

Blair v Brown

2015 NY Slip Op 30114(U)

January 5, 2015

Supreme Court, Queens County

Docket Number: 703733/2014

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

The plaintiffs commenced this action by filing a summons and complaint on May 29, 2014. Issue was joined by service of defendants Brown and Richards' verified answer with cross-claim dated July 29, 2014. Defendant Premchand Kewal joined issue by service of its verified answer with cross-claim dated August 15, 2014. On August 4, 2014, the law firm of German Rubenstein LLP substituted the law firm of Hecht Kleeger & Damashek as attorneys for plaintiff Tannize Gonzales. Plaintiff Tannize Gonzales now moves, prior to depositions, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages. Said plaintiff contends that the sole proximate cause of the accident was the negligence of defendant Merlon Richards in that his vehicle struck the Kewal vehicle in the rear.

In support of the motion, the plaintiff submits an affirmation from counsel, Joel Rubenstein, Esq; a copy of the pleadings; an affidavit of merit from plaintiff, Tannize Gonzales; and a copy of the police accident report (MV-104).

In her affidavit dated October 7, 2014, plaintiff Gonzales states that on January 1, 2014, at approximately 12:50 a.m., she was a passenger in a 2005 Lincoln owned and operated by Premchand Kewal. She states that the vehicle in which she was a passenger was brought to a complete stop at a red traffic signal on Linden Boulevard at its intersection with 193rd Street, in Queens County. She states that, "after being stopped for 15 seconds, the vehicle in which I was a passenger was struck in the rear by a 2000 Nissan motor vehicle operated by defendant Marlon Richards."

The police accident report, which is based upon statements made by the respective drivers, states with regard to the accident description:

"Driver of Vehicle #2(Kewal) states that while stopped at light Veh #1 (Richards) did hit the back of his vehicle. Driver of Veh #1 (Richards) states slowing in traffic at light and it Vehicle # 2."

Plaintiff's counsel contends that the accident was caused solely by the negligence of defendant Richards in that his vehicle was traveling too closely in violation of VTL § 1129, and the defendant driver failed to safely stop his vehicle prior to rear-ending the plaintiffs' vehicle. Counsel contends that the defendant admitted his fault to the police at the scene stating that he struck the plaintiff's vehicle while slowing down at the light. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability against the

Richards defendants because defendant Richards was solely responsible for causing the accident while the plaintiff and the driver of plaintiff's vehicle was free from culpable conduct.

Defendant Premchand Kewal cross-moves for summary judgment and submits an affidavit dated September 29, 2014 stating that he is the registered owner of a Lincoln Town car. On the date of the accident January 1, 2014, the plaintiffs were both rear seat passengers in his vehicle. He states that he was driving them to a location on Linden Boulevard. He stated that he stopped his vehicle at a red traffic signal at the intersection of Linden Boulevard and 193rd Street. He states that as he was stopped waiting for the light to turn green he felt an impact to the rear of his vehicle. He states that the impact was not heavy and there was no damage to either vehicle. The two passengers asked for an ambulance to come to the scene and the police and an ambulance both responded. He states that the passengers both left the scene in the ambulance and failed to pay the fare.

Counsel for Kewal states that defendant Kewal is entitled to summary judgment against the codefendants Richards and Brown because his vehicle was completely stopped when it was struck in the rear by the Richards vehicle. Counsel asserts that the rear end collision establishes a prima facie case of negligence against the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to provide a non-negligent explanation for how the accident occurred.

In opposition to the motion, counsel for Brown and Richards, Stuart Kurland, Esq., contends that the motion is premature in that depositions have not been held and that there are questions of fact regarding how the accident occurred. Counsel has not provided an affidavit from his client, Marlon Richards.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision

creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, both plaintiff Gonzales and defendant Kewal stated in their respective affidavits that the vehicle Kewal was driving and in which Gonzales was a passenger, was lawfully stopped at a red traffic signal when it was suddenly struck from behind by defendant's vehicle. Thus, the plaintiff and co-defendant Kewal satisfied their prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to co-defendant Richards to raise a triable issue of fact as to whether the Kewal vehicle was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). This court finds that the co-defendant, Richards, who did not submit an affidavit in opposition to the motion, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp., 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005][the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]).

In addition, the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212 [g]; Anzel v Pistorino, 962 NYS2d 700 [2d Dept. 2013]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Garcia v Tri-County Ambulette Serv., 282 AD2d 206 [1st Dept. 2001]; Johnson v Phillips, 261 AD2d 269 [1st Dept. 1999]).

Richards' contention that the plaintiff's motion for summary judgment is premature is without merit. The defendant failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during

discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, for the reasons stated above, it is hereby,

ORDERED, that the cross-motion of co-defendant, PREMCHAND KEWAL, for summary judgment dismissing the plaintiff's complaint and all cross-claims against him is granted, and the Clerk of Court is authorized to enter judgment accordingly, and it is further,

ORDERED, that the plaintiff's motion is granted, and the plaintiff, TANNIZE GONZALES, shall have partial summary judgment on the issue of liability against the defendants, HUBERT BROWN and MARLON RICHARDS, and the Clerk of Court is authorized to enter judgment accordingly, and it is further,

ORDERED, that upon completion of discovery, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on serious physical injury and damages.

Dated: January 5, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.