

Gause v Martinez

2011 NY Slip Op 31491(U)

May 10, 2011

Sup Ct, Queens County

Docket Number: 19291/2009

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

- - - - - x

LAUREL E. GAUSE and DARRYL L. GAUSE, Index No.: 19291/2009

Plaintiffs, Motion Date: 4/28/11

- against - Motion No.: 17

CARLOS MARTINEZ, Motion Seq.: 1

Defendant.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by plaintiff on the counterclaim, Laurel E. Gause and cross-motion by the plaintiff Laurel E. Gause, for an order pursuant to CPLR 3212 granting partial summary judgment to the plaintiff on the issue of liability and dismissing the defendant's counterclaim:

Papers
Numbered

Plaintiff on the Counterclaim's Notice of Motion-	
Affirmation-Affidavits-Service-Exhibits.....	1 - 5
Plaintiff's cross-motion-Affidavits-Exhibits.....	6 - 9
Defendant's Affirmation in Opposition-Affirmation.....	10 - 12
Plaintiff's Reply Affirmation-Exhibits.....	13 - 15
Plaintiff on the Counterclaim's Reply Affirmation.....	16 - 17

This is a personal injury action in which plaintiffs, LAUREL E. GAUSE and DARRYL L. GAUSE seek to recover damages for injuries sustained as a result of a motor vehicle accident that occurred on April 10, 2008 at approximately 7:10 p.m. at the

intersection of Pennsylvania Avenue and Twin Pines Drive, Kings County, New York.

At the time of the accident, the vehicle operated by plaintiff, Laurel E. Gause, was proceeding southbound on Pennsylvania Avenue. The defendant's vehicle was proceeding northbound on Pennsylvania when the driver, Carlos Martinez, attempted to make a left turn onto Twin Pines Drive. As the defendant's vehicle was turning left and was proceeding onto Twin Pines Drive it collided with the plaintiffs' vehicle which was proceeding straight in a southbound direction on Pennsylvania Avenue. There was a traffic light at the intersection. Plaintiff contends that the accident occurred as she was proceeding, with the green light in her favor and with the right of way on Pennsylvania Avenue, when the defendant's vehicle failed to yield the right of way and made a left turn in front of her vehicle.

Plaintiffs commenced an action against the defendant by filing a summons and complaint on July 21, 2009. Issue was joined by service of defendant's verified answer with a counterclaim dated August 25, 2009. On September 21, 2010, counsel for plaintiff on the counterclaim filed a verified answer to the counterclaim.

Andrea E. Ferrucci, Esq., counsel for the plaintiff on the counterclaim now moves for an order pursuant to CPLR 3212(b), granting summary judgment striking the defendant's counterclaim.

Plaintiffs' counsel, Adam B. Dressler, Esq., cross-moves for, partial summary judgment on the issue of liability. Plaintiffs' counsel states that he adopts the arguments and exhibits of Ms. Ferrucci, counsel for plaintiff on the counterclaim.

In support of the motion for summary judgment, counsel submits her own affidavit, a copy of the pleadings, the transcripts of the examinations before trial of the plaintiff Laurel E. Gause, and the defendant Carlos Martinez, and a copy of the police accident report (MV-104).

The plaintiff, Laurel Gause, age 50, appeared for an examination before trial on June 28, 2010. She testified that on the date in question she was going to a dialysis center to pick up her mother. She stated that she was proceeding southbound on Pennsylvania Avenue in the left lane at a rate of 10 miles per hour. As she approached the intersection of Twin Pines Drive the traffic light was red in her direction and she came to a stop. She observed the defendant's vehicle which was facing northbound on Pennsylvania Avenue in the left turn lane waiting to turn left onto Twin Pines Drive. She observed defendant's vehicle stopped for about one minute. When the traffic light turned green she waited a couple of seconds to make sure no pedestrians were crossing and then she proceeded into the intersection. As the front of her car entered the intersection the defendant's vehicle made a left turn and struck her vehicle.

The defendant Carlos Martinez, was deposed on June 28, 2010. He testified that on the date of the accident he was traveling northbound on Pennsylvania Avenue. When he approached Twin Pines Drive he moved into the left turn lane so that he could turn left onto Twin Pines Drive. He stated that the light in his direction was turning yellow. He testified that he stopped at the yellow light waiting for the right of way to make the left turn. As he began to make the left turn he observed the plaintiff's vehicle approaching "full speed ahead." He stated that plaintiff did not slow down as she approached the light. He testified that he did not see her vehicle until he turned to make the left turn. When he first saw her vehicle from a half a block away "she was coming down the road." He stated that he tried to speed up to get out of her way but she hit him anyway. He stated that he did not brake his vehicle prior to the collision.

The police report contains statements from both drivers. Plaintiff told the officer that defendant's vehicle turned in front of her causing her vehicle to strike the defendant's vehicle. The defendant told the officer that after making a left turn, the plaintiff's vehicle struck his vehicle.

Plaintiff's counsel contends that the actions of Mr. Martinez in attempting to make a left turn without yielding to the plaintiff's vehicle, which had the right of way was the sole proximate cause of the accident. Counsel contends that the

actions of the defendant violated VTL § 1141 which requires a driver of a vehicle intending to turn left within an intersection to yield the right of way to any vehicle approaching from the opposite direction. Counsel contends that the actions of the defendant in turning his vehicle directly into the path of the plaintiff's oncoming vehicle constitutes negligence as a matter of law. Moreover, counsel contends that plaintiff had the right to assume that the defendant's vehicle would not disobey the traffic rules.

Defendant's counsel, Loretta A. Restivo, submits an affirmation in opposition to the motion and cross-motion. She contends that summary judgment is not warranted because there are conflicting versions of how the accident occurred and questions regarding the comparative negligence of the plaintiff.

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]).

Upon review of the motion by the plaintiff on the counterclaim, the plaintiff's cross-motion, the defendant's opposition and the plaintiff's reply thereto, this court finds as

follows:

It is not disputed that the defendant made a left turn across Pennsylvania Avenue onto Twin Pines Road. Vehicle and Traffic Law § 1141 requires that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." A driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792[2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519[2d Dept. 2006]). Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592[2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

It is plaintiff's contention that the defendant Carlos Martinez, was negligent as a matter of law in attempting to make a left turn onto Twin Pines Drive in violation of VTL §1141 and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law through the submission the deposition testimony of each party. Since the defendant made a left turn into the path of the plaintiffs' vehicle without yielding the right of way despite seeing the plaintiffs' vehicle from a half a block away prior to initiating the left turn, his testimony established that he failed to yield to the plaintiff's vehicle as she proceeded lawfully through the intersection and he was therefore negligent as a matter of law (see Heath v Liberato, 2011 NY Slip Op 1803 [2d Dept. 2011]; Kucar v Town of Huntington 81 AD3d 784 [2d Dept. 2011]; Loch v Garber, 69 AD3d 814 [2d Dept. 2010]; Gabler v Marly Bldg. Supply Corp., 27 AD3d at 520 [2d Dept. 2006]; Bolta v Lohan, 242 AD2d 356 [2d Dept. 1997]). The plaintiff, who had the right-of-way, was entitled to anticipate that the defendant would obey the traffic law which required him to yield, and therefore his violation of Vehicle and Traffic Law § 1141 was the sole proximate cause of the accident (see Torro v Schiller, 8 AD3d 364 [2d Dept. 2004]). The defendant was negligent in failing to see that which, under the circumstances, he should have seen, and in crossing in front of the plaintiffs' vehicle when it was hazardous to do so (see Salce v Check, 23 AD3d 451 [2d Dept. 2005]).

Further, the plaintiff established, prima facie, her entitlement to judgment as a matter of law as the evidence

submitted in support of her motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of the plaintiff (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition to the plaintiffs' prima facie showing, the defendant failed to raise any material questions of fact as to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420, 421 [2d Dept. 2005]). Although a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection (see Demant v Rochevet, 43 AD3d 981 [2d Dept. 2007]), the defendant's testimony that the plaintiff was operating her vehicle "full speed ahead" or that she failed to keep a proper lookout or failed to exercise due care to avoid colliding with the defendant's vehicle after she observed the defendant's vehicle crossing the highway in front of her was speculative at best and not supported by competent evidence. Defendant's conclusory testimony was insufficient to raise a question of fact as to whether the plaintiff's speed may have been a factor in the happening of the accident (see Kucar v Town of Huntington, supra; Loch v Garber, supra.; Berner v Koegel, 31 AD3d 591 [2d Dept. 2006]; Maloney v. Niewender, 27 AD3d 426 [2d Dept. 2006]).

Although there were differences in each driver's version of how the accident occurred, none of the differences in the accounts was sufficient to demonstrate the existence of a triable issue of fact as to whether the defendant was comparatively negligent (see Kucar v Town of Huntington, 81 AD3d 784 [2d Dept. 2011]).

Further, it has been recognized that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (see Yelder v Walters, 60 AD3d 734 [2d Dept. 2010]; Jaramillo v Torres, 60 AD3d at 735 [2d Dept. 2009]; DeLuca v Cerda, 60 AD3d 721 [2d Dept. 2009]).

Thus, the defendant failed to raise a triable issue of fact, proffering only speculative assertions that the plaintiff may have been comparatively negligent which are unsupported by the testimony of the parties (see Pitt v. Alpert, 51 AD3d 650 [2d Dept. 2008]; Gorelik v Laidlaw Tr. Inc., 50 AD3d 7389 [2d Dept. 2007]; Ishak v Guzman, 12 AD3d 409 [2d Dept. 2004]).

Accordingly, based upon the foregoing it is hereby

ORDERED that the plaintiff's cross-motion is granted, and the plaintiff Laurel E. Gause shall have summary judgment on the issue of liability as against the defendant Carlos Martinez and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED that the motion for plaintiff on the counterclaim for summary judgment is granted and the counterclaim of Carlos Martinez on the issue of liability is hereby stricken; 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 : Long Island City, N.Y.
May 10, 2011

ROBERT J. MCDONALD
J.S.C.