

**Ulerio-Garcia v Rodriguez**

2017 NY Slip Op 32005(U)

September 21, 2017

Supreme Court, Queens County

Docket Number: 710705/2016

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

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

- - - - - x

JHONATAN ULERIO-GARCIA, Index No.: 710705/2016

Plaintiff, Motion Date: 9/15/17

- against - Motion No.: 170

JUAN A. RODRIGUEZ, S STRYSZOWSKI, Motion Seq.: 1
DANUTA STRYSZOWSKA and JOHNPETER
JALBERT,

Defendants.

- - - - - x

The following electronically filed documents read on this motion
by defendant JUAN A. RODRIGUEZ for an Order pursuant to CPLR
3212, granting summary judgment in favor of defendant JUAN A.
RODRIGUEZ and dismissing the complaint asserted against him:

Table with 2 columns: Document Name and Papers Numbered. Includes entries like 'Notice of Motion-Affirmation-Exhibits' and 'Defendant Jalbert's Aff. in Opposition-Exhibits'.

In this negligence action, plaintiff seeks to recover
damages for personal injuries allegedly sustained as a result of
a three-car accident that occurred on January 24, 2016 on the
southbound Major Deegan Expressway, in Bronx County, New York.

Plaintiff, a passenger in the vehicle operated by defendant
Rodriguez, commenced this action by filing a summons and verified
complaint on September 6, 2016. Defendant Jalbert joined issue by
service of a verified answer with cross-claim dated October 25,
2016. Defendants Stryszowski and Stryszowska joined issue by
service of an answer with cross-claim on or about November 10,
2016. Defendant Rodriguez joined issue by service of a verified
answer with cross-claim dated January 30, 2017. Defendant
Rodriguez now moves for summary judgment on the ground that he

bears no liability for the happening of this accident.

In support of the motion, defendant Rodriguez submits his own affidavit dated June 9, 2017, affirming that on the date of the subject accident he was operating a 2006 Mercedes Benz. The vehicle, including the brake lights, was in good working order. Traffic on the Major Deegan was moving. He was two car-lengths behind the vehicle ahead of his vehicle. His vehicle was traveling fifty miles per hour. He saw the vehicle ahead of him slow down and apply its brakes. He applied his brakes gradually and reduced his speed to forty-five miles per hour. A few seconds later, he felt an impact to the rear of his vehicle. There were no other impacts involving his vehicle. The vehicle that struck his vehicle from behind was a 2005 Lexus operated by defendant Stryszowski.

Based on his affidavit, defendant Rodriguez contends that the accident was caused solely by co-defendants' negligence in that, inter alia, co-defendants failed to maintain a safe distance between their vehicle and the vehicle travelling in front of their vehicle in violation of VTL § 1129(a) and failed to avoid striking the vehicle in front in the rear. Defendant Rodriguez further contends that he was free from culpable conduct as he was the lead vehicle in this three-car accident.

In opposition, co-defendant Jalbert submits an affidavit dated June 26, 2017. Although co-defendant Jalbert's affidavit lacks a certificate of conformity, the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect (see Fuller v Nesbitt, 116 AD3d 999 [2d Dept. 2014]; Todd v Green, 122 AD3d 831 [2d Dept. 2014]; Fredette v Town of Southampton, 95 AD3d 940 [2d Dept. 2012]). Accordingly, in its discretion, this Court will consider Jalbert's affidavit.

Co-defendant Jalbert affirms that he was involved in the subject three-car accident. The accident occurred on the southbound Major Deegan Expressway in the far left lane. He was operating a 2009 Subaru Outback at the time of the accident. He was travelling behind a Lexus (Stryszowski) at the time of the accident. He was travelling in the far left lane at approximately thirty miles per hour. The traffic conditions were flowing normally at the time of the accident. The distance between the front of his vehicle and the rear of the Lexus was approximately three car lengths. As he was traveling in the left lane, he saw the Mercedes Benz (Rodriguez) pass him in the lane immediately to his right. The Mercedes Benz then cut of the Lexus by moving from the lane it was travelling in into the left most lane. This caused the Lexus to suddenly apply its brakes. The Lexus was unable to stop in time and struck the rear of the Mercedes Benz.

The impact between the Lexus and Mercedes Benz caused the Lexus to stop short. He quickly applied his brakes, but was unable to stop in time. As a result of the sudden, abrupt stop by the Lexus, his vehicle came into contact with the Lexus.

Defendant Jalbert also submits a copy of the Police Accident Report (MV-104AN). In the accident description portion, the responding officer noted:

"At TPO Driver Vehicle 1 (Rodriguez) states drove South of deegan when uninvolved vehicle cut in front and hit brakes. Vehicle 1 hit brakes then Vehicle 2 (Stryszowski) hit Vehicle 1 in rear. Vehicle 2 states Vehicle 1 stop short causing Vehicle 2 to strike 1 causing Vehicle 2 to be struck by Vehicle 3 (Jalbert). Vehicle 3 states Vehicle 2 stopped short causing Vehicle 3 to strike 2."

Based on his affidavit, co-defendant Jalbert contends that defendant Rodriguez violated Vehicle and Traffic Law 1128(a) by failing to ascertain that the lane change could be made safely. Additionally, co-defendant Jalbert contends that the motion must be denied as there are differing versions of how the accident occurred.

Plaintiff also opposes the motion on the ground that the motion is premature as the depositions of the defendants have not been held and discovery is not yet complete. Plaintiff also contends that issues of fact exist as to how the accident occurred.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. 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 or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]). "A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (Myers v Fir Cab Corp., 64 NY2d 806 [1985]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a

reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Hearn v Manzolillo, 103 AD3d 689 [2d Dept 2013]; Taing v Drewery, 100 AD3d 740; Kastritsios v Marcello, 84 AD3d 1174[2d Dept. 2011]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, moving defendant Rodriguez affirmed that his vehicle was slowing down when it was struck in the rear. Thus, defendant Rodriguez satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]).

However, viewing the evidence submitted in the light most favorable to the nonmoving parties, the Police Accident Report and co-defendant Jalbert's affidavit stating that defendant Rodriguez changed lanes directly in front of co-defendant Stryszowski's vehicle raise a triable issue of fact as to the proximate cause of the subject accident and is sufficient to rebut the inference negligence (see Ortiz v Hub Truck Rental Corp., 82 AD3d 725 [2d Dept. 2011][finding that evidence that a plaintiff's vehicle made a sudden lane change directly in front of a defendant's vehicle, forcing that defendant to stop suddenly, is sufficient to rebut the inference of negligence]; Reitz v. Seagate Trucking, Inc., 71 AD3d 975 [2d Dept. 2010][finding that the defendants rebutted the inference of negligence by adducing evidence that the plaintiffs' vehicle suddenly changed lanes directly in front of their vehicle, forcing the defendant to stop suddenly]; Oguzturk v. General Elec. Co., 65 AD3d 1110 [2d Dept. 2009]). Additionally, in view of the conflicting testimony including whether defendant was traveling in the center lane or left lane immediately prior to the accident, defendant has not demonstrated as a matter of law that he was free from comparative negligence (see Martinez v Martinez, 93 AD3d 76 [2d Dept. 2012][finding that in light of the conflicting deposition testimony submitted in support of the motion, the defendant failed to eliminate all triable issues of fact]; Camarillo v Sandoval, 90 AD3d 593 [2d Dept. 2011]; Purcell v Axelsen, 286 AD2d 379 [2d Dept. 2001][finding where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide]).

Moreover, a "court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N.Y. & N.J., 46 AD3d 501 [2d Dept. 2007]). As the parties have presented differing versions as to how the accident occurred, there are triable issues of fact (see Boockvor v Fischer, 56 AD3d 405 [2d Dept. 2008]; Makaj v Metropolitan Transp. Auth., 18 AD3d 625 [2d Dept. 2005]).

Accordingly, for the above stated reasons, it is hereby,

ORDERED, that defendant JUAN A. RODRIGUEZ's motion for summary judgment is denied.

Dated: September 21, 2017  
Long Island City, N.Y.

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**ROBERT J. McDONALD**  
**J.S.C.**