Mastrogiacomo v Geoghan
2013 NY Slip Op 33041(U)
November 21, 2013
Supreme Court, Suffolk County
Docket Number: 09-29747
Judge: Jerry Garguilo
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[* 1]

SHORT FORM ORDER

INDEX No. 09-29747
CAL No. 13-00582MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-21-13
ADJ. DATE 9-25-13
Mot. Seq. # 009 - MD

PHILIP MASTROGIACOMO,

Plaintiff,

- against -

CRAIG M. GEOGHAN, JANET P. GEOGHAN, A. ULIANO & SONS, LTD, PETER CAPICOTTO, ATLANTIC TRAFFIC & DESIGN ENGINEERS, INC. COMMERCE BANK, NA. CUSTOM COMMERCIAL CONSTRUCTION CORP. and BOHLER ENGINEERING,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 25, 26 - 28, 29 - 31 ; Replying Affidavits and supporting papers 32 - 33 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants A. Uliano & Son, Ltd. and Peter Capicotto for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on July 15, 2008 on Portion Road, adjacent to a construction site located at 474 Portion Road, Lake Ronkonkoma, New York. The plaintiff was a passenger in a vehicle operated by the defendant Craig Geoghan, and owned by the defendant Janet P. Geoghan (collectively Geoghan). The Geoghan vehicle allegedly struck a construction vehicle (truck) operated by the defendant Peter Capicotto (Capicotto), and owned by the defendant A. Uliano & Son, Ltd. (Uliano), which was stopped on the shoulder, and possibly a portion of the lane of travel, of Portion Road, awaiting access to the construction site. The defendant TD Bank, N.A. (TD Bank) (identified and improperly pleaded as Commerce Bank, NA) was the owner of the site, which had undertaken to build a bank branch at the location (the project). The defendant Custom Commercial Construction Corp. (Custom) was the general contractor for the project, Uliano was a subcontractor hired by Custom to do excavation work at the site. The defendant Atlantic Traffic & Design Engineers, Inc. (Atlantic) was responsible for preparing the maintenance and protection of traffic plan (MTP Plan) for the construction site. The actions against the defendants Atlantic Traffic & Design Engineers, Inc. and Bohler Engineering have been discontinued. By order dated November 26, 2012, the undersigned granted conditional summary judgment to TD Bank.

Capicotto and Uliano now seek summary judgment dismissing the complaint and all cross claims against them on the grounds that Geoghan is the sole proximate cause of this accident. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of their motion, Capicotto and Uliano submit, among other things, the pleadings, the deposition transcripts of the plaintiff, Geoghan, Anthony Uliano and Custom's vice president, John Riportella (Riportella), Uliano's construction contract with Custom, and an unauthenticated copy of the police accident report, Form MV-104A, regarding this incident. The police accident report record relied on by the movants is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo***

Kang v Violante, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]); ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]). In addition, it is noted that the four deposition transcripts submitted are certified but not signed, and that the movants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court will consider the unsigned transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

The plaintiff was deposed on March 30, 2010. However, his testimony is of little help in determining the facts surrounding the happening of this accident as he testified that he was asleep when this accident occurred. At his deposition, Geoghan, the driver of the motor vehicle which struck the truck, testified that the accident occurred at 6:47 a.m. on the morning of July 15, 2008. The plaintiff was a passenger in his vehicle. They were traveling eastbound on Portion Road in Ronkonkoma, New York when his vehicle struck the rear of a truck stopped partially in the main lane of travel. Geoghan further testified that the truck extended about three to four feet into the lane of travel, that he did not see any flashing lights, cones or barricades as he approached the truck, and that he did not see the truck before the accident because the sun was in his face, obscuring his vision. He indicated that the truck was stopped at the top of a slight hill, that when his car reached the top of the hill the sun's glare "came from behind the hill and hit me in the face," and that his vehicle struck the truck "a second to less that a second" later. He stated that he did not see the truck, or the traffic signal light located ahead of the truck, before the accident, that he was traveling at approximately 40 miles per hour at the time of impact, and that he did not know how long the truck was stopped in position before the accident.

At his deposition, Anthony Uliano, testified that he is the owner of Uliano, and that Capicotto was an employee of the company and the driver of the subject truck. He described the truck as a 22-wheel tractor and trailer owned by Uliano, that he did not know the width of the truck, and that he did not know if Capicotto was still in the truck at the time of the accident. He stated that Uliano had a business relationship with Custom from 2003 to 2008 pursuant to a blanket contract agreement, that Custom did not supervise Uliano's work, and that Uliano was performing excavation and drainage services on the construction site pursuant to its agreement with Custom. On the morning of the accident, he was parked across the road when he heard the collision involving one of his trucks. He ran towards the car involved, and observed two boys in the car and the truck facing eastbound on Portion Road, "on the roadway, I would say towards the grass area on the right-hand side." He indicated that there was a "Men Working" sign posted west of the construction site, and that cones are used when Uliano works on the shoulder of a roadway. Anthony Uliano further testified that he did not know if there were any Uliano trucks parked on the shoulder of Portion Road when he parked his vehicle, that he did not know if said trucks would park on the shoulder, and that he did not know how long the truck was parked before the accident. He then stated that the truck arrived at the construction site after he did, that he did not know how long he was parked before the accident, and that he did not know if any portion of the truck was within the eastbound lane of travel on Portion Road. He indicated that the construction site

was open at the time, that he did not know if Capicotto could have driven into the site at the time, and that he was not aware of any instructions from Custom as to where Uliano could park its trucks. Anthony Uliano further testified that he had traveled eastbound on Portion Road before the accident occurred, and that he had had trouble with "sun glare."

At his deposition, Riportella testified that Custom had worked with Uliano for approximately 15 years before this project, that Uliano was hired to perform the clearing and excavation work for the job, and that Uliano was the only trade working at the site while performing the clearing and excavation work. He stated that Custom had a job superintendent, Vincent Chrillie (Chrillie) at the project site every day, and that the working hours for the site was 7:00 a.m. to 3:30 p.m. However, the accident happened before Chrillie arrived at the site. Riportella further testified that a blanket contract agreement dated November 19, 2003 (Agreement) was in effect for this project, that Uliano was hired by delivery of a purchase order/work authorization, and that the Agreement provided that Uliano "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with his work." He stated that Custom had rules in place which indicated that Uliano was supposed to park its vehicles "on site." He indicated that the site development plan for the project states that "the contractor shall take all appropriate measures to protect pedestrians and vehicle traffic during removal activity," that Uliano's work was removal activity, and that Custom was the general contractor for the project.

A review of the record, including the subject construction contract, reveals that there are issues of fact which preclude the grant of summary judgment herein. It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Carhuayano v J & R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept2004]; ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also* Vehicle and Traffic Law § 1129 [a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Carhuayano v J & R Hacking***, *supra*; ***Rainford v Sung S. Han***, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2d Dept 2005]; ***Gaeta v Carter***, *supra*).

The frontmost driver also has the duty not to operate his vehicle in a negligent manner (***Carhuayano v J & R Hacking***, *supra*; ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]), and the issue of comparative negligence is for a jury to decide (***Purcell v Axelsen***, *id.*). Here, the testimony indicates that a portion of Uliano's vehicle was parked in Geoghan's lane of travel before the accident. It has been held that a jury can reasonably conclude that a driver's action of parking on a shoulder or double parking on a busy street is a proximate cause of an accident that occurred when the vehicle is struck in the rear (***Grant v Nembhard***, 94 AD3d 1397, 943 NYS2d 272 [3d Dept 2012]; ***Bah v Benton***, 92 AD3d 133, 936 NYS2d 181 [1st Dept 2012]; ***White v Diaz***, 49 AD3d 134, 854 NYS2d 106

[1st Dept 2008]). Generally, the question of proximate cause is to be decided by the finder of fact, and where there is any doubt in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d [1980]). In addition, whether Geoghan's testimony that sun glare prevented him from seeing the Uliano vehicle is a non-negligent explanation for the accident and whether he acted reasonably under the circumstances cannot be resolved as a matter of law under these circumstances (*see eg.* ***Andre v Pomeroy***, 35 NY2d 361, NYS2d 131 [1974]; ***Alotta v City Hospital Center at Elmhurst***, 134 AD2d 391, 520 NYS2d 867 [2d Dept 1987]).

The movants contend that sun glare is not deemed a non-negligent explanation for a rear-end collision (***Agramonte v City of New York***, 288 AD2d 75, 732 NYS2d 414 [1st Dept 2001] (foremost auto was stopped for about five seconds prior to the collision); ***Johnson v Phillips***, 261 AD2d 269, 690 NYS2d 545 [1st Dept 1999] (foremost auto stopped for approximately five seconds before it was struck). Here, Capicotto and Uliano have not established that their vehicle was stopped for such a short period of time. In addition, it has been held that a reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking for five minutes on a busy street (***White v Diaz***, *supra*). It is undisputed that the accident occurred at approximately 6:47 a.m. Uliano testified that the construction site was open at that time. Riportella testified that the site's working hours were from 7:00 a.m. to 3:30 p.m. The court' s function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see*, ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). There are questions of fact whether Capicotto arrived at the site approximately 15 minutes before he would have been able to drive onto the site, whether it was foreseeable that a rear-end collision was a consequence of stopping on the shoulder of Portion Road for that period of time, and whether Capicotto was aware of the sun glare that Geoghan and Uliano testified they experienced that morning, making it reasonably foreseeable that an accident of this type could occur.

Thus, Capicotto and Uliano have failed to establish their entitlement to summary judgment dismissing the complaint and all cross claims against them. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, Capicotto and Uliano's motion which seeks to dismiss the complaint and all cross claim against them is denied.

Dated: 11/21/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION