

Zamir v Shoshani

2009 NY Slip Op 32852(U)

December 7, 2009

Supreme Court, Queens County

Docket Number: 5511/2008

Judge: Bernice Daun Siegal

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Bernice D. Siegal
Justice

Part 5

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AMY J. ZAMIR,

Plaintiffs,

-against-

SHLOMO SHOSHANI, SHALEV SHOSHANI, and
SONNIA J. ALVARADO,

Defendants.

-----X

Index No. 5511/2008
Motion Date: 10/14/09
Calendar No. 26
Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion and cross-motion for Summary Judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affidavit in Opposition-Exhibits.....	5-7
Reply Affidavit.....	8-9
Cross Motion-.....	10-13
Affidavit in Opposition-Exhibits.....	14-16
Reply.....	17-18

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant, Sonia Alvarado moves for an order pursuant to CPLR 3212, granting summary judgment, in Action #2, dismissing all claims and cross-claims against her on the issue of liability.

Plaintiff Amy Zamir ("Zamir"), moves for an order pursuant to CPLR 3212, granting the plaintiff, summary judgment on the issue of liability, only, against the defendants, Shlomo Shoshani, Shalev Shoshani ("Shalev") and Sonia Alvarado ("Alvarado").

Facts and Procedural History

The within action arises out of a motor vehicle accident involving three vehicles, which occurred on January 23, 2008 while the vehicles were traveling on the Grand Central Parkway. It is undisputed that Shalev and Alvarado were traveling Westbound, while Zamir was traveling Eastbound and that the vehicle operated by Shalev struck the motor vehicle of Alvarado. Following this collision, Alvarado's vehicle crossed over the divider separating westbound and eastbound lanes of traffic on the Grand Central Parkway and then collided with Zamir's car.

Alvarado has no recollection of the events that transpired after the initial collision and merely recalls an impact from the rear of her vehicle. Shalev, driving a vehicle owned by her father Shlomo Shoshani, testified that both her horn and her breaks were working properly prior to the accident and that she was driving 55 miles per hour when the accident occurred. Prior to the accident, Shalev was in the middle lane of the highway and merged into the right lane. Just after switching lanes, Shalev realized that the car in front of her was moving too slow for her current speed of 55 mph and then decided to switch back to the middle lane. Just seconds after the merge was almost complete, the initial strike occurred. Shalev did not honk her horn, but testified to applying medium pressure to the brakes.

Zamir was traveling in the center lane of the Grand Central Parkway going Eastbound for approximately 5-10 minutes prior to the accident.

The court notes that an Order was entered pursuant to CPLR 602(a) joining Action No. 1 bearing Index No. 4602/08 with Index No 2 bearing Index no. 5511/08 for Joint Trial.

Alvarado's Motion For Summary Judgment

Alvarado moves this court for an order pursuant to CPLR §3212, granting summary judgment to Alvarado, in this action bearing Index No. 5511/08, dismissing all claims and cross-claims against her on the issue of liability. Alvarado asserts that while traveling on the Grand Central Parkway heading westbound, she was struck in the rear by the vehicle operated by Shalev. Alvarado further asserts that it was the hit in the rear that caused her to cross over into eastbound portion of the Grand Central Parkway. Shalev, in her deposition, admitted to traveling in the right lane and then quickly switching to the middle lane where she struck the Alvarado vehicle. As Shalev failed to submit opposition to the within motion, she fails to dispute striking the Alvarado vehicle in the rear.

It is well established that summary judgment should only be granted where there are no material and triable issues of fact. (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957].) "Proof of a rear-end collision establishes a prima facie case of negligence on the part of the driver of the vehicle that strikes the forward vehicle and imposes a duty upon such operator to explain how the accident occurred." (*Taveras v. Amir* 24 AD3d 655 [2nd Dept 2005].) Shalev has failed to submit credible evidence to rebut Alvarado's contention that she struck the

Alvarado vehicle in the rear. In addition, summary judgment is appropriate when a party who was forced into the opposite side of traffic as a result of a rear-end impact that was caused by no fault of the moving party. (*Stretch v. Tedesco*, 263 A.D.2d 538 [2nd Dept 1999].) Plaintiff established that she was hit in the rear by Shalev and plaintiff has failed to set forth credible evidence to support a theory that Alvarado's actions after being struck in the rear were, in any way, negligent. Accordingly, summary judgment in favor of Alvarado is appropriate.

Zamir's Cross-Motion for Summary Judgment

Plaintiff's cross-motion for likewise moves for summary judgment. It is undisputed that the Plaintiff Zamir was traveling eastbound on the Grand Central Parkway when the Alvarado vehicle crossed over from the westbound portion of the Grand Central Parkway and struck the Zamir vehicle. "A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into the oncoming lane of traffic. Such an event constitutes a classic emergency situation, implicating the emergency doctrine." (*Koenig v. Lee*, 53 Ad3d 567 [2nd Dept 2008].)

In opposition, defendant Alvarado, asserts that the cross-motion for summary judgment should be denied as untimely pursuant to CPLR §2215. However, the court notes that the motion and cross-motion were originally returnable on September 16, 2009, and then adjourned to October 14, 2009 so that all parties could submit papers with respect to the instant applications. The attorney for Alvarado has had ample opportunity to submit

opposition to the cross-motion and in fact did submit opposition which simply alerted the court to the timeliness issue.

Therefore, Alvarado has suffered no prejudice from the court's acceptance of the within cross-motion. Accordingly, the plaintiff failed to raise a triable issue of fact as to whether Zamir's reaction to the emergency was unreasonable, or whether any negligence on her part prior to the cross-over contributed to the bringing about of the emergency. (Koenig v. Lee, 53 Ad3d 567 [2nd Dept 2008].) For the reasons set forth above, Zamir's cross-motion for summary judgment, on the issue of liability, is granted.

Conclusion

Defendant, Alvarado's motion for an order pursuant to CPLR §3212, granting summary judgment, in this action, dismissing all claims and cross-claims against her on the issue of liability is granted.

Plaintiff, Zamir's motion for an order pursuant to CPLR §3212, granting the plaintiff, summary judgment on the issue of liability, only, against the defendants, Shlomo Shoshani, Shalev Shoshani and Sonia Alvarado is granted.

Dated: December 7, 2009

Bernice D. Siegal, J. S. C.