

Vitaliotis v Luongo

2011 NY Slip Op 31169(U)

May 2, 2011

Supreme Court, Queens County

Docket Number: 26272/2008

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

- - - - - x

IRINI VITALIOTIS and ALEXANDER
VITALIOTIS,

Plaintiffs,

- against -

MAYRA M. LUONGO,

Defendant.

- - - - - x

The following papers numbered 1 to 7 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:

	Papers
Notice of Motion-Affidavits-Exhibits.....	1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....	4 - 5
Reply affirmation.....	6 - 7

In this negligence action, the plaintiff, Irimi Vitaliotis, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on November 4, 2005, between the vehicle owned and operated by defendant Mayra M. Luongo and the vehicle owned and operated by plaintiff Alexander Vitaliotis. The accident took place on the Clearview Expressway near its intersection with Northern Boulevard, Queens County, New York. At the time of the accident plaintiff Irimi

Vitaliotis, the wife of Alexander, was a front seat passenger in the Vitaliotis vehicle. Plaintiff Alexander Vitaliotis has brought a cause of action for loss of services.

The plaintiffs commenced this action by the filing of a summons and complaint on October 27, 2008. Issue was joined by service of defendant's answer dated December 19, 2008. Plaintiffs now move for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for assessment of damages.

Plaintiffs contend that at the time of the accident their vehicle was slowing down due to traffic on the Clearview Expressway when it was struck in the rear by the vehicle being operated by defendant Luongo. In support of the motion, the plaintiffs submit an affirmation from counsel, Harry Organek, Esq., a copy of the police accident report, and the deposition testimony of plaintiff Alexander Vitaliotis and the deposition testimony of defendant Mayra M. Luongo.

Plaintiff's examination before trial was taken on December 6, 2010. At that time Alexander Vitaliotis, age 70, testified that on Friday November 5, 2005, at approximately 6:00 p.m., he was traveling southbound in the right lane of the Clearview Expressway, proceeding at about 25 miles per hour. He stated that traffic about 100 feet in front of him was slowing down and he applied his brakes to slow down as well. While he was slowing

down for traffic his vehicle was struck in the rear by the vehicle being operated by the defendant. His wife was seated in the front passenger seat and his daughter was seated in the rear of the vehicle.

The defendant, Mayra Luongo, age 44, testified at an examination before trial on December 6, 2010. She stated that on the date in question she entered the right lane of the Clearview Expressway from the entrance ramp on Northern Boulevard. The defendant testified that at the time she entered the Expressway, she stated that traffic was "a little heavy," moving at less than the speed limit. Ms. Luongo stated she was traveling less than 30 miles per hour. As she passed the entrance ramp and was merging into the right lane, she was going slow because she was following the plaintiffs' vehicle. "He was braking and I was...they were in front of me and I had to brake also and I thought I wasn't going to hit them but I did and I'm so sorry." She stated that she observed the Vitaliotis vehicle as she was on the ramp. She stated that he passed and then she passed behind him. "I always saw him." She stated that when she got on the Clearview behind him he was braking and she didn't know he was going to do that. She stated that before the accident happened she saw brake lights on the rear of the Vitaliotis vehicle for at least five seconds before the impact. She said at the time of impact Vitaliotis was moving but he was braking, "causing all of us to stop and there

wasn't so much traffic for him to brake that much." She did not know if the car in front of him was braking prior to the accident. When the police officer came to the scene she explained that she hit the other vehicle because he was braking too much. She stated that she felt Vitaliotis was going too slow and braking too much with respect to the traffic conditions.

Counsel contends that the plaintiffs are entitled to partial summary judgement as to liability because the deposition testimony shows that the accident was caused solely by the negligence of the defendant who drove her vehicle into the rear of the plaintiffs' vehicle and that the plaintiff was free from culpable conduct.

In opposition to the motion, defendant's counsel Jeffrey M. Judd, Esq., submits an affidavit from the defendant dated March 18, 2011. In her affidavit the defendant states:

"At the time of the accident, I had been following plaintiffs for some time, and observed the plaintiffs' vehicle being driven erratically, to wit, frequent unexplained braking, punctuated by intermittent acceleration. At the times when the roadway configuration allowed me to see what was ahead of the plaintiffs' vehicle, I observed no traffic or condition which would explain such erratic behavior by the plaintiff. I was following the plaintiffs at a slow, safe speed, approximately 30 mph, at an appropriate distance, when the plaintiffs' vehicle came to a sudden, unexpected stop for no reason that I can ascertain, causing the collision."

Counsel contends that the application for partial summary judgment should be denied as the plaintiffs have failed to establish prima facie entitlement to judgment as a matter of law.

Counsel contends that the testimony and affidavit of the defendant raises questions of material fact regarding plaintiff's negligent driving, to wit: defendant's description of Vitaliotis's driving as erratic with braking for no apparent reason.

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" (Maccauley 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 Vargas v Luxury Family Corp., 77 AD3d 820 [2d Dept. 2010]; Celentano v Moriarty, 75 AD3d 572 [2d Dept. 2010]; Klopchin v Masri, 45 AD3d 737 [2d

Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]; Reed v. New York City Transit Authority, 299 AD2 330[2d Dept. 2002]).

Here, plaintiff stated in his deposition testimony that he was braking his vehicle and was slowing down for traffic on the Clearview Expressway when his vehicle was struck from behind by defendant's motor vehicle. Thus, the plaintiffs satisfied their prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was slowly stopping for traffic when it was struck in the rear by the vehicle operated by defendant Mayra Luongo (see Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of their 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 as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v. Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). At her deposition, the defendant testified that she saw the plaintiff's vehicle with its brake lights on for over

five seconds. She also stated that traffic was "a little heavy." Her assertion in her affidavit that the plaintiffs' vehicle was driving erratically or came to a sudden stop in front of her vehicle is belied by her deposition testimony that she saw him braking and slowing down for over five seconds prior to the impact (see Farrington v New York City Tr. Auth., 33 AD3d 332 [1st Dept. 2006]); Further although defendant maintains that the accident was the result of plaintiff braking or stopping suddenly, this does not explain her failure to maintain a safe distance from the vehicle in front of her [see Dicturel v Dukureh, 71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Zdenek v Safety Consultants, Inc., 63 AD3d 918 [2d Dept. 2009]). Moreover, the defendant's affidavit appears tailored to overcome her failure to testify at her deposition that the plaintiff was driving erratically and stopped short for no reason and is therefore insufficient to defeat the plaintiffs' motion for partial summary judgment (see e.g. Abbas v Salavel, 73 AD3d 1100 [2d Dept. 2010]; Israel v Fairharbor Owners, Inc., 20 AD3d 392 [2d Dept. 2005]; Phillips v Bronx Lebanon Hosp., 268 AD2d 318 [1st Dept. 2000]).

Accordingly, as the evidence in the record demonstrates that there are no triable issues of fact as to whether plaintiff Alexander Vitaliotis may have borne comparative fault for the

causation of the accident, and based on the foregoing, it is

ORDERED, that the plaintiffs' motion is granted, and the plaintiffs shall have summary judgment on the issue of liability against the defendant Mayra M. Luongo, 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.

Dated: May 2, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.