered as a result of the subject accident. The parties have completed discovery and a note of issue was filed on or about April 8, 2008. Alamo and Carabali now move, pursuant to CPLR 3212, for

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an order granting summary judgment on the issue of liability dismissing Perez's complaint. An interpreter was present at both Alamo's and Perez's depositions.

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, {{{384}}} [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v. Perlbinde*, 307 AD2d 230, 230-231 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 10, [1st Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof ..." (CPLR 3212 [b]). A party may also demonstrate a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, 49 NY2d at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Ordinarily, "any rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front" (*Francisco v Schoepfer*, 30 AD3d 275, 275 [1st Dept 2006]). Where the proponent of a motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a triable issue of fact, or to tender an acceptable excuse for his or her failure to do so (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *Vermette v Kenworth Truck Co.*, 68

NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 553 [1st Dept 2003], affd 3 NY3d 295 [2007]).

Where the evidence indicates that plaintiff has established defendants' prima facie entitlement to summary judgment on liability for the subject accident, such as where the plaintiff's vehicle was a stationary vehicle involved in a rear-end collision (see *Mariano v New York City Transit Authority*, 38 AD3d 236, 236 [1st Dept 2007]; *Woodley v Ramirez*, 25 AD3d 451, 452 [1st Dept 2006]; *Garcia v Bakemark Ingredients [East] Inc.*, 19 AD3d 224, 224 [1st Dept 2005]), the burden shifts to the owner and operator of the offending vehicle to rebut the inference of negligence by offering a non-negligent explanation for the contact (*Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]), and thereby, raise triable issues of material fact in order to defeat the plaintiff's motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Perez v Brux Cab Corp.*, 251 AD2d 157, 159 [1st Dept 1998]).

DISCUSSION

In support of their motion, Alamo and Carabali submit, amongst other things, a copy of the pleadings and copies of the Perez and Alamo depositions. Those deposition testimonies present slightly different versions of the circumstances leading up to the rear-end collision between the Gold and Alamo vehicles.

Perez stated in his deposition that the Alamo vehicle, in which he was riding, was moving at a crawl. He stated that the Alamo vehicle was moving slowly at the time that it was struck from behind by another vehicle. Perez was wearing a seat belt. He further stated that even though he was wearing a seat belt, he was unable to undo the

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seat belt and get out of the car on his own. He was taken out of the car, placed in an ambulance, and taken to a local hospital.

Alamo stated during his deposition that he entered into the left lane from the middle lane where some construction began on Interstate 95. He indicated that his car was moving slowly and did not strike vehicle #1 until after he had first been struck by the Gold vehicle. He alleges that, when he looked in his rear-view mirror just before he was struck from behind, he saw the operator of the Gold vehicle using a cell phone. He said the impact was hard and that his vehicle was subsequently totaled. He also stated that he used his signal light to change lanes and that his brake lights were working.

Contrary to Alamo's and Perez's versions, Gold stated during his deposition that the accident occurred just after the Alamo vehicle first struck vehicle #1. He said that he actually saw the Alamo vehicle strike vehicle #1 before Gold collided with Alamo. He stated that the Alamo vehicle was approximately two car lengths ahead of him before he collided with the Alamo vehicle. He also states that he did not see any brake light or signal lights being displayed on the Alamo vehicle in front of him.

It is well settled that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that "any rear-end collision with a stopped vehicle establishes a prime 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 such accident (*Francisco v Schoepfer*, 30 AD3d at 275-276, citing *Garcia v Bakemark Ingredients [East], Inc.*, 19 AD3d at 224; *Mullen v Rigor*, 8 AD3d 451, 451 [1st Dept 2004]; *Malone v Morillo*, 6 AD3d 104, x [1st Dept 2004]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]; *Johnson v*

Phillips, 261 AD2d 269, 271 [1st Dept 1999]). In addition, a “driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles taking into account the weather and road conditions” (*Francisco v Schoepfer*, 30 AD3d at 275, quoting *Malone v Morillo*, 6 AD3d at 325; *see also* Vehicle and Traffic Law § 1129 [a]). The injured occupants of a rear-ended vehicle are entitled to summary judgment on the issue of liability unless the defendant driver provides a non-negligent explanation for the collision (*Francisco v Schoepfer*, 30 AD3d at 275-276). A party’s alleged sudden stop in traffic may serve as a defendant’s non-negligent explanation sufficient to preclude summary judgment (*DeCosmo v Hulse*, 204 AD2d 953, 955 [3d Dept 1994]). The sudden slowing or a stop of a motor vehicle without giving proper signals in compliance with Vehicle and Traffic Law § 1163 may also create a question of fact regarding liability for a rear-end accident (*Drake v Drakoulis*, 304 AD2d 522, 523 [2d Dept 2003]).

On a motion for summary judgment, the Court is obligated to construe the evidence liberally in a light most favorable to the non-moving party (*Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [1st Dept 2006]; *Gonzalez v Metropolitan Life*, 269 AD2d 495, 496 [2d Dept 2000]). Based on the contrary statements gleaned from the deposition testimonies, at a minimum, three questions of fact exist. The first is whether, after being struck by vehicle #3, vehicle #2 was propelled forward and struck vehicle #1, or whether vehicle #2 struck vehicle #1 and was then struck by vehicle #3. The second is whether or not vehicle number #2 had working tail lights and brake lights prior to being struck by vehicle #3. The third is whether or not vehicle #2, which was returning to New York from a funeral in Rhode Island, properly merged into the left lane from the middle

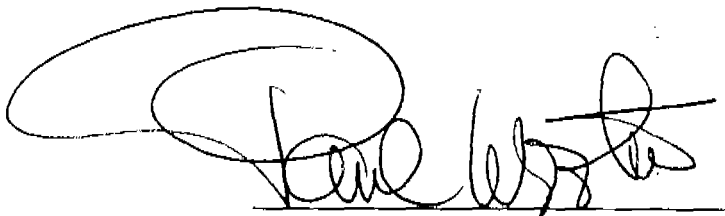
lane onto that portion of Interstate 95 located in Connecticut where there was some road construction.

As a result of the various versions in the depositions leading up to how the rear-end collision occurred, Gold has provided a non-negligent explanation to demonstrate potential culpability on the part of Alamo and Carabali, and has raised a question of fact sufficient to rebut the granting of summary judgment based upon a rear end collision (*Andre v Pomeroy*, 35 NY2d 361, 365-366 [1974]). Credibility issues are for the trier of fact (*Binetti v Infante*, 38 AD3d 210, 210 [1st Dept 2007]).

For these reasons and upon the foregoing papers, it is

ORDERED that the motion by Nelson Alamo and Roosevelt Carabali for summary judgment on the issue of liability is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon the other parties.



Dated: 9-29-09

SEP 29 2009

Paul Wooten Paul Wooten
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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