

Papagiannakis v Seven Nation LLC
2015 NY Slip Op 31320(U)
March 9, 2015
Supreme Court, Queens County
Docket Number: 11360/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

IOANNIS PAPAGIANNAKIS, Index No.: 11360/2013
Plaintiff, Motion Date: 02/05/15
- against - Motion No.: 17
Motion Seq.: 2
SEVEN NATION LLC, GARETH A. HUGHES and
SHELLA CAYO,

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by
defendant, SHELLA CAYO, for an order pursuant to CPLR 3212(b),
granting said defendant summary judgment on the issue of
liability, and dismissing the plaintiff's complaint and all
cross-claims against her:

Papers
Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 6
Plaintiff's Affirmation in Opposition.....7 - 10
Co-Defendant Hughes' Affirmation in Opposition.....11 - 13
Reply Affirmation.....14 - 16

In this action for negligence, plaintiff, Ioannis
Papagiannakis, seeks to recover damages for personal injuries she
allegedly sustained as a result of a four-vehicle accident that
occurred on April 9, 2011, on the 31st Street exit off of the
westbound Grand Central Parkway in Queens County, New York.
Plaintiff, the driver of the middle vehicle, alleges that he was
stopped waiting for a red traffic signal at the end of the exit
ramp when his vehicle was struck in the rear by the truck owned
by defendant, Seven Nation, LLC and operated by defendant, Gareth
A. Hughes. Plaintiff contends that the impact from the Hughes

vehicle caused his vehicle to be propelled into the vehicle of non-party, Michael Hosek, the operator of the lead vehicle. Co-defendant, Shella Cayo was in a vehicle in an adjoining lane of the exit ramp that was also struck in the rear by the Hughes vehicle at the same time plaintiff's vehicle, in the left lane, was struck in the rear.

This action was commenced by plaintiff Ioannis Papagiannakis against defendants, Seven Nation, Hughes and Cayo by the filing of a summons and complaint on April 9, 2011. Plaintiff filed a Note of Issue on April 11, 2014. This matter is presently on the calendar of the Trial Scheduling Part on March 24, 2015.

Defendant Cayo now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint on the ground that her vehicle was simultaneously struck in the rear by the Hughes vehicle while it was in an adjacent lane to the vehicle operated by the plaintiff. Cayo alleges her vehicle did not strike the plaintiff's vehicle or any other vehicle in the left lane and, as such, she was not involved in the plaintiff's accident. Therefore, it is asserted that she cannot be liable for the injuries allegedly sustained by the plaintiff. In support of the motion, the plaintiff submits an affirmation from counsel, Katie A. Walsh., a copy of the pleadings, a copy of the police report; a copy of the transcript of the examination before trial of plaintiff, Ioannis Papagiannakis and a certified copy of the motor vehicle accident report filed with the DMV by Mr. Hughes.

In his examination before trial taken on December 4, 2013, the plaintiff, Ioannis Pappgiannakis, age 43, testified that he was involved in a four-car motor vehicle accident on Saturday, April 9, 2011, at approximately 6:30 a.m. Plaintiff stated that he was traveling towards Astoria and exited the Grand Central Parkway at the 31st Street exit. As he was on the exit ramp stopped at a red traffic signal his vehicle was struck in the rear by a very heavy impact from the commercial box truck operated by defendant Hughes. He stated that the exit was made up of two lanes of traffic and his accident occurred in the left lane. As a result of the impact his vehicle was propelled into the vehicle in front of his operated by a non-party.

The police report submitted by the defendant contains a description of the accident as prepared by the responding police officer. The description states as follows:

"At t/p/o driver of Vehicle #1 (Hughes) states that while exiting the Grand Central Parkway westbound at the 31st Street exit his brakes did fail and he did rear-end Vehicle # 2 (plaintiff) and Vehicle # 3(Cayo). Furthermore, the force of the accident did push Vehicle #2 (plaintiff), into Vehicle #4 (non-party). Driver of vehicles #2, 3 and 4 state that while stopped for a red light at the exit ramp of the Grand Central Parkway, Vehicle #1 (Hughes) did rear end their vehicles."

Defendant Cayo's counsel contends that the accident was caused solely by the negligence of co-defendant Hughes in that said defendant's 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 plaintiff's vehicle. Moreover, according to the police report and Hughes' motor vehicle accident report, the Cayo vehicle was not in the same lane as the other vehicles and Cayo's vehicle never came into contact with the plaintiff's vehicle either in the rear or in the front. Counsel contends, therefore, that Cayo is entitled to summary judgment dismissing the plaintiff's complaint and all cross-claims against her because defendant Hughes admitted to the police officer that he struck both the plaintiffs vehicle and the Cayo vehicle in the rear because his brakes failed. Counsel claims that Hughes was solely responsible for causing the accident while Cayo was free from culpable conduct in that she was stopped at the light in lane adjacent to where the plaintiff's accident occurred and her vehicle was not part of the chain involving the plaintiff's accident.

In his affirmation in opposition, counsel for Seven Nation LLC, Nicholas J. Tafuri, Esq., contends that the moving party, Ms. Cayo has not appeared for a deposition and has not submitted an affidavit of merit in support of the motion. In addition, co-defendant asserts that the plaintiff's deposition transcript has not been executed by the plaintiff and the police report is uncertified and inadmissible. Plaintiff's counsel, Renata Vizental, Esq., joins in the opposition to the motion.

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]).

Although the movant did not submit an affidavit from Ms. Cayo, the movant has shown, through the police report, the deposition testimony of the plaintiff, and the certified copy of a motor vehicle accident report signed by defendant Hughes, that the Cayo vehicle was not part of the chain reaction accident in the left lane of the exit ramp which is allegedly responsible for the injuries sustained by the plaintiff. Mr. Hughes, in his diagram depicting the accident, shows the Cayo vehicle was in the right lane of the exit ramp right next to the plaintiff's vehicle which was in the left lane. The diagram shows that Hughes' truck came from behind both vehicles and simultaneously rear-ended plaintiff's vehicle and the Cayo vehicle next to it. Plaintiff's vehicle was shown to have been pushed into a fourth, non-party vehicle. In addition, Hughes' signed report concedes that his vehicle rear-ended the plaintiff's vehicle and scrapped the side of the Cayo vehicle.

Further, the police report contains Hughes' admission against interest in which he stated to the police officer that his brakes failed and caused him to rear-end both Cayo and the plaintiff's vehicle. The Courts have held that uncertified police reports are inadmissible to indicate a party's liability, because the police officer who prepared the report was not an eyewitness to the accident. However, this Court notes that the police report has probative value as it contains an admissions against interest of a party (see Vaden v Rose, 4 AD3d 468 [2d Dept. 2004]; Kemenyash v McGoey, 306 AD2d 516 [2d Dept. 2003]; Guevara v Zaharakis, 303 AD2d 555 [2d Dept. 2003]).

Furthermore, although unsigned, the transcript of plaintiff's deposition was certified by the court reporter, and the co-defendant did not raise any challenges to its accuracy. Thus, it qualified as admissible evidence for purposes of the motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Zalot v Zieba, 81 AD3d 935 [2d Dept. 2011]; Bennett v Berger, 283 AD2d 374 [1st Dept. 2001]). In his deposition, the plaintiff did not provide any testimony with respect to negligent acts of defendant Cayo.

Thus, Ms. Cayo, whose vehicle did not collide with the plaintiff's vehicle either in front or back demonstrated that her conduct was not a proximate cause of the rear-end collision between the Hughes vehicle and the plaintiff's vehicle (see Robayo v Aghaabdul, 109 AD3d 892 [2d Dept. 2013]; Sayyed v Murray, 109 AD3d 464 [2d Dept. 2013]; Prosen v Mabella, 107 AD3d 870 [2d Dept. 2013]; Xian Hong Pan v Buglione, 101 AD3d 706 [2d Dept. 2012]). Thus, Ms. Cayo satisfied her prima facie burden of establishing her entitlement to judgment as a matter of law by

demonstrating that she was not involved in the collision with the plaintiff's vehicle.

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the [plaintiff and co-defendant Hughes to raise a triable issue of fact as to whether Cayo was negligent, and if so, whether that negligence contributed to the happening of the accident (see Xian Hong Pan v Buglione, 101 AD3d 706 [2d Dept. 2012]; Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

This court finds that the affirmations in opposition submitted by the plaintiff and by Seven Nation failed to submit evidence as to any negligence on the part of Cayo sufficient to raise a triable question of fact.

Thus, as defendant Hughes failed to proffer sufficient evidence to rebut the inference of his own negligence and to raise a triable issue of fact, and as the evidence in the record demonstrates that there are no triable issues of fact as to whether Ms. Cayo may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby,

ORDERED, that the motion of defendant, Shella Cayo, for an order dismissing the complaint of the plaintiff and all cross-claims against her is granted, and it is further

ORDERED, that the Clerk of Court is authorized to enter judgment accordingly.

Dated: March 9, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.