

Gomera v City of New York

2010 NY Slip Op 31509(U)

June 14, 2010

Supreme Court, New York County

Docket Number: 111088/06

Judge: Cynthia S. Kern

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6/17/10

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Index Number : 111088/2006
GOMERA, MAXIMINA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 111 088/06
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is hereby decided*
in accordance with the annexed decision and
this action is hereby transferred to a
non-City part.

FILED
JUN 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/14/10

CYNTHIA S. KERN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
MAXIMINA GOMERA,

Plaintiff,

Index No. 111088/06

-against-

DECISION/ORDER

THE CITY OF NEW YORK, HENRY T. LEE,
JUAN M. MEDINA, HAZRO INCORPORATED
and MELANIA SUSANA.,

Defendants.

-----X
LEE HENRY,

Plaintiff,

Index No. 113456/07

-against-

DECISION/ORDER

JUAN M. MEDINA, HAZRO INCORPORATED
and MELANIA SUSANA.,

Defendants.

-----X

FILED
JUN 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Cross-Motion and Affidavits Annexed	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits on Motion.....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff Maximina Gomera commenced this personal injury action against defendants to
recover for injuries she allegedly sustained when the motor vehicle she was a passenger in struck

a car which itself had struck a stopped vehicle on January 5, 2006. Defendant the City of New York (the "City"), the owner of the lead car, now moves for summary judgment dismissing plaintiff's complaint on the grounds that she fails to rebut the presumption that the driver of the second vehicle, and not the driver of the stopped vehicle, was negligent. For the reasons set forth below, defendant City's motion for summary judgment is granted.

The relevant facts are as follows. On January 5, 2006, defendant Henry was driving a Chevy Blazer owned by his employer, the New York City Department of Parks and Recreation from his home to Prospect Park in Brooklyn southbound on the FDR Drive. He testified that he entered the right lane of the FDR drive and remained in the right lane until the time of the accident, an assertion plaintiff disputes. Plaintiff asserts that Mr. Henry switched lanes suddenly from the left lane to the middle lane and then the right lane. A second car, a town car or taxi, then struck Mr. Henry's car and then the car plaintiff was a passenger in struck the second car. It is undisputed that the Henry vehicle was stopped at the time of the impact. Defendant Melania Susana, the driver of the vehicle plaintiff was a passenger in, specifically testified that she witnessed the first accident and that the Henry vehicle changed lanes suddenly but that when the town car struck Mr. Henry's car, Mr. Henry's car was stopped. Plaintiff testified that she did not witness the Henry car change lanes nor did she witness the initial accident. She further testified that when she first saw the Henry vehicle, it was already in the right lane.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of*

New York, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

Defendant City is entitled to summary judgment because there is no reasonable, non-negligent explanation for why the second car rear-ended the Henry vehicle. A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, requiring him to provide a non-negligent explanation for the collision. *See Vespe v Kazi*, 2009 WL 1182015 (1st Dept May 5, 2009); *Diller v City of New York Police Dept.*, 269 A.D.2d 143 (1st Dept 2000); *Johnson v Phillips*, 261 A.D.2d 269 (1st Dept 1999). If the operator cannot come forward with any evidence to rebut the inference of negligence, the party in the stopped vehicle may properly be awarded summary judgment as a matter of law. *See Mankiewicz v Excellent*, 25 A.D.3d 591 (2nd Dept 2006); *Hurley v Izzo*, 248 A.D.2d 674 (2nd Dept 1998). “The fact that [the lead vehicle] may have changed lanes shortly before the impact, without more, [is] insufficient to rebut the presumption of negligence.” *Carela v Espinosa*, 14 Misc.3d 133(A) (Sup. Ct., App. Term 1st Dept 2007); *see also Cabrera v Rodriguez*, 72 A.D.3d 553 (1st Dept 2010) (allegation that lead vehicle may have been changing lanes irrelevant where it was undisputed that lead vehicle was stopped at the time of the accident).

In the instant case, the fact that Henry may have switched lanes shortly before the accident is insufficient to rebut the presumption of negligence on the part of the second vehicle given that it is undisputed that the Henry vehicle was stopped at the time of the accident. *See*

Carela, 14 Misc.3d 133(A). The case cited by plaintiff, *Myers v Crestwood Metals Corp.*, 40 A.D.3d 376 (1st Dept 2007) is inapposite as in *Myers* there appears to be a factual dispute regarding whether the lead vehicle was stopped at the time of the accident.

Accordingly, defendant City's motion for summary judgment is granted and the plaintiff's complaint is dismissed against defendant City only. This constitutes the decision and order of the court.

Dated: 6/14/10

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.

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JUN 17 2010
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