

Alphonso v Dawson

2012 NY Slip Op 30098(U)

January 3, 2012

Supreme Court, Queens County

Docket Number: 30499/2010

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

CHRISTIBELL ALPHONSO and RICHARD
ALPHONSO,

Index No.: 30499/2010

Motion Date: 12/12/11

Plaintiffs,

Motion No.: 1

- against -

Motion Seq.: 1

CAROLYN M. DAWSON and MARY CLAIRE
McMANUS,

Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by plaintiffs CHRISTIBELL ALPHONSO and RICHARD ALPHONSO for an order pursuant to CPLR 3212(b) granting plaintiff RICHARD ALPHONSO partial summary judgment on the issue of liability; dismissing all affirmative defenses raised in defendants' answer as to liability; dismissing defendants' counterclaim against the plaintiff CHRISTIBELL ALPHONSO; amending the caption to remove plaintiff CHRISTIBELL ALPHONSO as her claim has been settled with the defendants; and the cross-motion of the plaintiff on the counterclaim, CHRISTIBELL ALPHONSO for an order granting summary judgment dismissing the defendants' counter-claim against plaintiff CHRISTIBELL ALPHONSO:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Cross-Motion of Plaintiff on the Counterclaim.....	6 - 8
Defendants' Affirmation in Opposition-Affidavits.....	9 - 13
Plaintiffs' Reply Affirmation.....	14 - 16

In this negligence action, Plaintiffs, Christibell Alphonso and Richard Alphonso, seek to recover damages for personal injuries that each sustained as a result of a motor vehicle

accident that occurred on February 28, 2010, between the plaintiffs' vehicle operated by plaintiff Christibell Alphonso and the vehicle owned by defendant Carolyn M. Dawson and operated by defendant, Mary Claire Mcmanus. Plaintiff, Richard Alphonso, was a passenger in the Alphonso vehicle. The accident took place on the East Merrick Road exit ramp of the Meadowbrook Parkway in the Village of Freeport, Nassau County, New York when the defendants' vehicle allegedly struck plaintiffs' vehicle in the rear. Plaintiffs Christibell Alphonso and Richard Alphonso were both allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and complaint on December 18, 2010. Issue was joined by service of defendants' verified answer with affirmative defenses dated December 30, 2010. Because plaintiff Richard Alphonso was a passenger, defendants filed a counterclaim against plaintiff Christibell Alphonso for apportionment. On July 22, 2011, plaintiff Christibell Alphonso settled her claim against defendants for \$90,000 although a stipulation of discontinuance has not been filed. Counsel for Christibell Alphonso on the counterclaim filed a reply to the counterclaim on September 15, 2011.

Plaintiffs now move for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability, dismissing the defendants' affirmative defenses on the issue of liability and setting this matter down for a trial on damages only. Plaintiff Christibell Alphonso on the counterclaim cross-moves for summary judgment dismissing the defendants' counterclaim.

In support of the motion, the plaintiff submits an affidavit from counsel, Ira B. Gordon, Esq; a copy of the pleadings; an affidavit of merit from the plaintiff; and a copy of the police accident report (MV-104).

In her affidavit, dated July 22, 2011, plaintiff Christibell Alphonso states that on February 28, 2010 at approximately 2:30 P.M. she was the owner and driver of a motor vehicle that was at a complete stop on the exit ramp leading from the Meadowbrook Parkway onto East Merrick Road, in the Village of Freeport, County of Nassau. She states that, "while stopped, I was struck in the rear while waiting for the traffic ahead of me on East Merrick Road to move." She states that the exit ramp was a one lane roadway with no shoulder on either side of the road. She states that in the direction she was traveling on the exit ramp there was a merge to the left onto East Merrick Road, eastbound. Plaintiff states that while on the exit ramp in the only moving

lane her left turn signal indicator was in use because it was her intention to merge to the left onto East Merrick Road. Plaintiff brought her vehicle to a gradual and then a complete stop behind the stopped vehicle in front of her. She states that she was at a complete stop for approximately 3 - 4 seconds with her foot on the brake when her vehicle was struck in the rear by the vehicle being operated by defendant Mary Claire McManus. Plaintiff states that plaintiff, Richard Alphonso was a front seat passenger in her vehicle at the time of the accident and did not contribute in any way to the happening of the accident. Mr. Alphonso allegedly injured his neck, left shoulder, right shoulder and lower back as a result of the impact.

The police report indicates that the defendant driver, Ms. McManus, told the police officer at the scene that she was attempting to merge into traffic when she struck the plaintiffs' vehicle which had stopped in front of her. The police report also indicates that the defendant driver was issued a traffic citation for "following too closely" and for "driver inattention."

The plaintiff contends that the defendant driver was negligent in the operation of her vehicle in striking plaintiffs' vehicle in the rear. Plaintiffs' counsel contends that the accident was caused solely by the negligence of the defendant driver in that her vehicle was traveling too closely in violation of VTL § 1129 and that the defendant driver failed to bring her vehicle to a stop prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that the plaintiffs are entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct. In addition plaintiff claims that plaintiff Richard Alphonso is entitled to summary judgment as he was a passenger who was free from liability. Plaintiff on the counterclaim cross-moves for summary judgment dismissing the defendants' counterclaim against the plaintiff Christibell Alphonso on the ground that there is no material issue of fact regarding any negligence or liability on the part of the plaintiff on the counterclaim.

In opposition to the motion, defendants' counsel, William L. Bonifati, Esq., states that the plaintiffs' motion for partial summary judgment is premature as depositions of the parties have not yet been conducted. Counsel contends that the defendant has not yet had an opportunity to depose the plaintiff about the facts and circumstances of the accident. Counsel contends that the affidavit of the plaintiff raises a question of fact concerning the speed of the plaintiffs' vehicle prior to stopping and whether Christibell Alphonso stopped suddenly. Counsel has

not, however, submitted an affidavit from the defendant nor has he proffered any allegations of fact which would contradict the plaintiff's version of 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]).

"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" (Macaulay v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision 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 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiff stated in her affidavit that her vehicle was completely stopped for 3 - 5 seconds when it was suddenly struck from behind by defendants' 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 (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendants 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, who did not submit an affidavit in opposition to the motion, failed to provide 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]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp., 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005] [the defendants failed to raise a triable issue of fact by

only interposing an affirmation of their attorney who lacked knowledge of the facts]). The defendant's argument that the plaintiffs' vehicle may have stopped short is not supported by the record and, moreover, is not sufficient to provide a non-negligent explanation for the rear-end collision (see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011][the mere assertion that the respondents' (vehicle) came to a sudden stop while traveling in heavy traffic was insufficient to raise a triable issue of fact]]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Ramirez v Konstanzer, 61 AD3d 837 [2d Dept. 2009]). In addition, plaintiff Richard Alphonso as an innocent passenger is entitled to summary judgment as against defendant driver (see Garcia v Tri County Ambulette Serv., 282 AD2d 206 [2d Dept. 2001]).

The defendants' contention that the plaintiffs' motion for summary judgment is premature is without merit. Defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]). Further, the lack of disclosure does not excuse the failure of the party with personal knowledge to submit an affidavit in opposition to the motion (see Rainford v Han, 18 AD3d 638 [2d Dept. 2005] citing Niyazov v Bradford, 13 AD3d 501 [2d Dept. 2004]).

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

ORDERED, that the plaintiffs' motion is granted, and the plaintiffs, CHRISTIBELL ALPHONSO and RICHARD ALPHONSO shall have partial summary judgment on the issue of liability against the defendants, CAROLYN M. DAWSON and MARY CLAIRE McMANUS, and it is further

ORDERED, that the affirmative defenses raised in the defendants' answer regarding any issue as to liability are stricken and it is further

ORDERED, that the cross-motion by plaintiff on the counterclaim for an order granting summary judgment dismissing the defendants' counterclaim against plaintiff CHRISTIBELL ALPHONSO is

granted; and, it is further

ORDERED, that the Clerk of Court is authorized to enter judgment accordingly; and, it is further

ORDERED, that upon completion of discovery on the issue of damages and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages; and, it is further

ORDERED that those branches of the plaintiffs' motion for an order extending the plaintiffs' time to complete discovery on the issue of damages and extending the plaintiffs' time to file a note of issue and amending the caption to remove the name of CHRISTIBELL ALPHONSO is denied.

Dated: January 3, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.