

Phillips v Silvestro

2014 NY Slip Op 31005(U)

April 4, 2014

Supreme Court, Suffolk County

Docket Number: 12-1936

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Phillips v Silvestro
 Index No. 12-1936
 Page No. 2

Upon the following papers numbered 1 to 38 read on this motion ~~to consolidate; and this motion and cross-motion for summary judgment~~; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 27; Notice of Cross-motion and supporting papers 28 - 32; Answering Affidavits and supporting papers 33 - 34; 35 - 36; Replying Affidavits and supporting papers 37 - 38; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#001) by defendant Rosemarie Heaney, the motion (#002) by defendant Catalina Gomez-Pacho, and the cross-motion (#003) by defendant Rosemary Heaney are consolidated for purposes of this determination; and it is

ORDERED that the unopposed motion by defendant Rosemarie Heaney for an order joining for trial this action with an action entitled *Catalina Gomez-Pachon, plaintiff, against, defendants Christina L. Silvestro and Richard J. Silvestro*, assigned Index Number 9825/2013, is granted; and it is

ORDERED that a separate note of issue and bill of costs shall be filed in each action, and that separate court fees shall be paid for each action; and it is

ORDERED that the motion by Catalina Fiore, s/h/a Pachon Gomez, for dismissal of the complaint against her is granted; and it is

ORDERED that the cross-motion by defendant Rosemarie Heaney for dismissal of the complaint against her is granted.

Plaintiff Mark Phillips commenced this action (Action No. 1) to recover damages for personal injuries he allegedly sustained as a result of a multi-vehicle accident that occurred near exit 48 of the Sunrise Highway on July 20, 2011. The complaint alleges the accident happened when a vehicle owned by defendant Richard Silvestro and driven by defendant Christina Silvestro, a/k/a Christina Fucci ("Silvestro-Fucci"), crashed into the passenger side of a vehicle driven by Pachon Gomez while attempting to change lanes, thereby setting off a series of collisions involving six motor vehicles. As a result of the accident, the Phillips' vehicle was struck in the rear by a vehicle owned and operated by defendant Theseus Hansen. The force of the impact with the Hansen vehicle allegedly propelled the Phillips' vehicle into the rear of the vehicle before him, which was owned and operated by defendant Rosemarie Heaney, sued herein as Rosemary Heaney. A separate action (Action No. 2) was brought by Catalina Fiore, formerly known as Catalina Gomez-Pachon and sued herein as Pachon Gomez ("Pachon-Fiore"), seeking damages for personal injuries allegedly caused by the same accident. The Pachon-Fiore vehicle allegedly was struck in the side by the Silvestro-Fucci vehicle. However, Pachon-Fiore allegedly was able to bring her vehicle to a complete stop in the left lane and she observed, in her rear view mirror, the Silvestro-Fucci vehicle spinning out of control. Defendants/third-party plaintiffs Silvestro-Fucci and Richard Silvestro commenced a third-party action against Mark Phillips, Back Flow Specialist, Diego Cano, Giovannie Ivaldi, Rosemarie Heaney and Theseus Hansen.

Rosemarie Heaney moves for an order joining Action No. 1 and Action No. 2 for trial on the ground both cases arise from the same motor vehicle accident and involve common questions of fact and

Phillips v Silvestro
Index No. 12-1936
Page No. 3

law. Pachon-Fiore does not oppose the motion. However, she requests that the motion be stayed until depositions are scheduled in Action No. 2.

A motion pursuant to CPLR 602 to consolidate actions or to join separate actions for trial rests within the sound discretion of the trial court (*see Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]; *RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 825 NYS2d 140 [2d Dept 2006]). Consolidation gives rise to a new action that displaces the actions affected thereby (*Pigott v Field*, 10 AD2d 99, 101, 197 AD2d 648 [1st Dept 1960]; *see Kelley v Galina-Bouquet, Inc.*, 155 AD2d 96, 552 NYS2d 305 [1st Dept 1990]). Conversely, a joint trial preserves that separate character of each action, but secures the advantage of a single trial on common issues (*see Import Alley of Mid-Is. v Mid-Island Shopping Plaza*, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]). Absent prejudice to a substantial right of a party opposing the motion, consolidation or a joint trial of actions pending before a court should be granted when common questions of law or fact exist (*see Alizio v Feldman*, 97 AD3d 517, 947 NYS2d 326 [2d Dept 2012]; *Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132; *Whiteman v Parsons Transp. Group of N.Y., Inc.*, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; *Perini Corp. v WDF, Inc.*, 33 AD3d 605, 822 NYS2d 295 [2d Dept 2006]).

Here, a joint trial is appropriate, since Action No. 1 and Action No. 2 arise out of the same motor vehicle accident and involve common questions of law and fact (*see Brown v Cope Bestway Express, Inc.*, 99 AD3d 746, 952 NYS2d 220 [2d Dept 2012]; *Whiteman v Parsons Transp. Group of N.Y., Inc.*, 72 AD3d 677, 900 NYS2d 87; *see also Perini Corp. v WDF, Inc.*, 33 AD3d 605, 822 NYS2d 295; *J & A Vending v Eagle & Fein*, 268 AD2d 505, 703 NYS2d 53 [2d Dept 2000]). The motion for an order joining the two actions for trial, therefore, is granted.

Pachon-Fiore moves, pursuant to CPLR 3211 (a) (7) and 3212 (b), for dismissal of the complaint filed against her in Action No. 1, arguing that Silvestro-Fucci's negligence was the sole proximate cause of the accident. Heaney cross-moves for dismissal of the complaint, asserting that she was confronted with an emergency situation not of her own making when she was forced to make a sudden stop in the left lane after her vehicle was struck when the Silvestro-Fucci vehicle abruptly entered the lane in which she was traveling. Additionally, Heaney asserts that she was not the proximate cause of the accident with the Phillips' vehicle, as the vehicle had come to a complete stop and was propelled into her vehicle after it was struck in the rear by the Hansen vehicle. Phillips does not oppose the motion by Pachon-Fiore. However, Phillips opposes the motion by Heaney on the ground that triable issues exists as to whether she could have avoided the collision with the Silvestro vehicle and, if so, whether she was confronted with an emergency that required her to make a sudden stop.

At her examination before trial, Silvestro-Fucci testified that she fell asleep, while driving, before her vehicle made contact with any of the other vehicles involved in the accident. She testified that she had taken Xanax the day of the accident, and that, for the first time, it caused her to suddenly fall asleep. She testified that she woke up sometime after the accident began as her vehicle was spinning toward the cement divider separating the eastbound and westbound sides of the highway. She testified that the rear

Phillips v Silvestro
Index No. 12-1936
Page No. 4

of her vehicle eventually struck the concrete divider and came to a stop, and that she waited there for the police to arrive.

At her examination before trial, Pachon-Fiore testified that she was traveling in the left lane when the accident occurred. She testified that the Silvestro-Fucci vehicle unexpectedly struck the right-hand side of the passenger door of her vehicle, propelling it towards the cement divider, but that she managed to steer away from the divider before she came to a complete stop facing eastward in the left lane. She testified that her vehicle did not make contact with any other vehicles on the highway after she came to a complete stop. She testified that the first time she observed the Silvestro-Fucci vehicle was when it struck her, and, following the impact, she was able to observe the vehicle spinning in the middle of the highway.

At his examination before trial, Mark Phillips testified that his vehicle came into contact with two other vehicles as a result of the accident. He testified that he observed the Silvestro-Fucci vehicle, which had been in the right lane, unexpectedly veer across the highway and come into contact with the center median, where it stopped before it was struck by the vehicle traveling in the left lane ahead of him. He testified that he managed to bring his vehicle to a complete stop, veering left toward the median, for approximately ten seconds before he was struck in the rear. He testified that the impact to rear of his vehicle propelled him forward into the vehicle that was stopped ahead of him. He testified that a split second passed between the time he was stopped and the time his vehicle was struck in the rear. He testified that he heard tires braking before the initial accident occurred.

At her examination before trial, Heaney testified that her vehicle made contact with the Silvestro-Fucci vehicle and the Phillips vehicle as a result of the accident. She testified that she observed the Silvestro-Fucci vehicle make a forty-five degree turn into the middle lane and collide with two other vehicles, including one vehicle traveling ahead of her in the center lane. Heaney testified that though she slammed on the brakes and veered to the left to avoid the colliding vehicles ahead of her, the Silvestro-Fucci vehicle, which was still in motion, ricocheted into the left lane and struck her vehicle. She testified that the Silvestro vehicle began spinning as a result of this impact and finally stopped, making contact with the Heaney vehicle a second time, when its rear slammed into the median. She testified that a couple of seconds later her car was struck in the rear by the Phillips' vehicle, which hit her a second time three seconds later after it was struck by the Hansen vehicle. She testified that her vehicle was still in contact with the Silvestro-Fucci vehicle when it was struck in the rear by the Phillips' vehicle.

In determining a motion pursuant to CPLR 3211 (a) (7), a court must afford the pleading a liberal construction, accept all the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Hynes v Griebel*, 300 AD2d 628, 754 NYS2d 293 [2d Dept 2002]; *Glassman v Zoref*, 291 AD2d 430, 737 NYS2d 537 [2d Dept 2001]). Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see *Vorel v NBA Props.*, 285 AD2d 641, 728 NYS2d 397 [2d Dept 2001]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law,

Phillips v Silvestro
Index No. 12-1936
Page No. 5

tendering sufficient evidence to eliminate any material issues of fact from the case. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*see* CPLR §3212; *Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]).

The Court grants the unopposed motion by defendant Pachon-Fiore, as she submitted evidence that she did not operate her vehicle in a negligent manner or engage in any conduct that caused or contributed to the happening of the subject accident (*see Biddy v Vanmaltke*, 67 AD3d 845, 889 NYS2d 239 [2d Dept 2009]; *Merchant v Greyhound Bus Lines, Inc.*, 45 AD3d 745, 846 NYS2d 315 [2d Dept 2007]; *Lapadula v Sang Shing Kwok*, 295 AD2d 406, 743 NYS2d 168 [2d Dept 2002]; *Islar v Farrar*, 272 AD2d 580, 709 NYS2d 817 [2d Dept 2000]; *Donohue v Young*, 277 AD2d 347, 716 NYS2d 100 [2d Dept 2000]).

As for the cross-motion by Heaney, “under the emergency doctrine when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Jablonski v Jakaitis*, 85 AD3d 969, 970, 926 NYS2d 137 [2d Dept 2011], *quoting Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, 567 NYS2d 629 [1991]; *see Evans v Bosl*, 75 AD3d 491, 905 NYS2d 254 [2d Dept 2010]; *Palma v Garcia*, 52 AD3d 795, 861 NYS2d 113 [2d Dept 2008]; *Gajjar v Smith*, 31 AD3d 377, 817 NYS2d 653 [2d Dept 2006]). Although the existence of an emergency and the reasonableness of the response to it generally present triable issues of fact, whether an emergency existed “may in appropriate circumstances be determined as a matter of law” (*Vitale v Levine*, 44 AD3d 935, 936, 844 NYS2d 105 [2d Dept 2007]). A driver is not obligated to anticipate that a vehicle will go out of control and cross the roadway laterally, perpendicular to the flow of traffic on the roadway. Such an event constitutes a classic emergency situation implicating the emergency doctrine (*see Parastatidis v Holbrook Rental Ctr., Inc.*, 95 AD3d 975, 943 NYS2d 625 [2d Dept 2012]; *Smit v Phillips*, 74 AD3d 782, 901 NYS2d 705 [2d Dept 2010]; *Marsch v Catanzaro*, 40 AD3d 941, 942, 837 NYS2d 195 [2d Dept 2007]).

Here, Heaney demonstrated her *prima facie* entitlement to summary judgment by submitting evidence she did not operate her vehicle in a negligent manner, and that she was faced with an emergency situation not of her own making at the time of the subject accident (*see Parastatidis v Holbrook Rental Ctr., Inc.*, 95 AD3d 975, 943 NYS2d 625 [2d Dept 2012]; *Tsai v Zong-Ling Duh*, 79 AD3d 1020, 913 NYS2d 748 [2d Dept 2010]; *Minor v C & J Energy Savers, Inc.*, 65 AD3d 532, 883 NYS2d 587 [2d Dept 2009]; *Marsch v Catanzaro*, 40 AD3d 941, 837 NYS2d 195 [2d Dept 2007]). Significantly, Heaney testified that she slammed on her brake and veered to the left to avoid striking the vehicles ahead of her which had collided with the Silvestro-Fucci vehicle following its forty-five degree turn into the middle lane of travel. Heaney further testified that the sequence of events occurred within a

Phillips v Silvestro
Index No. 12-1936
Page No. 6

matter of seconds, and that despite her best efforts to avoid a collision, her vehicle only came to complete stop after it made contact with the Silvestro-Fucci vehicle which had ricocheted into the left lane. Additionally, Heaney submitted unrefuted evidence that she was struck in the rear by the Phillips vehicle after she had impacted the Silvestro vehicle stopped before her, and that the Phillips vehicle hit the rear of her vehicle a second time when it was struck by the Hansen vehicle. Under the circumstances of this case, Phillips speculative and conclusory assertion regarding whether Heaney could have avoided the collision with Silvestro vehicle is insufficient to raise a triable issue warranting denial of the cross-motion (*see Tarnavska v Manhattan & Bronx Surface Tr. Operating Auth.*, 106 AD3d 1079, 966 NYS2d 171 [2d Dept 2013]; *Parastatidis v Holbrook Rental Ctr., Inc.*, *supra*).

Accordingly, the cross-motion by Heaney for summary judgment dismissing the complaint against her is granted. The action is severed, and shall continue against the remaining defendants.

Dated: April 4, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION