DiLascio v Alvarez
2014 NY Slip Op 33431(U)
January 13, 2014
Supreme Court, Suffolk County
Docket Number: 12-33920
Judge: Daniel Martin

SHORT FORM ORDER

INDEX No. 12-33920
CAL No. 14-01081MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 8-20-14 (001)
MOTION DATE 8-26-14 (002)
ADJ. DATE 8-26-14
Mot. Seq. # 001 - MG
002 - MD

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JOSEPH DILASCIO,

Plaintiff,

- against -

GRAZYNA ALVAREZ and SARA ALVAREZ,

Defendants.

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Upon the following papers numbered 1 to 22 read on these motions for summary judgment and joint trial; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11, 16 - 20; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 13, 21 - 22; Replying Affidavits and supporting papers 14 - 115; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff Joseph DiLascio for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability is granted; and it is further

ORDERED that the motion by defendants Sarah Alvarez and Grazyna Alvarez for an order pursuant to CPLR 602(a) joining this action for trial with an action entitled Nicholas Lomenzo, plaintiff, against Grazyna Alvarez and Sarah Alvarez, and Joseph DiLascio, defendants, assigned index number 14-05555, is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at approximately 8:55 p.m. on August 18, 2011 at the intersection of Horseblock Road and the Long Island Expressway Service Road (Service Road) in the Town of Brookhaven. The accident allegedly happened when the vehicle operated by the defendant Sarah Alvarez (Alvarez) and owned by the defendant Grazyna Alvarez made a left turn into the lane of travel occupied by the plaintiff's vehicle while it was proceeding through the intersection.

It is undisputed that the plaintiff's vehicle was traveling southbound on Horseblock Road, and that Alvarez was traveling northbound on Horseblock Road, immediately prior to this accident. It is also undisputed that the subject intersection is controlled by a traffic light, that the Service Road[1] at the intersection is a one-way road for travel in the eastbound direction, and that Alvarez attempted to make a left hand turn heading westbound on the Service Road against the one-way traffic.

The plaintiff now moves for summary judgment on the issue of the defendants' liability. 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 the motion, the plaintiff submits, among other things, the pleadings, his affidavit, his deposition and that of Alvarez, and an unauthenticated copy of police accident report, Form MV-104A. The police accident report record relied on by the plaintiff 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]).

At his deposition, the plaintiff testified that he was operating his motor vehicle southbound on Horseblock Road on August 18, 2011 when he was involved in an accident at the subject intersection. He indicated that, at the intersection, Horseblock Road is a two-way road separated by a median, that the intersection is controlled by a traffic light, and that the traffic light was green as he traveled through the intersection. He stated that Horseblock Road consists of two lanes of travel in the southbound direction at the intersection, that his motor vehicle was in the right lane of the roadway, and that he intended to

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[1] The Court takes judicial notice that the Long Island Expressway Service Road at the subject location is also known and the LIE South Service Road.

continue straight through the intersection. The plaintiff further testified that he first saw Alvarez's vehicle approximately two car lengths away, coming straight at him, that he turned his wheel to the right and applied his brakes, and that the passenger side front of Alvarez's vehicle struck the driver's side front corner of his vehicle. He stated that he was traveling at approximately 45 miles per hour at impact, and that, because the time between his "slamming on" his brakes and the impact was "minimal", his vehicle did not slow down "a whole lot."

At her deposition, Alvarez testified that she was operating the motor vehicle owned by her mother, the defendant Grazyna Alvarez, northbound on Horseblock Road at the time of this accident, that she was coming from her boyfriend's house and heading to the Island 16 Movie Theater, and that she was using her Garmin GPS device (GPS) for directions to the theater. She indicated that, as she approached the subject intersection, her GPS directed her to make a left turn on to "the eastbound service lane, which was the wrong direction." She stated that, at the intersection, Horseblock Road is a two-way road separated by a median, that there is one lane of travel in the northbound direction, and that the intersection is controlled by a traffic light. Alvarez further testified that the traffic light at the intersection was green for her, that she slowed to approximately 20 miles per hour prior to making her left turn, that she does not know if she made a complete stop before making her left turn, and that she did not see the other vehicle before the impact. She stated that it was dark out at the time, that she and the other vehicle had their headlights on, and that the "front left," and perhaps the "whole front" of her vehicle impacted the other vehicle. She acknowledged that the map or "highlight" on her GPS indicated that she was to cross "under" the Long Island Expressway before making her left turn. However, she indicated that the voice command told her to "make my next left turn and my next left turn was the eastbound service road."

A driver intending to turn left within an intersection is required by law to yield the right of way to the vehicle proceeding straight or approaching from the opposite direction which is in the intersection or is so close as to constitute an immediate hazard (*see* Vehicle and Traffic Law §1141; ***Bogorad v Fitzpatrick***, 31 NY2d 984, 341 NYS2d 314 [1973]; ***Jones v Castro-Tinco***, 62 AD3d 957, 880 NYS2d 308 [2d Dept 2009]; ***Casaregola v Farkouh***, 1 AD3d 306, 767 NYS2d 57 [2d Dept 2003]; ***Mathewson v Bender***, 259 AD2d 673, 686 NYS2d 832 [2d Dept 1999]). A driver with the right of way is entitled to anticipate that another driver will obey the traffic laws that require her to yield the right of way (***Mohammad v Ning***, 72 AD3d 913, 899 NYS2d 356 [2d Dept 2010]; ***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]).

The evidence submitted by the plaintiff establishes his prima facie entitlement to summary judgment by establishing that the defendant driver violated Vehicle and Traffic Law § 1141 when she made a left turn directly into the path of the plaintiff's oncoming vehicle as he lawfully proceeded through the intersection with the right of way (*see* ***Loch v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; ***Almonte v Tobias***, 36 AD3d 636, 829 NYS2d 153 [2d Dept 2007]; ***Berner v Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Gabler v Marly Building. Supply Corp***., 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]; ***Russo v Scibetti***, 298 AD2d 514, 748 NYS2d 871 [2d Dept 2002]). Since the defendant admitted that she never saw the plaintiff's vehicle prior to making her left turn across Horseblock Road, she was negligent, as a matter of law, in failing to see that which she should

have seen through the proper use of her senses (*see* ***Almonte v Tobias***, *supra*; ***Berner v Koegel***, *supra*; ***Gabler v Marly Building. Supply Corp.***, *supra*; ***Russo v Scibetti***, *supra*).

Thus, the plaintiff has established that the defendant owner is also liable herein. Vehicle and Traffic Law §388 provides that the owner of a vehicle is vicariously liable to third parties for injuries resulting from the "use and operation" of such vehicle by any person using it with permission. The statute creates a strong presumption of permissive use which can be rebutted only with substantial evidence showing that the driver of the vehicle was not operating it with the owner's express or implied permission (*see* ***Murdza v Zimmerman***, 99 NY2d 375, 756 NYS2d 505 [2003]; ***Amex Assur. Co. v Kulka***, 67 AD3d 614, 888 NYS2d 577 [2d Dept 2009]; ***Talat v Thompson***, 47 AD3d 705, 850 NYS2d 486 [2d Dept 2008]). The presumption can be rebutted by evidence that the driver exceeded restrictions placed on his or her use of the vehicle by the owner (***Murdza v Zimmerman***, *supra*; ***Ellis v Witsell***, 114 AD3d 636, 979 NYS2d 826 [2d Dept 2014]; ***Aetna Casualty & Surety Co. v Brice***, 72 AD2d 927, 422 NYS2d 203 [4th Dept 1979] *affd* 50 NY2d 958, 431 NYS2d 528 [1980]; ***Rachon v Cheuvant***, 37 AD2d 911, 325 NYS2d 452 [4th Dept 1971]), thereby exonerating the owner from vicarious liability under the statute.

In opposition to the plaintiffs' prima facie showing of entitlement to summary judgment on the issue of liability, the defendants submit the affirmation of their attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v. Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). While said affirmation points out that summary judgment is rarely appropriate in negligence cases, it fails to even suggest that there is an issue of fact requiring a trial in this action. Neither does said affirmation address the issue of the defendant owner's vicarious liability herein.

Accordingly, the plaintiff's motion for summary judgment on the issue of the defendants' liability is granted.

The defendants now move for an order joining this action with an action entitled Nicholas Lomenzo, plaintiff, against Grazyna Alvarez and Sarah Alvarez, and Joseph DiLascio, defendants, assigned index number 14-05555 (Action No. 2). Said action was commenced by a passenger in the Alvarez vehicle. A motion pursuant to CPLR 602 to consolidate actions or to join separate actions for trial rests in the sound discretion of the trial court (*see* ***Alizio v Perpignano***, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]; ***Skelly v Sachem Cent. School Dist.***, 309 AD2d 917, 766 NYS2d 108 [2d Dept 2003]; ***D'Abreau v American Bankers Insurance. Co. of Fla.***, 261 AD2d 501, 690 NYS2d 655 [2d Dept 1999]). Generally, a joint trial on liability is appropriate, where two actions arise out of the same motor vehicle accident and involve common questions of law and fact (*see* ***Whiteman v Parsons Transp. Group of N.Y., Inc.***, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; ***J & A Vending Corp. v Eagle & Fein***, 268 AD2d 505, 703 NYS2d 53 [2d Dept 2000]). A joint trial preserves the separate character of each action, but secures the advantage of a single trial on common issues (*see* ***J & A Vending v J.A.M. Vending***, 268 AD2d 505, 703 NYS2d 53 [2d Dept 2000]; ***Import Alley of Mid-Island v Mid-Island Shopping Plaza***, 103 AD2d797, 477 NYS2d 675 [2d Dept 1984]). Nevertheless, even

where there are common issues of fact and law, consolidation may be denied when the actions are at markedly different procedural stages and it would result in undue delay in the resolution of either matter (*see* ***Ahmed v C.D. Kobsons, Inc.***, 73 AD3d 440, 904 NYS2d 366 [1st Dept 2010]; ***Abrams v Port Auth. Trans-Hudson Corp.***, 1 AD3d 118, 766 NYS2d 429 [1st Dept 2003]; ***Smith v Smith***, 261 AD2d 928, 689 NYS2d 805 [4th Dept 1999]).

Although this action and Action No. 2 arise out of the same motor vehicle accident and involve similar issues as to liability for the plaintiff's alleged injuries in Action No. 2, the actions are at markedly different stages of litigation, with the instant action having been placed on the trial calendar more than five months ago and Action No. 2 not yet even having scheduled a preliminary conference. Contrary to the conclusory assertions by defendants' counsel that the interests of justice will best be served by granting the instant motion, consolidating the actions will unduly delay resolution of the claims raised in this case and do disservice to the stated goal of CPLR 602(a) of "avoid[ing] unnecessary costs or delay (*see* ***Abrams v Port Auth. Trans-Hudson Corp.***, *supra*; ***Skelly v Sachem Cent. School Dist.***, *supra*; ***Durante Bros. & Sons v Rentar Indus. Devendra Corp.***, 76 AD2d 825, 428 NYS2d 485 [2d Dept 1980]).

Accordingly, the defendants' motion for joint trial is denied.

Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for the next available trial date.

Dated: January 13, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**