

Kim v Gallman

2015 NY Slip Op 32142(U)

October 19, 2015

Supreme Court, Bronx County

Docket Number: 301451/15

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 4

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Suk Kyung Kim, and Hyun O. Han,

Decision and Order

Plaintiffs

Index No. 301451/15

-against-

Sandy Gallman and Joselito Irizarry,

Defendants

Howard H. Sherman

J.S.C.

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FACTS AND PROCEDURAL HISTORY

Plaintiffs seek recovery for injuries allegedly sustained on December 17, 2014 in a three- vehicle collision that occurred on the Brooklyn/Queens Expressway near the 65th Place , Queens County, New York. At the time, Suk Kyung Kin ("Kim") was the driver , and his wife, Hyun O. Han ("Han"), the passenger, of a vehicle that was twice impacted in the rear while stopped in traffic on the expressway.

Defendant Sandy Gallman ("Gallman") was the owner and operator of the vehicle positioned directly behind the Kim car, and the vehicle of co-defendant Joselito Irizarry ("Irizarry") was behind Gallman's car.

This action was commenced in April 2015, and issue was joined with the service of each defendant's answer in May. The answers assert cross-claims against the co-defendant drivers, and Gallman interposes a counterclaim against Kim.

To date, no Note of Issue has been filed.

Motion

Plaintiffs now move for an award of summary judgment against the defendants on the issue of liability contending that there is no issue of fact that the culpable conduct of the defendant drivers was the sole proximate cause of the motor vehicle accident.

In support they submit copies of the pleadings, and a copy of the police accident report [MV-104],¹ as well as the affidavit of the plaintiff driver attesting to the circumstances of the accident. Accompanying the affidavit is the affidavit of Jennifer Park ("Park") who states that she was born in South Korea, and speaks fluent Korean, and graduated from high school and college in New York, and translated plaintiff's affidavit to her, and the translation is accurate.

In opposition, defendant Irizarry maintains the plaintiffs failed to meet their prima facie burden, pointing out that the copy of the police report is inadmissible as uncertified, and the supporting affidavit of the plaintiff driver is not probative as accompanied by an inadequate attestation of translation, and as it is conclusory in nature.

¹ The uncertified copy of the report is inadmissible.

In reply, plaintiffs argue that defendant has failed to submit an affidavit of anyone with personal knowledge of the facts to raise an issue of fact of a non-negligent explanation for the collision, and contends that the accompanying affidavit of the translator satisfies all requirements for consideration of plaintiff's affidavit. ²

DISCUSSION AND CONCLUSIONS

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 [1980] To support the granting of such a motion, it must clearly appear that no material and triable issue of fact is presented, the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition. Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]; see also, Smalls v.

² The affidavit is submitted with a correction addressed to the gender of the plaintiff driver.

AJI Industires, Inc., 10 NY3d 733, 735 [2008] Moreover, “ [a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent’s proof , but must affirmatively demonstrate the merit of its claim or defense” (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003] Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent’s Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

While summary judgment is “is rarely granted in negligence cases since the very question of whether a defendant’s conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (Wilson v. Sponable, 81 AD2d 1, 5; Siegel , Practice Commentaries , McKinney’s Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) ” Johannsdottir v. Kohn, 90 AD2d 842 [1st Dept. 1982] , such a motion will be granted “where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party.” (Morowitz v. Naughton, 150 AD2d 536 [1st Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67

[1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 Ad3d 276 [1st Dept. 2004]).

In addition, it is settled that a rear end collision with a vehicle establishes a *prima facie* case of negligence against the rearmost driver (see, Woodley v. Ramirez, 25 Ad3d 451 [1st Dept. 2006], as the “rule is that a driver must maintain a safe distance between his vehicle and the one in front of him” (Johnson v. Phillips, 261 AD2d 269,271 [1st Dept. 1999]; see also, Vehicle and Traffic Law § 1129 [a])

In the case of a rear-end collision, summary judgment on liability would properly lie “ unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car [and] [a] claim that the lead vehicle ‘stopped suddenly’ is *generally* insufficient to rebut the presumption of non-negligence on the part of the lead vehicle [emphasis added].” (Woodley v. Ramirez, 25 A.D.3d 451,452 [1st Dept. 2006]).

As a preliminary matter, it is the finding of this court that the affidavit of the translator setting forth both her qualifications and the accuracy of the specific translation, is sufficient for the court’s consideration of the affidavit.

Upon its consideration and the applicable law, it is the further finding of the court that plaintiffs have made their *prima facie* case of entitlement to summary judgment on the issue of liability by demonstrating that their vehicle was stopped in

traffic when twice impacted in the rear by defendant Gallman's vehicle.

In opposition, neither defendant driver comes forward to raise an issue of fact to either controvert Kim's description of the two-impact rear collision, or to offer a non-negligent explanation for the accident, or for the failure to maintain a safe distance behind the respective vehicles.

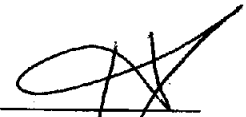
Accordingly, for the reasons above stated, it is ORDERED that the motion of plaintiffs for an order awarding summary judgment on the issue of liability be and hereby is granted pursuant to CPLR 3212, and it is further

ORDERED that summary judgment be entered in favor of plaintiffs as against defendants on the issue of liability, and it is further

ORDERED that upon the completion of all discovery with respect thereto and the filing of the Note of Issue and the payment of all appropriate fees therefor, this matter be set down for an assessment of damages to include determinations of whether each plaintiff sustained a serious injury in the subject motor vehicle accident, as well as proximate cause.

This constitutes the decision and order of this court.

Dated: October 19, 2015


Howard H. Sherman