

Carlos v Lall

2011 NY Slip Op 31674(U)

June 9, 2011

Supreme Court, Queens County

Docket Number: 14983/2009

Judge: Robert J. McDonald

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

RICHARD CARLOS,

Index No.: 14983/2009

Plaintiff,

Motion Date: 04/07/11

- against -

Motion No.: 6

MAHINDRA LALL AND CHARLOTTE ANN
LINDSEY,

Motion Seq.: 2

Defendants.

----- x

The following papers numbered 1 to 17 were read on this motion by defendant MAHINDRA LALL, for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant LALL and dismissing the plaintiff's complaint and any cross-claims filed against him:

Papers Numbered

- Defendant Lall's Notice of Motion-Affidavits-Exhibits...1 - 5
- Plaintiff's Affirmation in Opposition6 - 8
- Defendant Lindsey's Affirmation in Opposition.....9 - 11
- Defendant Lall's Affirmation in Reply to Lindsay12 - 14
- Defendant Lall's Reply to Plaintiff's Motion15 - 17

This is a personal injury action in which plaintiff, Richard Carlos, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on May 1, 2009, at approximately 9:49 p.m. on the southbound New York State Thruway (Interstate Route 87) near Exit 13 in Clarkstown, Rockland County, New York.

At the time of the accident, the vehicle owned and operated by defendant Charlotte Ann

Lindsey was proceeding southbound in the far left lane of the New York State Thruway. The plaintiff, Mr. Carlos, was a front seat passenger in the Lindsey vehicle. The vehicle owned and operated by defendant Lall was also proceeding southbound in the center lane. Defendant Lall contends that the accident occurred when Lindsey attempted to move her vehicle into the center lane in front of Lall's vehicle causing an impact with the Lall vehicle. The plaintiff contends that as a result of the accident he sustained physical injuries.

Plaintiff commenced an action against the drivers of both vehicles by filing a summons and complaint on June 8, 2009. Issue was joined by service of defendant Lall's verified answer with cross-claim dated August 6, 2009. The depositions of the plaintiff and defendant Lall have been completed. However, the deposition of Lindsey has not gone forward. Pursuant to stipulation dated October 20, 2010, signed by Justice Ritholtz, it was ordered that Lindsey was to be produced for a deposition no later than November 30, 2010 or she would be precluded from testifying at the time of trial.

Daniel P. McCabe, Esq., counsel for defendant Lall, now moves for an order pursuant to CPLR 3212(b) granting summary judgment in favor of Lall and dismissing the plaintiff's complaint and all cross-claims on the ground that Lall is not liable for damages as the evidence shows that Lall's actions at the time of the accident were neither negligent nor the proximate cause of the accident. In support of the motion for summary judgment, counsel submits his own affidavit, a copy of the pleadings, copies of the preliminary conference order and compliance conference order, and a copy of Lall's deposition testimony as well as the deposition testimony of the plaintiff, Richard Carlos.

Mr. Carlos, age 31, testified at his deposition, taken on March 30, 2010, that on the date of

the accident he was a front seat passenger in the vehicle being driven by his friend Charlotte Lindsey. They had been in Pennsylvania and were traveling home on the New York State Thruway proceeding southbound towards New York City. When asked the details of the accident Carlos stated that he did not remember the details because he was asleep at the time of the accident. He testified that he was awakened by the heavy impact on the passenger side of his vehicle but that he was immediately rendered unconscious. He remembers being awakened in the vehicle by Ms. Lindsey after the impact and he noticed that his face and left leg were bleeding. He left the scene in an ambulance and was taken to the Nyack Hospital emergency room where he was admitted overnight and released the next day. He received 30 stitches for a laceration near his eyebrow. He testified that as a result of the laceration he was left with a disfiguring scar on his face.

The plaintiff testified that he never saw the Lall vehicle at any time prior to the accident. When asked if Lindsey ever explained to him how the accident occurred, he stated that she told him she was going to exit the Thruway and the other vehicle, which was speeding, struck their vehicle.

The deposition of defendant Mahindra Lall, age 47, a resident of Middletown, New York was taken on May 24, 2010. He testified that at the time of the accident he was alone in his vehicle and was on his way to his job as a manager with the New York City Transit Authority in Manhattan. He stated that he was traveling southbound in the center lane of the New York State Thruway traveling at approximately 55 miles per hour. There were three lanes of traffic in his direction near Exit 13. When asked to describe how the accident occurred he stated:

“A car came in front of me. There was no prior indication to that car; no lights; nothing visible, no taillights. So it was like a sudden awareness that this car was in my lane and that was when the accident occurred. There was no time to avoid the impact. I knew I was going to hit the car” (see Lall transcript, p. 23).

Lall also testified that he did not see the vehicle in the left lane prior to the accident and he first noticed the vehicle which came from the left lane was in his lane a split second prior to the vehicles coming into contact. He stated that it was a hard impact to the front of his vehicle by the right side of the Lindsey vehicle. As a result of the impact his airbags were deployed. Lall stated that he did not know if Lindsey's car had its headlights on, but he believed that its taillights were not on. When a state trooper arrived at the scene, Lall told the trooper that the other driver came into his lane, that he believed the other driver was unfamiliar with the area and he also believed that the other driver was attempting to move to the right lane to exit the Thruway. Lall testified that Lindsey told the trooper that she was wrong and the accident was her fault. When he examined his vehicle he observed that there was damage to the hood and front of the vehicle.

The police report submitted by plaintiff's counsel is based upon the statements from both drivers and states:

“Operator of V-1(Lall) traveling southbound on the New York State Thruway (I-87) in the center lane. Operator of V-2 (Lindsey) traveling southbound on (I-87) in the far left lane. Operator of V-2 changes lanes into the center lane in front of V-1. V-1 strikes same along passenger side rear. V-1 continues off the roadway and comes to rest along the right shoulder. V-2 goes into a spin and comes to rest in earth embankment along the right shoulder.”

The police sketch annexed to the report depicts the Lindsey vehicle changing from the left lane into the center lane immediately in front of the Lall vehicle. The police report also describes the accident as a sideswipe with the vehicles traveling in the same direction.

Lall's counsel, Daniel P. McCabe, Esq., argues in support of the motion for summary judgment, that the sworn testimony of Mr. Lall indicates that he was traveling lawfully within the center lane of the Thruway at a safe rate of speed and that he was not negligent as a matter of law. He contends that defendant Lindsey's negligent actions in suddenly changing lanes without warning

when it was not safe to do so was the sole proximate cause of the accident.

Counsel Michael E. Janus, Esq., on behalf of the plaintiff, Richard Carlos, submits his affirmation in opposition to the motion as well as an affidavit from the plaintiff dated February 2, 2011. In his affidavit, the plaintiff states that although he was sleeping at the time of the impact he did not feel any unusual movement such as swerving before the impact. "Had there been, I would most likely have been startled and woken up." He also states that the headlights were on in the Lindsey vehicle. Counsel contends that summary judgment is not warranted because Lall has failed to meet his prima facie burden of demonstrating that he was not negligent as a matter of law and there are triable issues of fact regarding his freedom from negligence.

In addition, plaintiff claims that the plaintiff is being prejudiced in that Lindsey failed to appear for her deposition. Counsel claims that Lall has shown that he bears liability for the accident as he struck the Lindsey vehicle in the rear and that absent a non-negligent explanation he is liable as a matter of law. He states that the points of impact of the vehicle shows that this was a hit in the rear accident and, as such, Lall is liable for negligence as a matter of law. He also contends that Lall's testimony that he failed to see Lindsey's vehicle in the left lane immediately prior to the accident indicates that failed to exercise reasonable care in that he failed to see what should be seen and failed to take reasonable care to avoid the accident. Counsel also claims that although Carlos testified he was asleep when the impact occurred, his testimony that Lindsey's headlights were on contradicted Lall's testimony that Lindsey's taillights were not operating. Counsel also submits that there is a question of Lall's credibility as he testified that the roads were dry, whereas Carlos testified it was raining at the time of the accident.

Michelle F. Vlosky, Esq., submits an affirmation in opposition on behalf of Lindsey. Counsel

states that notwithstanding the fact that Lindsey has not been deposed, Lall's deposition testimony indicates that there is a material question of fact as to whether Lall was comparatively negligent for failing to see what was there to be seen by the proper use of his senses and failing to take any action to avoid the accident.

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 defendant's motion, plaintiff and defendant Lindsey's affirmations in opposition and the plaintiff's reply thereto, this court finds as follows:

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]).

It is the movant's contention that Lindsey was negligent as a matter of law in attempting to change lanes when it was not safe to do so, in failing to properly signal and in failing to yield the right of way to Mr. Lall's vehicle and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, Lall established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony indicating that he was lawfully proceeding southbound on the New York State Thruway traveling at a speed of 55 miles per hour when the Lindsey vehicle

abruptly entered his lane from the left lane without yielding the right of way causing an impact with the side rear portion of Lindsey's vehicle. As the deposition testimony indicates that Lindsey changed lanes without first ascertaining that the lane change could be made with safety, Lindsey was in violation of Vehicle and Traffic Law § 1128(a) and as such was negligent as a matter of law (see Pollack v Margolin, 2011 NY Slip Op 4649 [2d Dept. 2011]; Rivera v Corbett, 69 AD3d 916 [2d Dept. 2010]; Summers v Teddy Cab Corp., 50 AD3d 671 [2d Dept. 2008]; Shuman v Maller, 45 AD3d 566 [2d Dept. 2007]; Moreback v. Mesquita, 17 AD3d 420 [2d Dept. 2005]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (see Vainer v DiSalvo, 79 AD3d 1023 [2d Dept. 2010]).

The Lall vehicle, which had the right-of-way, was entitled to anticipate that the other vehicle would obey the traffic laws and therefore, Lindsey's violation of the Vehicle and Traffic Law was prima facie evidence that her actions were the sole proximate cause of the accident (see Martin v Ali, 78 AD3d 1135 [2d Dept. 2010]; Bongiovi v. Hoffman, 18 AD3d 686 [2d Dept. 2005]; Torro v Schiller, 8 AD3d 364 [2d Dept. 2004]).

Thus, the defendant established, prima facie, his entitlement to judgment as a matter of law. Further, the deposition testimony submitted in support of the motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of Lall (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition to defendant Lall's prima facie showing, the plaintiff and co-defendant have failed to raise any material questions of fact as to whether Lall was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Pitt v. Alpert, 51 AD3d 650 [2d Dept. 2008]; Gorelik v Laidlaw Tr. Inc., 50 AD3d

7389 [2d Dept. 2007]; 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 and may be 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]) here, neither the deposition of the plaintiff nor the deposition of Lall was sufficient to raise a question of fact as to whether Lall's actions may have been a factor in the happening of the accident.

Plaintiff's counsel also contends that Lall was also negligent as a matter of law as his vehicle hit the Lindsey vehicle in the rear and, as such, absent a non-negligent explanation he is also liable as a matter of law. However, this accident, as described in the testimony and the police report, was not a hit in the rear accident with a stopped or slowing vehicle. Rather, it was a sideswipe accident caused by a driver making an unsafe lane change and cutting off the driver with the right of way. Plaintiff testified the impact was to the passenger side of the vehicle and Lall also testified that the impact was to the passenger rear side of Lindsey's vehicle. The police report classifies the accident as a sideswipe and states that Lall's vehicle struck Lindsey's vehicle along the passenger side rear. Thus, the cases cited by counsel with regard to hit in the rear accidents are inapplicable herein.

Further, the contradictory testimony from the plaintiff who was admittedly sleeping at the time of the accident and subsequently rendered unconscious, regarding the weather conditions and the operability of Ms. Lindsey's taillights, was not sufficient to create a question of fact as to the whether Lall contributed to the happening of the accident.

In addition, although Lall stated that he did not see the Lindsey vehicle immediately prior to

the accident, 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, 64 AD3d 762 [2d Dept. 2009]; Jaramillo v Torres, 60 AD3d 734 [2d Dept. 2009]; DeLuca v Cerda, 60 AD3d 721 [2d Dept. 2009]).

Accordingly, based upon the foregoing it is hereby ORDERED that the defendant's motion is granted, and the defendant Mahindra Lall shall have summary judgment dismissing the plaintiff's complaint and all cross-claims as against defendant Mahindra Lall only.

Dated : Long Island City, N.Y.
June 9, 2011

ROBERT J. MCDONALD
J.S.C.
