

Astillero v Abramov

2012 NY Slip Op 32646(U)

October 17, 2012

Supreme Court, Queens County

Docket Number: 12460/2011

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

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MARIBEL CAGUIOA ASTILLERO, Index No.: 12460/2011
Plaintiff, Motion Date: 10/11/12
- against - Motion No.: 3
Motion Seq.: 4

DAVID ABRAMOV and ASIA ABRAMOV,
Defendants.

----- x

DAVID ABRAMOV and ASIA ABRAMOV
Third-Party Plaintiffs,
- against-

JEZRIEL ASTILLERO,
Third-Party Defendants.

-----x

The following papers numbered 1 to 12 were read on this motion by plaintiff, MARIBEL CAGUIOA ASTILLERO, for an order pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages:

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10
Reply Affirmation.....	11 - 12

This is a personal injury action in which plaintiff, Maribel Caguioa Astillero, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on June 26, 2009, on the eastbound lanes of the Horace Harding Expressway near its intersection with 97th Place, Queens County,

New York.

At the time of the accident, the plaintiff was a restrained front seat passenger in the vehicle operated by her husband, Jezriel. Plaintiff's vehicle was stopped on the eastbound lanes of the Horace Harding Expressway when it was hit in the rear by the vehicle owned by defendant Asia Abramov and operated by defendant David Abramov.

The plaintiff commenced this action by filing a summons and complaint on March 3, 2010. Issue was joined by service of defendants' verified answer dated June 2, 2010. Defendants commenced a third-party action against Jezriel Astillero, plaintiff's husband and the driver of the vehicle in which plaintiff was a passenger, by service of a third-party summons and verified complaint on January 23, 2012. Jezriel Astillero served a verified answer to the third-party complaint on April 2, 2012. Plaintiff filed a note of issue and certificate of readiness on July 17, 2012. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages.

In support of the motion, the plaintiff submits an affidavit from counsel, Elana Sharara, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; and a copy of the transcripts of the examinations before trial of the plaintiff, Maribel Caguioa Astillero and defendant, David Abramov, and a copy of the police accident report(MV-104AN).

In her examination before trial, taken on December 2, 2011, Ms. Astillero, age 33, testified that on the date of the accident, Friday June 26, 2009, she was a passenger in a Toyota Highlander owned and operated by her husband Jezriel. She stated that her husband picked her up in Manhattan and they were on their way home. They were proceeding eastbound on the Horace Harding Expressway in Queens County when she observed a fire truck with its lights and sirens on coming from The Long Island Expressway and crossing the Horace Harding Expressway. She stated that because the fire truck crossed in front of them her husband brought his vehicle to a gradual stop. After three to five seconds she felt a heavy impact to the rear of her vehicle. She left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital. She stated that as a result of the accident she sustained injuries to her neck and back.

Defendant, David Abramov, testified an at examination before trial on December 2, 2011. He testified that on the date of the

accident he was operating a 2004 Lexus owned by his wife. He was driving on the Horace Harding Expressway on his way home from work when he stopped at a red traffic signal. After the light changed to green he proceeded in the right lane at a rate of 15 - 20 miles per hour. He states that he observed the plaintiff's vehicle change lanes in front of his car and come to an abrupt stop. He states that he also observed a fire truck exiting the Long Island Expressway and crossing Horace Harding by proceeding the wrong way on an entrance ramp. Defendant states that he believes that because of the fire truck on Horace Harding the plaintiff driver panicked and switched lanes and then stopped short. Defendant testified that he also slowed down when he saw the fire truck but the plaintiff's car changed lanes abruptly in front of him. He states that after he was cut off he tried to stop his vehicle but he collided with the plaintiffs vehicle. When the police arrived on the scene defendant told them that "the fire truck was coming out of the highway where it's supposed to be an entrance. He came out of the highway without lights and siren." Defendant told the officer that the plaintiff then changed lanes in front of him cutting him off and he stopped his car but it collided with the plaintiff's vehicle.

The police report which is based upon the statements of the drivers states:

"At t/p/o driver of Veh 1 (plaintiff) states while yielding to an emergency vehicle driver of Veh 2 (defendant) did suddenly rear end him. Driver of Veh 2 (defendant) states that driver of Veh 1 (plaintiff) suddenly stopped causing him to collide with vehicle. Minor damage to Veh 1."

The plaintiff-passenger contends that Abramov was negligent in the operation of his vehicle in striking plaintiff's vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that his vehicle was traveling too closely in violation of VTL § 1129 and that he failed to brake his vehicle in a timely and proper manner. In addition, plaintiff asserts that the defendant driver conceded that the plaintiff's vehicle was at a complete stop 15 feet in front of his vehicle when he rear-ended her vehicle and he failed to provide a reasonable explanation as to why he rear-ended the plaintiff's vehicle. Counsel contends, therefore, that the plaintiff is 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 opposition to the motion, defendants' counsel, Shawn P. O'Shaughnessy, Esq., states that although defendant struck the plaintiff's vehicle in the rear, the deposition testimony of the defendant raises triable issues of fact. Specifically, counsel contends that the testimony of the defendant-driver that he was driving in the right lane of the Horace Harding Expressway when the plaintiff's SUV cut in front of him from the left lane but then stopped suddenly in front of him raises a non-negligent explanation for the collision. Counsel claims that because the operator of plaintiff's vehicle also operated his vehicle in a negligent manner the issue of comparative negligence is for the jury to determine.

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 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 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 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]).

Here, plaintiff testified that her vehicle was stopped on the Horace Harding Expressway waiting for an emergency vehicle to pass when it was struck from behind by defendants' motor vehicle. Thus, the plaintiff satisfied her prima facie burden of establishing her entitlement to judgment as a matter of law on the issue of liability by demonstrating that her vehicle was stopped when it was struck in the rear by the vehicle operated by defendant (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 defendant to raise a triable issue of fact as to whether the driver of plaintiff's vehicle was also negligent, and if so, whether his negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

Viewing this evidence in the light most favorable to the non-moving party and affording the defendant the benefit of every favorable inference that can be drawn from the evidence, this court finds that the defendant's testimony at his examination before trial stating that the plaintiff's vehicle suddenly changed lanes in front of him, cutting him off and causing him to hit plaintiff's vehicle in the rear was sufficient to raise a triable issue of fact as to the proximate cause of the subject accident and was sufficient to provide a non-negligent explanation for the rear-end collision (see Scheker v Brown, 85 AD3d 1007[2d Dept. 2011] [the defendant raised a triable issue of fact as to whether she had a non-negligent explanation for the collision stating that the plaintiff driver suddenly changed lanes, directly in front of her vehicle, without signaling, and then slowed down]; Ortiz v Hub Truck Rental Corp., 82 AD3d 725 [2d Dept. 2011][evidence that a plaintiff's vehicle made a sudden lane change directly in front of a defendant's vehicle, forcing that defendant to stop suddenly, is sufficient to rebut the inference of negligence]; Reitz v Seagate Trucking, Inc., 71 AD3d 975 [2d Dept. 2010][the defendants rebutted the inference of negligence by adducing evidence that the plaintiffs' vehicle suddenly changed lanes directly in front of their vehicle, forcing the defendant to stop suddenly]; Oquzturk v General Elec. Co., 65 AD3d 1110 [2d Dept. 2009][defendant's explanation, that the accident occurred after the plaintiff's vehicle suddenly, and without signaling, moved from the center lane into the left lane directly in front of defendant's path and then slowed down, raised a triable issue of fact sufficient to defeat the plaintiffs' motion]; also see Connors v Flaherty, 32 AD3d 891 [2d Dept. 2006]; Briceno v Milbry, 16 AD3d 448 [2d Dept. 2005]). Further, whether the defendant had sufficient time or distance to stop his vehicle after allegedly being cut-off is a question of fact for the jury.

Therefore, this Court finds that the plaintiff has failed to demonstrate that the sole proximate cause of the accident was the defendant driver's violation of VTL § 1129 in following too closely to the plaintiff's vehicle. Rather, the evidence in the record demonstrates that there are triable issues of fact as to whether the driver of plaintiff's vehicle may have borne comparative fault for the causation of the accident (see Allen v

Echols, 88 AD3d at 927 [2d Dept. 2011]; Gause v Martinez, 91 AD3d 595 [2d Dept. 2011][the issue of comparative fault is generally a question for the trier of fact]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the plaintiff's motion for partial summary judgment on the issue of liability as against defendants David Abramov and Asia Abramov is denied.

Dated: October 17, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.