

Franco v Maurad

2016 NY Slip Op 30025(U)

January 7, 2016

Supreme Court, Queens County

Docket Number: 11796/2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CARLOS FRANCO, et al.,
Plaintiff(s),

Index
No. 11796 2013

- against -

Motion
Date November 16, 2015

DANNY MAURAD,
Defendant(s).

Motion
Cal. No. 61

DANNY MAURAD,
Third-Party Plaintiff,

Motion
Seq. No. 10

-against-

ISHA P. MEHTA, et ano.,
Third-Party Defendants.

The following papers numbered 1 to 6 read on this motion by third-party defendant Christopher Saire (Saire) for an order granting him leave to renew his prior cross motion for summary judgment pursuant to CPLR 2221 (e) and, upon such renewal, for summary judgment dismissing the third-party complaint and all cross-claims.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-6

Upon the foregoing papers it is ordered that the motion is determined as follows:

By prior order dated May 6, 2015, this court granted the motion by third-party defendant Isha P. Mehta (Mehta) for an order granting her summary judgment dismissing the

third-party complaint and all cross-claims against her. It was noted in said order, upon this court's recitation of the papers used on the motion, that, though the court received an opposition by defendant/third-party plaintiff Danny Maurad (Maurad) to "the summary judgment cross motion on the issue of liability by Third-Party Defendant Christopher Saire," neither a cross motion nor reply papers to this opposition by Saire was actually received from the Centralized Motion Part (CMP).

Saire now makes the instant motion for leave to renew its cross motion. In support, Saire presents, *inter alia*, a copy of its prior cross motion together with an affidavit of service, indicating that same was served upon all parties to the action on February 17, 2015; a copy of the reply to Maurad's opposition to the cross motion together with an affidavit of service, indicating that same was served upon all parties to the action on March 12, 2015; a copy of a cancelled check dated February 17, 2015 cashed by the Queens County Clerk, which reflects a payment of the \$45.00 cross motion fee paid by Saire; and the affidavit of Zaneke Powe, assistant managing clerk of inSync Litigation Support, LLC (ILS), wherein it was detailed that ILS filed and paid for the cross motion fee on behalf of Saire's counsel on or about February 19, 2015, and that ILS also submitted said cross motion and a reply affirmation to the CMP on March 20, 2015.¹

Maurad opposes that branch of Saire's motion for leave to renew, noting, *inter alia*, that it took Saire nearly six months from the date of this court's May 6, 2015 order to make the instant application, and further that it is "extremely odd" that all papers, with the exception of Saire's, were received by the court. Maurad also avers that consideration of the motion would prejudice him in that – as of the time the opposition was prepared – the case was scheduled for trial on November 18, 2015 (two days after the motion was marked submitted in CMP). Maurad also argues that CPLR 2221 (e) is inapplicable as this is not a circumstance in which there are new facts and, as such, Saire cannot offer a "reasonable justification for the failure to present such facts on the prior motion" as required by CPLR 2221 (e) (3).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; see *Parker v New York City Hous. Auth.*, 81 AD3d 964 [2011]; *Ramirez v Khan*, 60 AD3d 748 [2009]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759 [2007]).

1. Though the affiant states that "[o]n March 20, 2015, the Motion was marked fully submitted by the CMP Calendar Clerk, court records indicate that the prior motion was actually fully submitted on April 27, 2015.

Though the circumstances of this case as presented do not fit neatly into a CPLR 2221 (e) framework, the court finds it appropriate to grant that branch of Saire's motion to renew its prior cross motion for summary judgment. It is clear from the evidence presented that Saire filed and paid for his cross motion for summary judgment, to which Maurad had an opportunity to – and, in fact – did oppose, but that, for reasons unknown to this court (and to Saire, for that matter), the cross motion and reply were never received. Though Maurad indicates that Saire did not present a reasonable justification for his failure to present these new facts on the prior cross motion, the court finds that Maurad did so by virtue of establishing that there was no need to present such facts until it was discovered by him that his papers were not received and, consequently, not considered by the court.

Moreover, the prejudice cited by Maurad is rendered moot in light of the fact that, when the matter appeared in the Trial Scheduling Part on November 18, 2015, the note of issue was vacated (*see e.g. Pandolf v American Intl. Group, Inc.*, 16 AD3d 315 [2005]).

Turning to that branch of the motion seeking summary judgment, Saire, referencing its prior cross motion, relies upon the same evidence and testimony which was presented in support of Mehta's motion, namely: that the evidence demonstrates that Maurad was the cause of this chain reaction accident. A recitation of the facts, thus, as presented in the May 6, 2015 order, is warranted; therein, the court outlined the pertinent testimonies of the respective parties:

“Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained as a result of multi-vehicle accident which occurred on January 3, 2012 on Broadway at or near its intersection with 82nd Street, in the County of Queens, City and State of New York. . . .

“Mehta testified, in relevant part, that she was traveling on Broadway, which has one lane of travel in each direction, when she was struck in the rear by the vehicle being driven by Saire.

“Saire testified, in relevant part: that he was traveling along Broadway in heavy traffic; that the roads were dry; that he gradually stopped behind Mehta's vehicle, which was also stopped, for approximately five seconds before his vehicle was struck in the rear by the vehicle being driven by plaintiff Carlos Franco (Franco); and that said impact caused his vehicle to strike Mehta's in the rear.

“Franco testified, in relevant part: that he was traveling along Broadway; that the roads were dry; that he was moving at the time of impact,

as was the vehicle being driven by Saire; that he noticed the vehicle being driven by Maurad behind him; that Maurad's vehicle then struck his in the rear; and that he could not recall whether the impact between his vehicle and Maurad's vehicle caused him to strike Saire's vehicle. Plaintiffs Maria and Alejandro Franco, who were passengers in Franco's vehicle, also testified essentially to the same facts as Franco, to wit: that their vehicle was struck in the rear by the vehicle being driven by Maurad, thereby propelling them into Saire's vehicle.

“Maurad testified, in relevant part: that he was traveling along Broadway; that the roads were slippery with powdery snow thereon; that a nonparty's vehicle quickly entered their lane of travel from the parking lane, which initially did not involve Maurad's vehicle, whereby Mehta suddenly braked to successfully avoid impact with the nonparty; that Saire was also able to avoid contact; that Franco was unable to avoid the collision, as he struck Saire, who then struck Mehta; that he heard the screeching of tires and saw these events, which included all vehicles' brake lights having been illuminated, at which point he started to stop, but began to slide and could not veer to the right or left due to traffic conditions, and was ultimately unable to avoid striking plaintiffs' vehicle; and that, as a result of the impact to plaintiffs' vehicle, same was propelled into the others.”

It is well-settled that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision” (*Rainford v Sung S. Han*, 18 AD3d 638 [2005]; see *Malak v Wynder*, 56 AD3d 622 [2008]; *Katz v Masada II Car & Limo Serv., Inc.*, 43 AD3d 876 [2007]). Here, Saire has met his burden by demonstrating that he was either stopped or stopping on Broadway behind Mehta's vehicle when plaintiffs' vehicle struck his vehicle in the rear, thus demonstrating that he was not the proximate cause of the accident. Thus, Maurad – who was operating the rear-most vehicle – is required to rebut the inference of negligence on his part (see e.g. *Drakh v Levin*, 123 AD3d 1084 [2014]; *Timm v Barilli*, 109 AD3d 655 [2013]; *Strickland v Tirino*, 99 AD3d 888 [2012]).

Maurad has failed to raise a triable issue of fact in opposition to the motion. That Franco could not recall whether the impact between his and Maurad's vehicle caused him to strike Saire's vehicle has no bearing on whether Saire is liable for plaintiffs' injuries as a result of the accident, as this testimony does not present a version which conflicts with Saire's recounting, *i.e.*, that Franco indeed struck his vehicle in the rear, thereby propelling

him into Mehta's vehicle² (see *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472 [2008]). To that end, Maurad's contention that "[i]t could be argued that but for defendant Saire's failure to stop and strike the rear of defendant Mehta's vehicle is what caused the chain reaction" is without merit, inasmuch as, notably, there has been no testimony presented that Saire independently struck Mehta's vehicle. It should further be noted that Maurad himself testified that Saire, like Mehta, was successfully able to avoid impact due to a nonparty having entered the parties' lane of travel.

Further, as stated in this court's May 6, 2015 order, Maurad was not faced with an emergency situation as suggested by him (*compare Honold v Karwowski*, 124 AD3d 724 [2015] [doctrine applies when driver faced with vehicle crossing over into oncoming traffic], *and Garcia v Stewart*, 120 AD3d 1298 [2014] [doctrine applies when driver faced with another falling asleep behind the wheel and crossing double-yellow line], *and Quinones v Altman*, 116 AD3d 686 [2014] [doctrine applies when driver faced with vehicle being "catapulted" into path of travel]; *with Pearson v Northstar Limousine, Inc.*, 123 AD3d 991 [2014] [doctrine does not apply when emergency was partially created by a driver's disregard of existing traffic conditions]).

Maurad's remaining contentions, which are essentially the same as those presented in opposition to Mehta's motion, are without merit (*see* May 6, 2015 order).

Accordingly, Saire's motion for an order granting him leave to renew his prior motion and, upon such leave, for summary judgment in his favor dismissing the third-party complaint and all cross-claims is granted.

Dated: January 7, 2016

J.S.C.

2. It may, however, present sufficient evidence to establish Franco's potential comparative negligence as it relates to his suit against Maurad.