

Nolen v Naqui

2013 NY Slip Op 30769(U)

April 10, 2013

Sup Ct, Queens County

Docket Number: 6337/2011

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

- - - - - x

SARA NOLEN, Index No.: 6337/2011
Plaintiff, Motion Date: 02/07/13
- against - Motion No.: 16

Motion Seq.: 1

IMRAN H. NAQUI, FANTASTIC
TRANSPORTATION CORP., and STEVEN HALL,
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendants, IMRAN H. NAQUI and FANTASTIC TRANSPORTATION CORP., for an order pursuant to CPLR 3212 granting said defendants summary judgment and dismissing the plaintiff's complaint against them on the ground that co-defendant STEVEN HALL is solely liable for the subject accident; or in the alternative for an order pursuant to CPLR 3126 striking the answer of co-defendant STEVEN HALL for willful failure to appear for a court ordered deposition:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, SARA NOLEN, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on January 22, 2011, at approximately 3:25 a.m., at the intersection of Merrick Avenue and North Jerusalem Road, Nassau County, New York.

Plaintiff claims that at the time of the accident, she and her friend, Christina Lynch, were passengers in the taxi cab owned by Fantastic Transportation Corp. and operated by Imran H. Naqui, when said vehicle collided with the motor vehicle owned and operated by co-defendant Steven Hall.

Plaintiff commenced this action against Steven Hall and the owner and operator of the taxi cab by service of a summons and complaint on March 15, 2011. Issue was joined by service of an answer by defendants Naqui and Fantastic Transportation on July 5, 2011. By stipulation dated June 27, 2011 the plaintiff discontinued the action against defendant Hall. A note of issue was filed by the plaintiff on June 7, 2012. On July 18, 2012, plaintiff and the Naqui defendants entered into a stipulation resolving a motion to vacate the note of issue. Pursuant to said stipulation defendant Naqui was ordered to appear for a deposition. This matter is now on the calendar of the trial scheduling part for April 11, 2013.

Maryellen David, Esq., counsel for defendant Naqui, now moves for an order pursuant to CPLR 3212(b), granting summary judgment in favor of the Naqui defendants and dismissing plaintiff's complaint against them on the ground that co-defendant Steven Hall is solely liable for causing the accident. In support of the motion, Naqui submits an affirmation from counsel; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the police accident report (MV-104AN); a copy of Naqui's accident report (MV104); and copies of the transcripts of the examinations before trial of the plaintiff, Sara Nolen and non-party Christina Lynch. A copy of the examination before trial of Imran H. Naqui was not submitted with the original motion but rather certain selected pages of his pre-trial testimony were attached to the reply papers only. As only a portion of the deposition was submitted and as it was not submitted with the original motion it will not be considered by the court.

In his police accident report defendant Naqui states, "I was traveling South on Merrick Avenue. Other vehicle was traveling South on Merrick Avenue and made a left turn quickly. I was in the intersection already - he hit me head on."

Christian Lynch was deposed on August 1, 2011 in a separate matter against her insurance company. She testified that she was involved in an accident on January 22, 2011. She was seated in the rear seat of a taxi cab behind the driver. Her friend, Sara Nolen, plaintiff herein, was seated next to her in the rear seat. She stated that her vehicle was proceeding straight on Merrick Avenue when it reached the intersection with North Jerusalem. The light was green in their favor when she felt a hard impact to the passenger side of the taxi cab. She stated that she passed out as a result of the impact and regained consciousness outside of the vehicle. She left the scene in an ambulance which transported her to the emergency room at Nassau County Medical Center. She

received stitches for a cut to her mouth and was also treated for a fractured hand.

Plaintiff, Sara Nolen, age 24, was deposed on May 11, 2012. She stated that on the date of the accident she was a rear seat passenger in the defendants' taxi cab. She was seated behind the passenger seat. Christina was behind the driver. The cab was traveling on Jerusalem Avenue. She stated the other vehicle was traveling in the opposite direction on Jerusalem intending to make a left turn onto Merrick Avenue. The accident occurred in the middle of the intersection when the taxi was struck in the side by the front of the Honda operated by Steven Hall. She stated that the cab was waiting at a red light and the Honda was waiting at the red light waiting to make a left turn. She stated that when the light turned green "both of the cars were inching up and were acting like they didn't know which car was going to go, but we weren't aware that they were going to hit into each other." She stated that the Honda was inching up like he was going to turn left and the cab driver stopped to let the Honda turn but then the cab driver proceeded ahead and the vehicles collided. She testified that both cars proceeded into the intersection at the same time. When asked if the cab driver was totally focused on driving, the plaintiff stated that it appeared that "he was more focused on the music and talking to my friend and I." Ms. Nolen left the scene in an ambulance and was taken to the emergency room at Nassau County Medical center where she was treated for a fractured left arm and fractured right knee.

Counsel for defendant Naqui argues that the Naqui vehicle is entitled to summary judgment based upon the accident report filed by the cab driver in which he stated that he was in the intersection when the Hall vehicle made a quick left turn and hit him head on. Counsel argues that plaintiff Nolan's testimony was consistent with Naqui's statement. However, as set forth above plaintiff testified that both vehicles proceeded at the same time with the Hall vehicle making a left turn and the Naqui vehicle attempting to proceed straight through the intersection. Counsel contends that the Hall vehicle violated VTL § 1141 by failing to yield the right of way to the Naqui vehicle and turning at the intersection without waiting until the turn could be made with reasonable safety. Counsel contends that Hall was solely negligent based upon his failure to observe and yield to the Naqui vehicle which had the right of way was traveling straight ahead. Further, counsel asserts that co-defendant Hall was negligent in failing to see that which under the circumstances he should have seen, and in turning left in front of the Naqui vehicle when it was hazardous to do so (citing Galvin v Zacholl, 302 AD2d 965 [4th Dept. 2003]). Counsel contends that based upon the evidence submitted, the Naqui defendants are entitled to

summary judgment dismissing the complaint against them as Hall was solely negligent as a matter of law and there is no evidence that Naqui was comparatively negligent.

In opposition to the motion, plaintiff's counsel, Russell LiBrizzi, Esq., the testimony of the plaintiff to the effect that the drivers were both inching up, made eye contact, hesitated and then proceeded into the intersection at the same time indicates that the cab driver, Naqui did not establish his own freedom from comparative negligence and that each driver, under the circumstances of this case, bears a portion of responsibility for the accident.

Upon review of defendant Naqui's motion, the plaintiff's opposition and defendants' reply thereto, this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2d Dept 2005]). 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]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

Based upon a review of the pre-trial testimony and evidence submitted, this Court finds that there are material issues of fact which preclude granting summary judgment dismissing the complaint against Naqui and Fantastic Transportation. Movant contends that the defendant Hall violated Vehicle and Traffic Law § 1141 in making a left turn directly into the path of Naqui's vehicle when it was not reasonably safe to do so. The court's have held that a party is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the defendant's violation of VTL § 1141 in turning left directly into the path of an oncoming vehicle, which was lawfully present in the intersection (see Ducie v Ippolito, 95 AD3d 1067 [2d Dept. 2012]; Gause v. Martinez, 91 AD3d 595 [2d Dept. 2012]; Socci v Levy, 90 AD3d 1020 [2d Dept. 2011]; Ahern v Lanaia, 85 AD3d 696 (2d Dept. 2011).

However, the Appellate Division has also stated that "there can be more than one proximate cause of an accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Winner v Star Cruiser Transp., Inc., 95 AD3d 1109 [2d Dept. 2012] citing Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Villa v Leandrou, 94 AD3d 980 [2d Dept 2012]; Calcano v Rodriguez, 91 AD3d 468 [1st Dept. 2012]). Although the movant had the right-of-way, and was entitled to anticipate that defendant Hall would obey the traffic laws (see Martin v Ali, 78 AD3d 1135, 1136 [2010]; Yelder v Walters, 64 AD3d 762 [2009]), movant also has a duty to keep a proper lookout and to exercise reasonable care to avoid a collision with another vehicle in the intersection (see Gause v Martinez, 91 AD3d 595 [2d Dept. 2012]; Bonilla v Calabria, 80 AD3d 720 [2d Dept. 2011]; Todd v Godek, 71 AD3d 872 [2d Dept. 2010]).

Here, Naqui claims that he was already in the intersection when Hall made a quick left into his vehicle. However, this court finds that there is conflicting testimony as to the facts surrounding the accident, including, but not limited to, the issue concerning which vehicle lawfully entered the intersection first, whether defendant Hall violated VTL § 1141, if he did whether such violation was the sole proximate cause of the accident (see Soibov v Palmer, 102 AD3d 951 [2d Dept. 2013]; Gause v Martinez, 91 AD3d 595 [2d Dept. 2012]). As testified to by the plaintiff, both vehicles were inching up after the light turned green and were hesitating about which vehicle would proceed first into the intersection. Based upon the plaintiff's testimony it appears that both vehicles proceeded into the intersection at the same time.

Therefore, the movant's evidentiary submissions did not prove his freedom from comparative negligence as a matter of law, and as such, is insufficient to establish, prima facie, that Hall's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both defendants were negligent (see Allen v Echols, 88 AD3d 926[2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Therefore, viewing the evidence in the light most favorable to the non-moving party (Stukas v Streiter, 83 AD3d 18 [2nd Dept. 2011]; Judice v DeAngelo, 272 AD2d 583 [2nd Dept. 2000], this court finds that there are factual issues concerning whether each defendant each met their respective duty to observe what

should have been observed and the duty to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]).

Accordingly, as triable questions exist as to whether both drivers exercised due care and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, that the motion by IMRAN H. NAQUI and FANTASTIC TRANSPORTATION CORP., for summary judgment dismissing the plaintiff's complaint against said defendants is denied, and it is further,

ORDERED that the branch of the motion for an order striking the answer of defendant Hall for failing to appear for a court ordered deposition is denied. Movant has failed to show such failure was willful and further the most recent stipulation concerning discovery dated July 18, 2012 did not provide for a deposition of Hall.

Dated: April 10, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.