Hanakis v Decarlo
2012 NY Slip Op 30090(U)
January 9, 2012
Supreme Court, Queens County
Docket Number: 1768/2009
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

MARIA HANAKIS and NIKOLAS HANAKIS,

Plaintiffs,

- against -

ELAINE A. DECARLO, ANDREW DECARLO, KALEEKAL J. BABY, PHILIP SONY MAMMEN, and JIAN CHEN,

Defendants.

Action No. 1
Index No.: 1768/2009
Motion Date: 10/27/11
Motion No.: 18
Motion Seq.: 5

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY as Subrogee of KALEEKAL J. BABY,

Plaintiff,

-against-

ELAINE A. DECARLO,

Defendant.

Action NO. 2
Index No.: 1923/2010

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ELAINE A. DECARLO,

Third-Party Plaintiff,

-against-

MARIA HANAKIS, NIKOLAS HANAKIS and JIAN CHEN,

Third-Party Defendants,

--x

[* 2]

The following papers numbered 1 to 10 were read on this motion by defendants Elaine A. DeCarlo and Andrew DeCarlo for an order pursuant to CPLR 2221 granting reargument of the plaintiffs' prior cross-motion in Action No. 1, for an order pursuant to CPLR 3212(b) which sought partial summary judgment on the issue of liability against defendants Elaine A. DeCarlo and Andrew DeCarlo and upon reargument vacating the prior order of this Court dated July 18, 2011 which granted summary judgment and substituting an order denying plaintiffs' cross-motion for summary judgment on the ground that there is a question of fact as to the plaintiff driver's comparative negligence:

	Papers Numbered
Plaintiff's Notice of Motion - Exhibits..................	1 - 5
Defendant Hanakis' Affirmation in Opposition.............	6 - 8
Affirmation in Reply....................................	9 - 10

This is a negligence action in which the plaintiff, MARIA HANAKIS, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred at approximately 2:30 p.m. on August 23, 2008. The four-car, chain reaction accident took place on the eastbound Staten Island Expressway near its intersection with Hylan Boulevard, Richmond County, New York. The facts of the accident are set forth in this court's prior decision dated July 18, 2011.

Defendant Jian Chen previously moved for an order granting summary judgment and dismissing the plaintiff's complaint against him as he was the lead car or fourth car in the four car chain. Defendants Kaleekal J. Baby and Sony Mammen Philip s/h/a Philip Sony Mammen cross-moved for an order granting summary judgment dismissing the plaintiff's complaint against them as they were the third vehicle in the chain, directly in front of plaintiff's vehicle and the plaintiff cross-moved for an order granting partial summary judgment on the issue of liability against defendants Elaine DeCarlo and Andrew DeCarlo as plaintiff's vehicle, the second car in the chain was struck in the rear by the DeCarlo's vehicle which was the first car in the chain.

By decision dated July 18, 2010 this court granted the motion by defendant Chen for summary judgment dismissing the complaint and all cross-claims against him, granted the cross-motion by defendants Kaleekal J. Baby and Sony Mammen Philip for summary judgment dismissing the complaint and all cross-claims against them and granted the cross-motion by plaintiff, Maria

Hanakis and Nikolas Hanakis, for partial summary judgment on the issue of liability against defendants Elaine A. DeCarlo and Andrew DeCarlo.

Counsel for the DeCarlo defendants now moves for an order granting reargument only of that branch of the prior decision which granted the plaintiffs' cross-motion for partial summary judgment on the issue of liability against the Decarlo defendants. This court previously held that Ms. DeCarlo was negligent as a matter of law and that her negligence was the sole proximate cause of the rear end collision and ensuing chain reaction. This decision was based upon the deposition testimony Ms. Elaine DeCarlo, who testified that she turned around to look in the back seat because she was distracted by her children fighting and when she turned around to face forward she struck the plaintiff's vehicle which had stopped in traffic in front of her.

In the instant motion to reargue, counsel concedes that DeCarlo was negligent but argues, based upon the deposition testimony of defendant Chen, that the plaintiff was also negligent and that there is a question of fact as to the plaintiff's comparative liability. Counsel asserts that Chen testified that the plaintiff's vehicle first struck the third vehicle and he believed that the DeCarlo vehicle did not strike the plaintiff's vehicle until after the plaintiff's vehicle struck the vehicle in front of it. He stated that he did not see the DeCarlo vehicle strike the plaintiff's vehicle and that he believed the DeCarlo vehicle struck plaintiff's vehicle after the plaintiff's car first struck the car in front of it, because he heard a loud boom ten seconds after the first impact. Thus, plaintiff argues, as he did in the previous motion, that Hanakis was comparatively negligent in that it was only after Hanakis rear ended the Philip vehicle that Decarlo rear ended the Hanakis vehicle and that said testimony creates a question of fact as to plaintiff's comparative negligence.

It is established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its determination (see McDonald v Strah, 44 AD3d 720 [2d Dept. 2007]; Everhart v County of Nassau, 65 AD3d 1277 [2d Dept. 2009]). CPLR 2221 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d][2]). A motion for leave to reargue is not

designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced or to present arguments different from those already presented (see Veeraswamy Realty v Yenom Corp. 71 AD3d 875 [2d Dept. 2010]; Woodys Lumber Co., Inc. v Jay Ram Realty Corp., 30 AD3d 590[2d Dept. 2006]; Williams v Board of Educ. of City School Dist. of New York City, 24 AD3d 458 [2d Dept. 2005]; Simorz v Mekryari, 16 AD3d 543, [2d Dept. 2005]).

Upon review and consideration of the motion to reargue and the plaintiff's affirmation in opposition thereto, this court finds that the moving papers fail to establish that the court overlooked, misapprehended either the facts or law or otherwise mistakenly arrived at its determination to grant the plaintiff's prior cross-motion for partial summary judgment on the issue of liability.

This Court finds that under the circumstances of this case, as stated in the prior decision of July 18, 2010, Decarlo's deposition testimony established that Decarlo's inattentiveness in proceeding at a rate of 30 - 40 miles per hour in stop-and-go traffic and not looking in the direction she was driving was the sole proximate cause of the accident (see Giangrasso v Callahan, 87 AD3d 521 [2d dept. 2011]; Blasso v Parente, 79 AD3d 923 [2d Dept. 2010]). Ms. DeCarlo herself testified that the plaintiff's vehicle was stopped in front of her at the time of the impact and that as a result of the impact between her vehicle and the car in front of her, that car was propelled into another vehicle. Further, Ms. Hanakis testified that her vehicle was stopped in traffic at the time of the accident and that after the impact from the rear by the DeCarlo vehicle, her vehicle was propelled into the vehicle in front of her. Ms. Hanakis also testified that the vehicle she was propelled into was in the next lane over. Further, defendant Philip who was in front of the Hanakis vehicle, testified that he saw in his mirror that the plaintiff's vehicle was stopped in back of his and he personally observed that the DeCarlo vehicle was proceeding at a fast rate of speed and hit the Hanakis vehicle which was propelled into his vehicle. Thus, as stated previously, both Hanakis and Philip testified at their depositions that their respective vehicles were at a complete stop when the Hanakis' vehicle was struck from behind by the vehicle driven by DeCarlo causing the chain reaction accident. After reviewing all of the testimony this court finds that the testimony of Chen was speculative and without merit based on the circumstances of the accident and the testimony of the other drivers. Chen stated that his conclusion as to the sequence of the impacts was based only on a loud sound he heard and not on any personal observations or the number of impacts to

his vehicle. Thus, the deposition testimony failed to raise a question of fact with regard to the comparative negligence of the plaintiff.

In addition, the defendant's argument that the cross-motion was procedurally defective pursuant to CPLR 2215 and should not have been decided by the Court as a cross-motion can only be made against a moving defendant is without merit. Here, the defendant failed to argue the procedural error in opposition to the motion and moreover was not prejudiced as defendant was permitted to submit opposition papers and had a sufficient opportunity to be heard on the merits (see Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011][although a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party, a technical defect of this nature may be disregarded where there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought]; Sheehan v Marshall, 9 AD3d 403 [2d Dept. 2004]).

Accordingly, for all of the above stated reasons it is hereby,

ORDERED that the defendant's motion for an order pursuant to CPLR 2221 granting leave to reargue the plaintiff's prior cross motion for summary judgment on the ground that the court overlooked relevant facts and misapplied controlling principals of law is granted and upon reargument the decision of this court dated July 18, 2011 is adhered to in its entirety and it is further,

ORDERED, that the stay contained in the order to show cause dated August 24, 2011 is vacated.

Dated: January 9, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.