Vasquez v Gaches
2014 NY Slip Op 30684(U)
March 10, 2014
Supreme Court, Suffolk County
Docket Number: 21423/12
Judge: Paul J. Baisley

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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GINO VASQUEZ, by his parent and natural guardian, GENIENE VASQUEZ and GENIENE VASQUEZ, individually,

Plaintiff,

-against-

CHRISTINA GACHES, DYLAN GACHES, LORI RYAN and TYLER RYAN,

Defendants.

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INDEX NO.: 21423/~~10~~ 12
CALENDAR NO.: 201301768MM
MOTION DATE: 11/21/13
MOTION NO.: 001 MD

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1- 9 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-11; 12-16 ; Replying Affidavits and supporting papers 17-18; 19-20 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of the defendants Christina Gaches and Dylan Gaches for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint and all cross claims against them is denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR R. 3212(b) summary judgment is granted to the extent that all affirmative defenses based on the plaintiffs' comparative negligence are dismissed pursuant to CPLR R. 3212(g).

This action was commenced to recover damages, personally and derivatively, for personal injuries sustained by the infant plaintiff, Gino Vasquez ("Gino"), on March 26, 2012, while a passenger in a vehicle owned by the defendant Christina Gaches and operated by the defendant Dylan Gaches (collectively, "the Gaches"). The accident allegedly happened when the vehicle in which the plaintiff was riding as a passenger was traveling southbound in the right lane of the William Floyd Parkway. It is undisputed that the vehicle operated by the defendant Dylan Gaches ("Dylan") came into contact with a vehicle owned by the defendant Lori Ryan and operated by the defendant Tyler Ryan (collectively, "the Ryans"). In their bill of particulars, the plaintiffs allege that the accident occurred at the intersection of William Floyd Parkway and Surry Court, in the County of Suffolk, New York.[1]

[1] It is undisputed that the correct name of the subject roadway is Surry Circle.

The Gaches now move for summary judgment on the ground that the negligence of the defendant Tyler Ryan ("Tyler") was 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]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

In support of their motion, the Gaches submit, among other things, the pleadings, Dylan's deposition transcript, the deposition transcripts of Tyler and the infant plaintiff Gino, and a copy of the police accident report regarding the accident. Initially, the Court notes that the police accident report record relied on by the Gaches 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, a review of the record reveals that the deposition transcripts of Dylan and Tyler are certified but unsigned, and that the Gaches have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). The Court may consider Dylan's deposition testimony as it has been adopted by the party deponent (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; *Wojtas v Fifth Ave. Coach Corp.*, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]). In addition, the Court may consider Tyler's unsigned deposition transcript as the parties have not raised any challenges to its 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]).

At his deposition, Gino testified that he was in the right rear passenger seat of the Gaches' motor vehicle at the time of this accident, that Dylan was operating the vehicle, and that they were traveling southbound in the right lane of travel on the William Floyd Parkway. He stated that Dylan first entered the William Floyd Parkway in the right lane and remained there for approximately one mile before this accident occurred. Gino further testified that he does not know whether the impact occurred at the subject intersection, and that he did not see the impact

between the two vehicles. He indicated that it was a sunny day, that the roads were dry, and that he was wearing his seat belt at the time of this accident.

Dylan testified that he was driving the Gaches' vehicle with the permission of his mother, Christina, at the time of this accident, that he entered the William Floyd Parkway from Sunrise Highway and proceeded in the southbound right lane of travel, and that the accident occurred at the intersection with Surry Circle. He described William Floyd Parkway as consisting of three lanes of travel and one left-hand turn lane in the southbound direction at the subject intersection, that the intersection was controlled by a traffic light, and that Surry Circle runs east and west with one lane of travel in each direction. He stated that he first saw the traffic light at Surry Circle approximately "one football field away," that he was traveling at 40 miles per hour, and that he had intended to continue southbound through the subject intersection. Dylan further testified that he did not see any vehicles in the middle lane of travel as he approached the intersection, that he felt the impact just as he was entering the intersection, and that he never saw the other vehicle involved in this accident before he felt the impact to his vehicle. He indicated that his vehicle was in the right lane when the impact occurred, that the right front side bumper of the other vehicle came into contact with his driver's side passenger door, and that he did not see the other vehicle until after the accident. Dylan further testified that, after the accident, the other vehicle was resting just inside the intersection somewhat in the right lane facing Surry Circle on an angle, that all four of the passengers in his vehicle told him that they "didn't see anything happening," and that he did not tell the police officers that responded to this accident that the other car changed lanes into his lane because he "didn't see it at all."

At his deposition, Tyler testified that he was driving the Ryan vehicle with the permission of his mother, Lori, at the time of this accident, that he entered the William Floyd Parkway from Montauk Highway and proceeded in the southbound middle lane of travel, and that the accident occurred at the intersection with Surry Circle. He stated that his maximum speed on the William Floyd Parkway was 50 miles per hour, that he did not remember passing any other vehicles in the right or left lanes of travel on the parkway, and that he did not remember other vehicles passing his because he was "going with the rate of traffic." He indicated that he first saw the traffic light at Surry Circle approximately 150 feet away, that the traffic light turned to yellow when he was approximately 100 feet away, and that he slowed his vehicle to approximately five or ten miles per hour when the accident occurred. Tyler further testified that he put his " right blinker" on intending to get over to the right lane, that he looked in his rear and side view mirrors, and that he "didn't see anything." He stated that he was approximately 25 feet from the subject intersection when the accident occurred, that the right side of his vehicle was damaged from "behind the passenger door and up to the front," and that the other vehicle was damaged from the driver's side front fender to the driver's side door. Tyler further testified that he did not see the other vehicle before this accident, that the vehicle was in his "blind spot," and that after the accident his vehicle was still in the middle lane of the parkway. He stated that he told the police officer that responded to the accident that the other vehicle sideswiped his vehicle and then continued through the intersection.

It is well settled that a driver is negligent if he or she makes an unsafe lane change (VTL 1128(a); *Fogel v Rizzo*, 91 AD3d 706, 937 NYS2d 122 [2d Dept 2012]). The Vehicle and Traffic Law provides, in pertinent part:

> §1128. Driving on roadways laned for traffic
>
> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules ... shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Where a driver is lawfully operating his vehicle within his own lane of traffic and a second vehicle enters into his lane of traffic and collides with his vehicle, the second vehicle is liable for the collision as a matter of law, absent other circumstances that may create a triable issue of fact, and summary judgment is warranted (*Rivera v Corbett*, 69 AD3d 916, 892 NYS2d 790 [2d Dept 2010]; *Neryaev v Solon*, 6 AD3d 510, 775 NYS2d 348 [2d Dept 2004]; *DeBlasi v City of New York*, 306 AD2d 308, 760 NYS2d 667 [2d Dept 2003]).

Here, the Gaches failed to establish their entitlement to judgment as a matter of law. The deposition testimony of Dylan and Tyler conflict as to the happening of the accident (*see Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). Several factual issues exist as to how the accident happened and which vehicle made an unsafe lane change in violation of Vehicle and Traffic Law §1128(a) (*see Meng Wai Wang v Dailly News, L.P.*, 90 AD3d 624, 933 NYS2d 888 [2d Dept 2011]). Additionally, a driver is required to see that which he should have seen through the proper use of his senses and to exercise reasonable care under the circumstances to avoid an accident (*see Breslin v Rudden*, 291 AD2d 471, 738 NYS2d 471 [2d Dept 2002]; *Filipazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]; *Zambrano v Seok*, 277 AD2d 312, 715 NYS2d 750 [2d Dept 2000]).

The failure to make a *prima facie* showing of entitlement to summary judgment 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, the Gaches' motion for summary judgment dismissing the complaint and all cross claims against them is denied.

However, that does not end the inquiry herein. The plaintiffs oppose the Gaches' motion and ask the Court to search the record and grant them summary judgment as to the defendants' liability on the ground that one or the other party was negligent. The issues of fact that preclude the granting of summary judgment in favor of one or more of said drivers also preclude an award of summary judgment in favor of innocent passengers (*see Morrison v Montzouotsos*, 40 AD3d 717, 835 NYS2d 713 [2007]; *Martinez v Mendon Leasing Corp*, 295 AD2d 408, 744 NYS2d 44 [2002]; *Mundo v City of Yonkers*, 249 AD2d 522, 672 NYS2d 128 [1998]; *cf. Silberman v Surrey Cadillac Limousine Service*, 109 AD2d 833, 486 NYS2d 357 [1985]).

Although the Supreme Court Appellate Division for the Second Department held in the case of *Silberman v Surrey Cadillac Limousine Service*, *id.*, that the existence of issues of fact with respect to comparative negligence on the part of defendant drivers does not preclude an award of partial summary judgment in favor of an innocent passenger on the issue of said defendants' liability, more recent case authorities have held otherwise (*see Munter v Hubert*, 34 AD3d 544, 825 NYS2d 490 [2d Dept 2006]; *Morrison v Montzouotsos*, *supra*; *Arguello v Koenig-Rivkin*, 20 Misc3d 1141A, 873 NYS2d 231 [Sup Ct, Suffolk County 2008], *affd*, 66 AD3d 934, 888 NYS2d 547 [2d Dept 2009]). Therefore, summary judgment in favor of an innocent passenger is precluded where issues of comparative negligence on the part of the drivers of the vehicles cannot be resolved as a matter of law (*but see Brabham v City of New York*, 105 AD3d 881, 963 NYS2d 332 [2d Dept 2013]). Not precluded, however, is an award of summary judgment in favor of the innocent passenger on the issue of said passenger's freedom from engagement in any acts of culpable conduct which may have caused or contributed to the occurrence of the subject accident (*see Garcia v Tri-County Ambulette Service, Inc.*, 282 AD2d 206, 723 NYS2d 163 [1st Dept 2001]).

Here, there are factual issues as to the negligence of the drivers of the vehicles allegedly involved in the subject accident which preclude the granting of the plaintiff's motion for partial summary judgment on the issue of the defendants' liability. However, the record is devoid of any evidence tending to establish that the infant plaintiff acted unreasonably under the circumstances and that he breached a duty of care owing to himself, to the driver of his vehicle or to anyone else (*see Luck v Tellier*, 222 AD2d 783, 634 NYS2d 814 [3d Dept 1995]; *Knorr v City of Albany,* 68 AD2d 982, 414 NYS2d 819 [3d Dept 1979]; *Alture v 2061 Bryant Ave. Corporation*, 256 AD 1004, 10 NYS2d 901 [2d Dept 1939] *cf. Posner v Hendler*, 302 AD2d 509, 755 NYS2d 255 [2d Dept 2003]).

Accordingly, the Court declares, pursuant to CPLR R. 3212(g), that the issue of the plaintiffs' freedom from engagement in acts of culpable conduct is hereby established for all purposes in this action and the application is otherwise denied.

Dated: March 10, 2014

PAUL CONSOLEY, J.S.C.