

Giamundo v Taylor

2015 NY Slip Op 31347(U)

April 10, 2015

Supreme Court, Queens County

Docket Number: 709691/2014

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

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SALVATORE GIAMUNDO,	Index No.:	709691/2014
	Motion Date:	03/26/15
Plaintiff,	Motion No.:	39
- against -	Motion Seq.:	1
NORMA TAYLOR,		
Defendant.		

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The following papers numbered 1 to 11 were read on this motion by plaintiff, Salvatore Giamundo, for an order pursuant to CPLR 3212 granting plaintiff partial summary judgment on the issue of liability and setting this matter down for a trial on serious injury and damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Affidavits-Exhibits.....	5 - 9
Reply Affirmation.....	10 - 11

This is a personal injury action in which plaintiff, Salvatore Giamundo, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on April 4, 2013, on the campus of Creedmore Psychiatric Center located at 80-45 Winchester Boulevard, Queens County, New York.

Plaintiff submits an affidavit stating that on April 4, 2013, he was the operator of a vehicle that was stopped on Avenue C between 1st and 3rd Streets on the campus of Creedmore Psychiatric Center. He states that at the time of the accident his vehicle was stopped, his emergency flashers were on, and the door was open because he was waiting for two passengers to exit the vehicle. He states that his vehicle was stopped for 20

seconds when he felt a heavy impact to the rear of his vehicle. He states that the vehicle that was at fault was the vehicle owned and operated by defendant Norma Taylor who backed her vehicle into the rear of his vehicle while he was stopped. He asserts that the defendant was negligent in the operation of her vehicle in striking his vehicle in the rear. He claims that as a result of the accident he sustained, inter alia, a labral tear of the right shoulder requiring arthroscopic surgery and disc herniations at C3-4, C4-5 and C5-6, requiring a vertebrectomy and diskectomy.

Plaintiff commenced this action by the filing of a summons and complaint on December 18, 2014. A supplemental summons and amended complaint were filed on December 23, 2014. Issue was joined by service of defendant's verified answer to supplemental summons and complaint dated January 23, 2015.

Scott L. Wiss, Esq., counsel for the plaintiff, now moves prior to the completion of discovery for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages only. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of the plaintiff's bill of particulars; and an affidavit of facts from the plaintiff.

The plaintiff contends that the defendant driver was negligent in the operation of her vehicle in striking the plaintiff's vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that the plaintiff's vehicle was completely stopped while he was discharging passengers when the defendant backed her vehicle into the rear of the plaintiff's vehicle. Counsel claims that the defendant was negligent in failing to safely stop her vehicle prior to rear-ending the plaintiff's vehicle. Counsel contends that the evidence indicates that the plaintiff's vehicle was lawfully stopped when it was struck from behind by the defendant's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment on the issue of liability because the defendant did not stop her vehicle in time. Plaintiff alleges that the defendant was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

In opposition, defendant Norma Taylor submits an affidavit dated March 13, 2015, in which she states that at the time of the accident she was backing out of a parking lot because the lane into the parking lot was obstructed. She put her vehicle in

reverse and slowly backed out of the parking lot. She states as she was backing up her vehicle made contact with the side of the plaintiff's van. She states that the plaintiff's van was parked on a narrow lane for moving traffic. She did not see any passengers exit or enter the van at the location of the accident. She states that the van was parked in a lane across from the parking lot. She states that this is not an area where the SNAP vehicles generally discharge or pick up passengers for the senior facility in that location. She states that the plaintiff's van was parked perpendicular to the entrance or exit of the parking lot.

In opposition to the motion, defendant's counsel, Marcella Gerbasi Crewe, Esq., asserts that the plaintiff failed to establish a prima facie showing that the defendant was negligent as a matter of law as there are questions of fact as to when the accident occurred, and whether the plaintiff was negligent in causing or contributing to the accident. Counsel asserts that although the plaintiff stated that he was stopped with his flashers on when his vehicle was struck he does not provide sufficient details to establish his freedom from liability. Counsel claims that defendant's affidavit raises questions of fact as to whether the plaintiff stopped his vehicle in the roadway blocking the exit to the parking lot and as such whether his negligence contributed to causing the accident. Counsel also asserts that the motion is premature having been brought prior to the depositions of the parties.

Upon review of the plaintiff's motion, the defendant's opposition and the plaintiff's reply thereto, this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2nd Dept 2005]). 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]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

It is plaintiff's contention that defendant, Norma Taylor, was negligent as a matter of law in backing her vehicle out of the parking lot and striking the plaintiff's vehicle which was at

a complete stop with his emergency flashers on and the door open discharging passengers in front of the Creedmore building and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his affidavit stating that his stopped vehicle was struck by the defendant's vehicle while she was backing out of the parking lot. The defendant conceded that her vehicle made contact with plaintiff's parked vehicle as she was backing up. Thus, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting proof that the defendant violated Vehicle and Traffic Law § 1211 (a) (unsafe backing-up). Pursuant to VTL 1211(a) "the driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic" (see Gill v Braasch, 953 NYS2d 783 [4th Dept. 2012]; Bukharetsky v Court St. Off. Supplies, Inc., 82 AD.3d 812 [2d Dept. 2011]; Recinos v Priamo, 94 AD3d 848 [2d Dept. 2012]; Sanabria v Paduch, 61 AD3d 839 [2d Dept 2009]; Ortiz v Calavera, 26 AD3d 319 [2d Dept. 2006]). Here, plaintiff established as a matter of law that defendant was negligent in failing to see that which, under the circumstances, she should have seen in backing her vehicle toward the plaintiff's vehicle before ascertaining that it was safe to do so.

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether the plaintiff 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]).

In opposition to the plaintiff's prima facie showing, the defendant failed to raise any material questions of fact as to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The defendant 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]). Although the defendant alleges that the plaintiff's vehicle was stopped on a roadway blocking an exit to the parking lot, the affidavits submitted show that the presence of the vehicle at that location merely furnished the condition or occasion for the occurrence rather than being one of its causes (see Wechter v Kelner, 40 AD3d 747 [2d Dept. 2007])[liability cannot be imposed upon a party who merely

furnished the condition or occasion for the occurrence of the event but was not one of its causes]; Fermaglich v Arnone, 36 AD3d 584 [2d Dept. 2007]; Gerrity v Muthana, 28 AD3d 1063 [4th Dept. 2006]; Mendrykowski v N.Y. Tel. Co., 2 A.D.3d 1410 [4th Dept. 2003]; O'Malley v. USA Waste of N.Y., Inc., 283 AD2d 409 [2d Dept. 2001]).

The defendant's 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])

Thus, as the evidence in the record demonstrates that there are no triable issues of fact as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, Salvatore Giamundo, shall have partial summary judgment on the issue of liability against the defendant, Norma Taylor, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon the completion of discovery 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 the issues of serious injury threshold and damages.

Dated: April 10, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.