

Guevara v City of New York

2014 NY Slip Op 33323(U)

February 24, 2014

Supreme Court, Bronx County

Docket Number: 350122/11

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MELANY GUEVARA INFANT BY MOTHER AND NATURAL
GUARDIAN CRISTINA GUEVARA AND CRISTINA GUEVARA, INDIVIDUALLY,

DECISION AND ORDER
Index No: 350122/11

Plaintiff(s),

- against -

CITY OF NEW YORK, SHAH R. ALI AND JORGE E.
BOLIVAR,

Defendant(s).

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In this action for the negligent operation of a motor vehicle, defendant JORGE E. BOLIVAR (Bolivar) moves for an order granting him summary judgment thereby dismissing the complaint and cross-claims asserted against him. Bolivar avers that insofar as the instant accident occurred when he was rear-ended by the CITY OF NEW YORK's (the City) vehicle - which vehicle was operated by defendant SHAH R. ALI's (Ali), while Bolivar was stopped, Bolivar was not negligent and, therefore, not liable. Plaintiffs cross-move seeking partial summary judgment on the issue of the City and Ali's liability asserting that as the rear-ending vehicle, the City and Ali are liable as a matter of law. The City¹ opposes the instant

¹ In addition to the affirmation in opposition submitted by the City, it also submits a notice of cross-motion seeking a panoply of relief, including dismissal of the instant action pursuant to CPLR § 3126. However, the supporting affirmation to that cross-motion only contains arguments in opposition to plaintiffs' motion to strike the City's answer. Insofar as the Court does not have any motion by plaintiffs seeking to strike

motion and cross-motion asserting that discovery is incomplete and that in any event, questions of fact exist and, therefore, summary judgment cannot be granted.

For the reasons that follow hereinafter, Bolivar's motion and plaintiffs' cross-motion are hereby granted.

The instant action is for personal injuries allegedly sustained by plaintiff MELANY GUEVARA (Melany) on May 27, 2010 at Hugh Grant Circle and Metropolitan Avenue, in Bronx County, NY. The complaint alleges that Melany was injured in a motor vehicle accident involving defendants' vehicles and that the accident was caused by the negligence of the defendants with respect to the operation of their respective vehicles. Plaintiff CRISTINA GUEVARA (Cristina) asserts a claim for loss of services.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively

the City's answer and, more importantly, because the City's affirmation utterly fails to support the relief sought in its notice of cross-motion, the Court shall deny the City's cross-motion.

demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

In the absence of evidence to the contrary, a defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham v Wagner*, 48 AD3d 349, 350 [1st Dept 2008 [Court held that defendant established prima facie entitlement to summary judgment when she tendered evidence evincing that she was not at fault for the accident therein and could not have avoided the same.]; *Cerda v Parsley*, 273 AD2d 339, 339 [2d Dept 2000] [Defendants were entitled to summary judgment because the evidence presented established that defendant operator was not negligent in the operation of defendants.])). Alternatively, a defendant can establish prima facie entitlement to summary judgment by demonstrating that the plaintiff was negligent in the operation of his/her vehicle and that said negligence was the sole proximate cause of the accident (*Espinoza v Loor*, 299 AD2d 167, 168 [2d Dept 2002] [Defendant "made out a prima facie case that the accident resulted solely from (plaintiff's)

negligence.")); *Borges v Zukowski*, 22 AD3d 439, 439 [2d Dept 2005]).

It is well settled that a rear-end collision with a stopped vehicle is prima facie evidence of negligence on the part of the operator of the second, offending, and rear-ending vehicle (*Carhuayano v J & R Hacking*, 28 AD3d 413, 414 [2d Dept 2006]; *Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]; *Danza v Longieliere*, 256 AD2d 434, 435 [1st Dept 1998]). In order to rebut the presumption of negligence, the operator of the rear-ending vehicle is required provide a cognizable non-negligent excuse (*Carhuayano* at 414; *Johnson* at 271; *Mitchell* at 251). Accordingly, a rear-end collision, when one of the vehicles is stopped, creates a prima facie case of liability with respect to the operator of the rear-ending vehicle² (*Edney v Metropolitan Suburban Bus Authority*, 178 AD2d 398, 399 [2d Dept 1991]). A failure by the operator of the offending vehicle to rebut the finding of negligence with admissible evidence requires judgment in favor of the other vehicle (*Grimes-Carrion v Carroll*, 13 AD3d 125, 126 [1st Dept 2004]; *Bendiik v. Dybowski*, 227 AD2d 228, 228 [1st Dept 1996]).

² The same is true when an accident occurs as a vehicle, coming to stop and slowing, is struck in the rear (*Chepel v Meyers*, 306 AD2d 235, 237 [2d Dept 2003]; *Power v Hupart*, 260 AD2d 458 [2d Dept 1999]).

While in the Second Department a sudden stop by the vehicle ahead or unavoidable skidding on a wet surface constitute non-negligent explanations sufficient to rebut the presumption of negligence (*Carhuayano* at 414; *Chepel* at 237; *Filippazzo* at 419; *Power* at 458), in the First Department, a claim that a vehicle stopped short or that the roadway was wet is insufficient to rebut the presumption of negligence (*Mitchell* at 251 ["It is not a sufficient defense to claim that plaintiffs' vehicle stopped short"]; *Danza* at 435 ["We find that the defendant's testimony to the effect that the accident was caused by the plaintiffs' sudden stop was insufficient to rebut the presumption that he was negligent"])).

Here, Bolivar establishes prima facie entitlement to summary judgment insofar as he tenders evidence demonstrating that he was not negligent in the operation of his vehicle at the time this accident occurred and that the accident occurred when he was stopped and rear-ended by the City and Ali's vehicle. Specifically, Bolivar submits Melany's deposition transcript, who testified that on the date of this accident, she was a passenger in Bolivar's vehicle when it came to a sudden stop to avoid hitting a pedestrian who had been involved in a separate accident. According to Melany, five seconds after Bolivar stopped his vehicle, it was hit in the rear by the City and Ali's vehicle. According to Cristina's deposition transcript, also submitted by Bolivar, she

was involved in a motor vehicle accident while a passenger in Bolivar's vehicle. Cristina testified that Bolivar brought his vehicle to a stop to avoid hitting a pedestrian who was on the ground and that three to five seconds thereafter, Bolivar's vehicle was impacted from the rear. Bolivar submits his own deposition transcript, where he testified that the instant accident occurred at the intersection of Hugh Grant Circle and Metropolitan Avenue. Bolivar approached the intersection and came to a stop before the cross-walk for a red light. When the light turned green, although Bolivar observed a pedestrian in the crosswalk to his left, he nevertheless slowly moved his vehicle. Immediately thereafter, after traveling only a few feet, at five miles per hour, he observed that the car to his left struck the pedestrian knocking her into Bolivar's lane of travel. Bolivar brought his vehicle to a stop and thereafter, he was impacted in the rear by the City and Ali's vehicle.

Based on the foregoing, it is clear that insofar as Bolivar was not traveling at an excessive rate of speed and obeyed the attendant traffic control devices he was not negligent in the operation of his vehicle (*Dinham* at 350; *Cerda* at 339). Moreover, it is equally clear that the City and Ali's vehicle rear-ended Bolivar's vehicle after it had come to a complete stop. As such, the City and Ali are presumed to have acted negligently in the operation of their vehicle (*Carhuayano* at 414 ; *Mitchell* at 251;

Johnson at 271; *Danza* at 435) and absent a cognizable non-negligent excuse they are liable for the instant accident (*Edney* at 399). Accordingly, Bolivar has established prima facie entitlement to summary judgment.

For these very reasons and with the submission of the same evidence, plaintiffs have also established prima facie entitlement to summary judgment with respect to the City and Ali's liability.

Nothing submitted by the City raises a triable issue of fact sufficient to preclude summary judgment in favor of plaintiffs and Bolivar. Here, the City's salient evidence in opposition to the instant motion and cross-motion is an affidavit from Ali wherein he concedes that he impacted Bolivar's vehicle in the rear after it stopped short. This excuse is non-negligent as a matter of law (*Mitchell* at 251; *Danza* at 435). Accordingly, the City fails to raise any triable issues of fact sufficient to defeat summary judgment. The Court notes that, here, the City's claim that discovery is incomplete is insufficient to defeat summary judgment because when the information necessary to oppose summary judgment is wholly within the control of the party opposing summary judgment, and could be produced by way of sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f), is inappropriate (*Soto-Marquin v. Mellet*, 63 AD3d 449, 450 [1st Dept 2009]; *Johnson* at 272). Here, contrary to the City's contention,

although Ali has not been deposed, the facts about which he would testify could have, and in fact, have been proffered via his affidavit. It is hereby

ORDERED that the complaint and all cross-claims as against Bolivar be dismissed. It is further

ORDERED liability be hereby resolved in plaintiff's favor. It is further

ORDERED that Bolivar serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : February 24, 2014
Bronx, New York



Mitchell J. Danziger, ASCJ