

Colon v Lim

2011 NY Slip Op 30512(U)

March 7, 2011

Supreme Court, Queens County

Docket Number: 25688/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JULIO COLON, Index No.: 25688/2009
Plaintiff, Motion Date: 02/03/11
- against - Motion No.: 2
JAMES LIM, Motion Seq.: 001
Defendants.

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The following papers numbered 1 to 5 were read on this motion by the plaintiff for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and for an order pursuant to CPLR 3025 granting plaintiff leave to amend the caption and to serve a supplemental summons and complaint to add SHARON LIM as An additional party:

Papers
Notice of Motion-Affidavits-Exhibits.....1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....4 - 5

In this negligence action, the plaintiff, JULIO COLON, seeks to recover damages for personal injuries that he sustained as a result of a motor vehicle accident that occurred on at approximately 6:00 p.m. on November 25, 2008, between the vehicle owned by SHARRON LIM and operated by defendant JAMES LIM and the vehicle operated by plaintiff JULIO COLON. The accident took place in front of 45-22 162nd Street (southbound), Flushing, New

York.

The plaintiff commenced this action by service of a summons and complaint on September 25, 2009. Issue was joined by service of defendant's answer on October 20, 2009. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and setting this matter down for assessment of damages.

At the time of the accident, plaintiff's vehicle was proceeding southbound on 162nd Street two blocks south of Northern Boulevard. Plaintiff contends that he was completely stopped in front of 45-22 162nd Street when his vehicle was struck in the rear by the vehicle being operated by the defendant James Lim. In support of the motion, the plaintiff submits an affidavit from counsel, James Mattone, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the plaintiff's motor vehicle accident report; a signed statement from the defendant; and excerpts from the examinations before trial of plaintiff, JULIO COLON and defendant JAMES LIM.

In his examination before trial taken on May 26, 2010, the plaintiff stated that on the date in question he left his home and headed east on 132nd Street and made a right on 162nd Street. It was dark out so he had his headlights on. He proceeded southbound on 162nd Street, crossed Northern Boulevard and stated that he "stopped because of a garbage truck picking up debris so

I was two car lengths behind the garbage truck at a dead stop." He stated that he was the third car behind the garbage truck and that he had been stopped between one and two minutes prior to the defendant's vehicle striking his car in the rear. The plaintiff stated that while they were waiting for the police to arrive, "Mr. Lim said he acknowledged that it was 100 per cent his fault and he would pay for all the damages and that we did not need to involve the police or insurance. So when the police showed up to the scene I stated there is no need for a police report." The defendant signed a statement at the scene stating that he agreed to pay all damages on the plaintiff's vehicle stating, "It was my fault. Honda stop on the street." Plaintiff and Mr. Lim then traveled together to a body and fender shop to get a repair estimate for plaintiff's vehicle.

The following day the plaintiff went to the emergency room at New York Hospital and then went to the 109th Precinct to file a police report. Mr. Lim subsequently informed the plaintiff that as the repair amount was too high for him to pay he would prefer to let the insurance company handle the claim.

Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that he was traveling too closely and without due regard to the speed of his vehicle in violation of VTL §§ 1129 and 1180 and that he failed to safely stop his vehicle prior to rear-ending the plaintiff's

vehicle. Counsel contends that plaintiff is entitled to partial summary judgment as to liability because the defendant was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

In his examination before trial, taken on May 26, 2010, defendant JAMES LIM, age 73, testifying through a Korean interpreter, stated that at the time his vehicle hit the plaintiff's vehicle it was stopped in the middle of the block. He stated that he was proceeding at a rate of 25 miles per hour when the impact occurred. There was no traffic light where plaintiff was stopped and defendant did not know of if there were any vehicles in front of the plaintiff's vehicle. He conceded that he offered to settle with the plaintiff at the scene so as to avoid filing a claim with the insurance company. He also agreed that he signed the statement at the scene stating that it was his fault.

In opposition to the motion the defendant also submitted an affidavit dated February 1, 2011, in which he states that it was dark at the time of the accident and that when he first saw the plaintiff's vehicle it was stopped in the middle of the block with no brake lights or any other lights illuminated on the plaintiff's vehicle. He stated that he did not know it was stopped until it was too late to avoid the accident. He states that, "I did not expect a vehicle to be stopped in the middle of

the block with no lights on.”

Counsel for defendant, James N. Donovan, Esq., contends that summary judgment is not appropriate in this case as the defendant’s affidavit raises triable issues of fact as to the manner in which plaintiff operated his vehicle immediately prior to the accident. Specifically, defendant alleges that although there is no dispute that the plaintiff’s vehicle was completely stopped in the middle of the block at the time of impact, the defendant, in his affidavit has offered a non-negligent explanation for the collision, that being that he had no expectation of a car being stopped at night with no lights illuminated in the middle of the block (citing Klopchin v Masri, 45 AD3d 737[2d Dept. 2007]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

“When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with

the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2 330[2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]. Here, plaintiff stated in his affidavit that his vehicle was at a complete stop behind a garbage truck when he was struck from behind by defendant's motor vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing his entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was completely stopped when it was struck in the rear by the vehicle operated by defendant James Lim (see Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of his entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). This court finds that the defendant failed to submit evidence sufficient to raise

a triable question of fact.

The defendant's explanation, raised for the first time in his affidavit of February 1, 2011, that the plaintiff's vehicle did not have its lights on, was insufficient to rebut the presumption of negligence created by the rear-end collision, and raise a triable issue of fact to defeat summary judgment (see Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2004][defendant's testimony that she did not recall seeing brake lights or tail lights illuminated on the plaintiff's vehicle before the collision did not adequately rebut the inference of negligence]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003][the defendant failed to provide evidence sufficient to raise a triable question of fact as to whether the alleged malfunctioning brake lights on the plaintiff's vehicle proximately caused the accident]; Waters v City of New York, 278 AD2d 408 [2d Dept. 2000][defendant's statement that he did not observe any illuminated brake lights indicating that the truck was stopped is insufficient to establish a genuine issue of material fact precluding summary judgment]; also see Santarpia v. First Fid. Leasing Group, Inc., 275 AD2d 315 [2d Dept. 2000]; Lopez v. Minot, 258 AD2d 564 [2d Dept. 1999]).

Moreover, the defendant's affidavit appears tailored to overcome his failure to mention, at his examination before trial, anything about the plaintiff's lights not being on and tailored

to overcome the written admission of fault which he executed on the date of the accident (see e.g. Israel v Fairharbor Owners, Inc., 20 AD3dd 392 [2d Dept. 2005]; Phillips v Bronx Lebanon Hosp., 268 AD2d 318 [1st Dept. 2000]).

Thus, as the evidence in the record demonstrates that there are no triable issues of fact as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is

ORDERED, that the plaintiff's motion is granted, and the plaintiff JULIO COLON shall have summary judgment on the issue of liability as against the defendant JAMES LIM and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that a copy of this order with notice of entry be served on the Clerk of the Trial Term Office and that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for an assessment of damages and it is further,

ORDERED, that on consent of the defendants, the plaintiff's motion to amend the caption to add SHARRON LIM as a party defendant is granted. The amended summons and amended verified complaint shall be deemed served upon service of a copy of this order with notice of entry in conformance with the rules of service.

ORDERED, that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

Dated: March 7, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.