

**Gitman v Martinez**

2016 NY Slip Op 33081(U)

February 17, 2016

Supreme Court, Ulster County

Docket Number: 13-4087

Judge: Michael H. Melkonian

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

CATHY GITMAN,

Plaintiff,

-against-

**DECISION**  
**AND**  
**ORDER -**  
**AMENDED**

RUBEN MARTINEZ, CRETE CARRIER CORP.,  
HERBERT BENNER and ZOOK TRUCKING, LLC,  
Defendants.

(Supreme Court, Ulster County, Motion Term, February 9, 2016)  
Index No. 13-4087  
(RJI No. 55-14-00344)

(Acting Justice Michael H. Melkonian, Presiding)

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4 H 04 M  
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MELKONIAN, J.:

This is an action for damages for personal injuries arising out of a three-vehicle chain-reaction accident which took place on September 19, 2013, between the motor vehicle operated by plaintiff Cathy Gitman ("plaintiff"), the tractor-trailer owned by defendant Zook Trucking, LLC ("Zook") and operated by defendant Herbert Benner ("Benner") (collectively referred to herein as the "Zook defendants") and the tractor-trailer owned defendant Crete Carrier Corp. ("Crete") and operated by defendant Ruben Martinez ("Martinez") (collectively referred to herein as the "Crete defendants"). Plaintiff's motor vehicle was the first in the chain. The accident occurred on Interstate 87 in the Town of Rosendale.

Plaintiff moved for partial summary judgment on liability on the ground that Benner's tractor-trailer was rear-ended by Martinez's tractor-trailer, which caused Benner's tractor-trailer to be propelled into the plaintiff's motor vehicle. The motion was served on or about July 25, 2014 and was returnable on September 22, 2014. By Decision and Order dated December 3, 2014, this Court granted plaintiff's motion for partial summary judgment on liability and, upon searching the record (CPLR § 3212[b], [e]), granted summary judgment to the Zook defendants dismissing the complaint and all cross-claims insofar as asserted against them.

On January 30, 2015, the Crete defendants moved pursuant to CPLR § 2221 for leave to renew and upon renewal to vacate the Court's December 3, 2014 Decision and Order. In

so moving, the Crete defendants argued that they uncovered “new facts” that they claimed were unavailable to them at the time of the original motion. The “new facts” that the Crete defendants relied upon consisted of a September 19, 2013 ambulance report from Kingston Hospital, which contains a notation that states plaintiff “reports that she was rear-ended by a tractor trailer and then the tractor trailer that hit her was then hit by another tractor trailer causing her to spin off the roadway.”

In a Decision and Order dated June 18, 2015, this Court denied the Crete defendants’ motion to renew finding that their failure to submit the new evidence earlier was the result of their failure to exercise due diligence (see, CPLR § 2221[e][3]). This Court further found that under the circumstances, as stated in the prior decision of December 3, 2014, the Crete defendants failed to submit evidence as to any negligence on the part of Benner or plaintiff or to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact.

The Crete defendants now move once again for leave to renew and upon renewal to vacate the Court’s December 3, 2014 Decision and Order which, as afore stated, granted summary judgment to plaintiff on the issue of liability and, upon searching the record (CPLR § 3212[b], [e]), granted summary judgment to the Zook defendants dismissing the complaint and all cross-claims insofar as asserted against them.

A motion for leave to renew must be based on new or additional facts “not offered on the prior motion that would change the prior determination” and “shall contain a reasonable

justification for the failure to present such facts on the prior motion” (CPLR § 2221[e][2], [3]).

Here, the Crete defendants base their motion on the examination before trial testimony of the plaintiff, who had yet to be deposed when this Court issued its December 13, 2014 Decision and Order and January 30, 2015 Decision and Order. At her deposition, plaintiff described the accident as a chain collision involving three vehicles in which her vehicle was the first in line. She testified that while her vehicle was stopped, she indeed felt two separate impacts to the rear of her vehicle. The tractor-trailer immediately in back of her vehicle was operated by Benner. The tractor-trailer immediately in back of Benner’s tractor-trailer was operated by Martinez.

She testified:

- Q: What do you remember about being hit?  
A: A massive impact, you know, in the back from behind.  
Q: After you were hit, what did you do?  
Put my foot on the brake, gripped the steering wheel hard, attempted to keep the car under control and not hit anyone around me and I stayed in the lane I was in keeping the car from swerving.  
Q: Where did your vehicle come to rest?  
A: In a ditch on the right side of the northbound side.  
Q: How was it that you ended up over there?  
A: I was hit a second time or there was a second impact.  
Q: How much time elapsed between the first impact and the second impact, if you know?  
A: Everything was happening very fast. Maybe three seconds.  
Q: What happened when you were hit the second time? Were you hit by the same vehicle again?  
A: I don’t know. I assume it was. I don’t know. I was

looking straight ahead. I just felt the impact and I imagine I was hit twice by whatever was behind me.

Q: When you say you assume, what makes you assume .....that?

A: Well, something hit me from behind. I was hit in the rear and I had --- it slammed me twice. What it was, I don't know.

Q: When you were hit the second time, is that when you went off the road?

A: When I was hit the second time, the car was then out of control and spinning and I came to a rest on the side of the road.

Q: Now, I want to go back to your testimony a little bit. Earlier in your testimony, you mentioned you remembered what you called a massive impact and then you hit your brake and began turning your wheel. Which way were you turning your wheel after that first impact?

A: I was not turning my wheel. I was keeping the car straight. I put my hands on the steering wheel at 10 and 2 and held the car straight.

Q: After that first impact, did you continue straight ahead or did you turn somewhat?

A: Yes.

Q: You were continuing straight ahead?

A: Yes.

Q: Were you actually able to hit the brake?

Mr. McCarthy: After the first hit?

Q: After the first impact and before the second impact?

A: Yes.

Q: After you hit the brake, that was --- (Interrupted)

A: After I was hit --- after I was hit the first time, even though I applied the brake hard, I accelerated forward at an increasing rate and then was hit a second time.

Q: When you say that you were accelerating, was that from the force of that first impact?

A: Yes.

Q: What is the first thing you remember after the second hit?

A: Screaming.

Q: Was your vehicle already stopped at that point on the side?

- A: At what point?
- Q: After the second hit and when you screamed or was your vehicle still moving?
- A: My vehicle was still moving. It was spinning.
- Q: After your vehicle came to a rest, what do you remember next? Just kind of walk me through what happened after that?
- A: It was severe, severe pain. I mean I was in pain after was hit the first time.
- Q: Where was the pain after you were hit the first time?
- A: My whole body. Through my back, my neck, my hands, my knees.
- Q: When you were struck the first time, did your body come into contact with any portion of the inside of the vehicle, if you know what I mean?
- A: I was thrown around somewhat, but the second impact was greater and that really threw me around.
- Q: I just want to slow it down for one second and go back to that moment that you were first hit. You're driving. Did you have two hands on the wheel, if you know?
- A: Yes. Yes.
- Q: What was the initial movement that your body made inside the vehicle?
- A: Like lurching forward.
- Q: You went forward?
- A: Yes.
- Q: Then there was the second impact. What did your body do at that point? Forward again?
- A: Hard to remember. I was in different directions.
- Q: Anywhere specific that you remember pain? You said your whole body, hands, knees?
- A: That was after the first impact. The second impact --- and for the first impact, also I felt something, pain go through my whole --- like down my spine and the second impact was more greater pain in more areas of my body.

The fact that plaintiff felt two separate impacts to the rear of her vehicle constitutes competent evidence sufficient to raise a triable issue of fact as to whether Benner's tractor-

trailer rear ended her vehicle before Martinez's tractor-trailer rear-ended Benner's tractor-trailer (Exantus v Town of Ossining, 266 AD2d 502, 502 [2<sup>nd</sup> Dept. 1999]). Thus, the Court finds that the Crete defendants met their burden of setting forth "new facts not offered on the prior motion that would change the prior determination" and "reasonable justification for the failure to present such facts on the prior motion" (see, Hurrell-Harring v State of New York, 112 AD3d 1217 [3<sup>rd</sup> Dept. 2013]). Accordingly, the Crete defendants' motion to renew is granted, and upon renewal, this Court's December 13, 2014 Decision and Order is modified to reflect that plaintiff's complaint against the Zook defendants is reinstated as well as any cross-claims asserted between the defendants.

This Memorandum constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the Crete defendants. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of CPLR Rule 2220 respecting filing, entry and Notice of Entry.

SO ORDERED.  
ENTER.

Dated: Troy, New York  
February 17, 2016

FILED  
4 H of M  
FEB 24 2016

NINA POSTUPACK  
ULSTER COUNTY CLERK

  
MICHAEL H. MELKONIAN  
Acting Supreme Court Justice

Papers Considered:

- (1) Notice of Motion dated January 4, 2016;
- (2) Affirmation of Steven J. Auletta, Esq., dated January 4, 2016, with

exhibits annexed;

- (3) Memorandum of Law dated January 4, 2016;
- (4) Affirmation of Michelle M. Davoli, Esq., dated February 2, 2015,  
with exhibits annexed;
- (5) Memorandum of Law dated February 2, 2016;
- (6) Affirmation of Ellen Buchholz, Esq., dated February 4, 2016; and
- (7) Affirmation of Steven J. Auletta, Esq., dated February 11, 2016.