Sang Woo Joo v Hoehn
2015 NY Slip Op 32320(U)
December 3, 2015
Supreme Court, Suffolk County
Docket Number: 12-17782
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 12-17782
CAL. No. 15-00272MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-18-15 (#001)
MOTION DATE 6-25-15 (#002 & #003)
ADJ. DATE 7-30-15
Mot. Seq. #001- MG
#002- MG
#003- XMD

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SANG WOO JOO,

Plaintiff,

- against -

NICHOLE J. HOEHN, LEVIN W. HOEHN, DARREN S. COHEN, PAUL J. KRYSCUK, EILEEN C. PRUNTY and DOMINIC V. GERALI,

Defendant.

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 24 - 34; Notice of Cross Motion and supporting papers 43 - 50; Answering Affidavits and supporting papers 17 - 18; 35 - 36; 37 - 38; 51 - 55; 56 - 57; Replying Affidavits and supporting papers 19 - 23; 39 - 42; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Paul J. Kryscuk and Eileen C. Prunty for summary judgment dismissing the complaint and all cross claims as asserted against them is granted; and it is further

ORDERED that the motion by defendant Dominic V. Geraci for summary judgment dismissing the complaint and all cross claims as asserted against him is granted; and it is further

ORDERED that the motion by defendants Nichole J. Hoehn and Kevin W. Hoehn for summary judgment dismissing the complaint and all cross claims as asserted against them is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained in a multiple car chain collision that occurred on November 21, 2011, on County Road 16 in Holtsville, New York. Plaintiff alleges one cause of action for negligence against all defendants. Each defendant has answered and cross claimed against all others. Plaintiff operated the first car, a Ford Windstar van, which was stopped at the light on Portion Road at its intersection with Avenue C. Dominic Geraci (sued herein incorrectly as Dominic Gerali) was next in line, and operated a silver Honda Accord. Paul Kryscuk was operating a gray Jeep Grand Cherokee owned by Eileen Prunty, his mother. Darren Cohen was behind Kryscuk and operated a yellow Jeep. Nichole Hoehn, was driving a green Honda, owned by her father, Kevin Hoehn, the last vehicle in the chain. It is alleged that Hoehn's car struck Cohen's. Cohen's Jeep struck Kryscuk's Jeep Grand Cherokee. In turn, Kryscuk's vehicle struck Geraci's. Plaintiff alleges that he was stopped for two minutes when his vehicle was struck in the rear by Geraci's vehicle, and pushed into the intersection, where he struck a left-turning vehicle, not a party to this lawsuit.

Kryscuk, as the third car in the chain, and Prunty, as owner of that car, now move for summary judgment dismissing the complaint and all cross claims as asserted against them. In support of the motion, they submit, among other things, the pleadings, the transcript of Paul Kryscuk's own examination before trial, and transcripts of the examinations before trial of Darren Cohen, Nicole Hoehn, Sang Woo Joo, and Dominic Geraci. Plaintiff opposes the motion, in an affirmation dated June 27, 2015, notarized July 27, 2015, filed July 30, 2015. In reply, Kryscuk and Prunty argue the opposition papers are late, and they supply a copy of the postal envelope stamped July 31, 2015.

Geraci, as the second car in the chain, moves for summary judgment dismissing the complaint and all cross claims asserted against him. In support of the motion he submits, among other things, the pleadings, the transcript of his own examination before trial, and the transcripts of the examinations before trial of Sang Woo Joo, Paul Kryscuk, Darren Cohen, and Nichole Hoehn. Kryscuk submits "limited opposition" to the motion arguing that Kryscuk is not responsible for the accident. Plaintiff opposes the motion. In reply, Geraci argues that the plaintiff's opposition papers are untimely.

As to the timeliness of plaintiff's opposition, conclusive evidence of the postal envelope stamped July 31, 2015, establishes that the opposition papers are untimely. Kryscuk's reply is also untimely. Pursuant to CPLR 2214 (b) all answering papers were required to be served at least seven days before the return date or adjourned date of the motion, July 30, 2015. Pursuant to CPLR 2214 (c) "[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion unless the court for good cause shall otherwise direct." A court has the discretion to consider late opposition papers, provided it affords the movant time to submit reply papers (***Kavakis v Total Care Systems***, 209 AD2d 480, 619 NYS2d 634 [2d Dept 1994]). The movant did not ask for time to submit a reply and has not shown that it would suffer any prejudice by the Court's acceptance of late

opposition papers. Accordingly, the Court has considered the plaintiff's answering opposition papers, as well as the late reply.

Nicole Hoehn, the driver of the last car in the chain, and Kevin Hoehn as owner of the vehicle, also move for summary judgment dismissing the complaint and all cross claims as asserted against them. In support of the motion they submit, among other things, the amended summons and complaint, their answer, but not the answers of other defendants, portions of the transcript of plaintiff's examination before trial, transcripts of the examinations before trial of Nichole Hoehn, and Darren Cohen. Kryscuk, in "partial opposition" argues that Kryscuk was stopped when his vehicle was struck in the rear. In opposition, plaintiff submits the accident report, and the transcripts of the examinations before trial of Dominic Geraci, and Sang Woo Joo.

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]).

As to the first motion, Kryscuk and Prunty have established from undisputed evidence that prior to the accident, their Jeep Grand Cherokee was at a complete stop because of heavy traffic, when it was struck in the rear by Cohen's yellow Jeep. The impact to the rear of this vehicle pushed the car forward into Geraci's car. Cohen's examination before trial testimony confirms that he too was at a complete stop when a heavy impact to the rear of his vehicle pushed it eight to ten feet forward into Kryscuk's vehicle. Cohen did not see or hear any other collisions prior to the accident. Hoehn's testimony at her examination before trial confirms that the Cohen vehicle was stopped at the time of impact and that her car struck the rear of Cohen's. She could not see in front of Cohen's car and "did not see any other collisions." She had "no idea" what happened among the cars in front of Cohen's. Plaintiff's testimony at his examination before trial further establishes the chain collision in that he was stopped for two minutes, when his vehicle was struck in the rear by Geraci's and pushed into the car in front of him.

It is well-settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Carhuayano v J & R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept2004]; ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; *see also* Vehicle and Traffic Law § 1129 [a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, unavoidable skidding on a wet pavement, or some other reasonable excuse (*see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010];

Carhuayano v J & R Hacking, *supra*; ***Rainford v Sung S. Han***, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]).

In multiple-car, chain-reaction accidents the courts have recognized that the operator of a vehicle which is stopped or coming to a stop and is propelled into the vehicle in front of it, as a result of being struck from behind, is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision (*see* ***Mohamed v Town of Niskayuna***, 267 AD2d 909, 700 NYS2d 551 [3d Dept 1999]; ***Vargas v Muhammad Akbar***, 123 AD3d 1016, 999 NYS2d 163 [2d Dept 2014]). The collision between Kryscuk vehicle and Geraci's vehicle merely furnished the occasion for the occurrence of the accident, and was not one of its causes (*see* ***Sheehan v City of New York***, 40 NY2d 496, 503, 387 NYS2d 92 [1976]; ***Cuccio v Ciotkosz***, 43 AD3d 850, 851, 841 NYS2d 686 [2d Dept 2007]). Here, Kryscuk testified that as a result of the impact, he hit the car in front of him. This testimony is consistent with the examination before trial testimony of plaintiff, and Geraci. Thus, the evidence establishes that Hoehn was the sole cause of this accident. Kryscuk has established a *prima facie* entitlement to summary judgment in his favor. No liability, therefore, attaches to the fourth vehicle in this five car chain reaction accident (*see* ***Mustafaj v Driscoll***, 5 AD3d 138, 773 NYS2d 26 [1st Dept 2004]).

Plaintiff's primary objection to Kryscuk's motion to dismiss the complaint and all cross claims asserted against him is that Kryscuk was traveling too fast and stopped abruptly. Contrary to plaintiff's position, Kryscuk's vehicle did not strike Geraci's vehicle prior to his vehicle being struck in the rear by Cohen's vehicle. Kryscuk was stopped for two seconds, and despite "a pretty abrupt stop" his vehicle did not strike Geraci's until pushed by Cohen's vehicle. Plaintiff has not produced evidence in admissible form sufficient to require a trial of material issues of fact, in that the evidence of Kryscuk's full stop is undisputed (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). Accordingly, the motion by Kryscuk and Prunty for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims as asserted against them is granted.

Turning to Geraci's motion for summary judgment dismissing the complaint and all cross-claims as asserted against him, Geraci as the second car in this five vehicle accident, has established his entitlement to summary judgment as a matter of law. Geraci testified at his examination before trial that he was stopped for five or six seconds before his vehicle was struck from behind. He heard two collisions behind him. When struck, his car moved six to eight feet forward into plaintiff's car. Likewise, Kryscuk testified that his car was at a complete stop with about one-half a car length separating them. He also testified that Hoehn said she was sorry that she had caused the accident and admitted her fault at the scene. Cohen testified that he was stopped behind stopped vehicles in traffic. When he was at a complete stop, the Jeep was eight to ten feet in front of him. Cohen did not see or hear any collisions prior to the impact to the rear of his vehicle.

Plaintiff's objection to the motion is entirely speculative. It is alleged, without foundation, that a reasonable person would have moved their vehicle forward in the five to six seconds prior to the rear impact to Geraci's vehicle or "at least sounded his horn in order to warn the car in front of him of an accident." Plaintiff also alleges that as proponent of the motion, Geraci has not met his initial burden by proving a non-negligent explanation for striking plaintiff. To the contrary, as discussed above, it is

uncontroverted that Geraci was stopped behind plaintiff and the rear impact to Geraci's vehicle pushed his car into plaintiff's. Plaintiff has not produced evidence in admissible form sufficient to require a trial of material issues of fact, in that the evidence of Geraci's full stop is undisputed. Accordingly, the motion by Geraci for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims as asserted against him is granted.

Finally, Nichole Hoehn, as operator, and Kevin Hoehn, as owner, of the last car in this multiple-chain car accident, move for summary judgment dismissing the complaint and all cross claims as asserted against them. They maintain that, contrary to all of the admissible evidence discussed above, the accident involved two separate and distinct automobile accidents. It is alleged that Sang Woo Joo's vehicle was struck by Dominic Geraci's vehicle. It is alleged that "afterward," Hoehn's vehicle struck Cohen's vehicle pushing Cohen's vehicle into Kryscuk's into Geraci *after* Geraci struck plaintiff's car. In support of the two-accident theory, Hoehn testified at her examination before trial, that she heard the accident before she saw it. While she couldn't see past the Jeep, the car in front of her, she heard one crash thirty seconds to a minute before her vehicle struck the yellow Jeep. Cohen also testified at his examination before trial that he heard from "people on the street" that plaintiff actually hit the left-turning vehicle belonging to non-party Michael Ambroio prior to the chain-reaction.

Both two-accident theories, Geraci's vehicle striking Joo's first, and then a chain reaction occurring and Joo's vehicle striking left-turning Michael Ambroio's vehicle first, and then a chain reaction occurring are speculative. Cohen's testimony is based upon inadmissible hearsay, "people on the street said . . .." Hoehn testified she had "no idea" as to what transpired among the cars that were in front of the yellow Jeep. She relied on what she was told happened and did not actually see any other car crash. Moreover, Cohen testified that Hoehn admitted to speeding and going fast, causing the accident. Given Nichole Hoehn's own testimony at her examination before trial, the Hoehn defendants have not established their *prima facie* entitlement to dismissal of the complaint or any cross claim. The Court has not considered the police accident report submitted in opposition, as it is not certified pursuant to CPLR 4518 and is therefore inadmissable. It also noted that the Hoehns' failure to submit the co-defendants' answers, which contain cross claims, is fatal to the motion (*see* CPLR 3212 [b]). Accordingly, the motion by the Hoehn defendants for summary judgment dismissing the complaint and the cross claims as asserted against them is denied.

Dated: December 3, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION