

Gold-Cumberbatch v Gilani
2017 NY Slip Op 33397(U)
June 19, 2017
Supreme Court, Westchester County
Docket Number: Index No. 68943/2016
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
MORGAN GOLD-CUMBERBATCH,

Plaintiff,

-against-

SANA GILANI, SAEEDA ASAD GILANI, HUNTER
KLEIN and STUART KLEIN,

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 14 were read on the motion of Morgan Gold-Cumberbatch ("plaintiff") for partial summary judgment as to liability, made pursuant to CPLR 3212, as against defendants Sana Gilani and Saeeda Asad Gilani, Hunter Klein and Stuart Klein. ("defendants"):

PAPERS

NUMBERED

Notice of Motion, Affirmation, Exhibits A-G ¹	1-9
Gilani Affirmation in Opposition	10
Klein Affirmation and Affidavit in Opposition	11-12
Reply Affirmation, Exhibit H	13-14

Upon the foregoing papers, the court determines as follows:

In this action for personal injury, plaintiff alleges she was involved in two separate and unrelated motor vehicle accidents occurring approximately a year apart in different counties, as described in greater detail, *infra*. The original summons and complaint were filed a week before the second accident [E-file Doc. 1] followed by an amended complaint filed a week after the second accident [E-file Doc. 3]. Based upon this factual/legal

¹ Court rules require plaintiff to use numbered exhibit tabs.

scenario, there is an apparent misjoinder of parties under CPLR § 1003 as the claims do not arise out of the same transaction or occurrence and involve completely independent and unrelated defendants. Although the court is within its right to sever the action *sua sponte* [CPLR § 1003], it will decide this motion as one, and leave resolution of the joinder issue for a later date.

First cause of action (Gilani)

Plaintiff, in her affirmation, alleges as follows: on December 30, 2015 at 4:20 p.m., she was operating her vehicle southbound, on the Bronx River Parkway in Eastchester in Westchester County when she brought her vehicle to a stop in the left turn lane behind traffic at a red light. Plaintiff was stopped for at least ten seconds. As soon as the light turned green, another vehicle, "suddenly and without signaling or warning" moved into plaintiff's lane and struck the front passenger's side of her vehicle. Both the vehicle in front of plaintiff and plaintiff's vehicle were still stopped at the time of the collision. Plaintiff's vehicle was pushed into the guardrail on her left as a result of the impact of the defendant's vehicle. Later the plaintiff learned that this car was driven by defendant Sana Gilani and owned by defendant Saeeda Asad Gilani. According to the certified police accident report [Pltf Ex. G], defendant told the police officer who responded to the scene that she was changing lanes when she sideswiped the plaintiff's vehicle. These facts are uncontroverted as there is no affidavit from the defendant driver or other contradictory proof submitted in opposition to the motion.

Plaintiff submits there are no issues of fact and that she is entitled to summary judgment as to liability. In opposition, defendants assert: 1) the motion is premature as there is a need for disclosure prior to determination of a motion for summary judgment; 2) plaintiff's affidavit leaves open questions of fact as to traffic conditions, positions of vehicles and other related conditions at the time of the accident as to whether plaintiff's actions may have contributed to the accident.

Upon review, the court finds defendants have failed to show that additional discovery might lead to relevant evidence, or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of plaintiff. CPLR 3212 (f); *Pabaroo v TS 405 Lexington Owner, LLC*, 141 AD3d 634 [2d Dept 2016]; *Orellana v Maggies Paratransit Corp.*, 138 AD3d 941 [2d Dept 2016]; *Williams v Spencer-Hall*, 113 AD3d 759 [2d Dept 2014].

Defendants failed to submit an affidavit from the defendant driver describing her own version of the events surrounding the accident so as to rebut plaintiff's version. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Moreover, the affirmation of defendants' attorney was insufficient to raise a triable issue of fact as to whether defendants had a nonnegligent explanation for the collision or

whether plaintiff was comparatively negligent in the happening of the accident. *Pierre v Demoura*, 148 AD3d 736 [2d Dept 2017].

Defendant further contends the certified police report is not admissible without support of testimony, and that the information in the accident report is only admissible as long as the report is made based upon the officer's personal observations. Here, defendant herself made a statement shortly after the accident to the police officer who, in the course of duty, responded to the accident. The police officer who prepared the report was acting within the scope of his duties in recording the defendant driver's statement and the statement is admissible as an admission of a party. The report was made based upon the officer's personal observations and while carrying out police duties. The admission made by defendant contained in the certified police report falls within the exceptions to the hearsay rule. See CPLR 4518(a); *Shehab v Powers*, 150 AD3d 918 [2d Dept 2017]; *Memenza v Cole*, 131 AD3d 1020, 1021- 1022 [2d Dept 2015]; *Jackson v Donien Trust*, 103 AD3d 851 [2d Dept 2013].

Accordingly, plaintiff is entitled to partial summary judgment as to liability on the first cause of action as against defendants Sana Gilani and Saeeda Asad Gilani.

Second cause of action (Klein)

Plaintiff, in her affidavit, alleges that on December 20, 2016, she was operating her vehicle northbound on the Hutchinson River Parkway in Bronx, New York. There was heavy traffic at the time and she slowed down and brought her vehicle to a stop near Exit 3W. The vehicle directly in front of her was stopped, as were several other vehicles in front of it. Plaintiff was stopped for at least 10 seconds when she was rear-ended by another vehicle which she later learned was driven by Hunter Klein and owned by Stuart Klein.

Plaintiff submits there are no issues of fact and that she is entitled to summary judgment pursuant to CPLR 3212. In opposition, defendant asserts there are issues of fact, as confirmed by his affidavit which conflicts with plaintiff's affidavit. Defendant describes that as cars were proceeding between three and five miles per hour in heavy stop and go traffic, plaintiff's car suddenly stopped and his front bumper "tapped" her rear bumper. He states plaintiff "jump[ed] out" of her vehicle and "jogg[ed] over to mine [vehicle]." He continues that "she then hurriedly proposed that we exchange insurance information, not call the police and continue in our respective routes in order to avoid traffic delays. As I had never been in a motor vehicle accident before and there was no perceivable damage, I followed suit. No damage was visible to either vehicle. The police were not called. Ms. Gold-Cumberbatch's car was not stopped for 10 seconds prior to the incident. We left the area after quickly exchanging insurance information." [Klein Aff. ¶ 3-8]

On these conflicting factual recitations, the court finds that the granting of summary judgment as to liability at this time is not appropriate. The parties' conflicting affidavits raise issues of fact as to whether the defendant driver has a nonnegligent explanation to justify his conduct under the circumstances, and whether the impact was unavoidable. That

is a question for the trier of fact. *Winegrad v New York City Medical Center*, 64 NY2d 851 [1985]. As there has been no discovery as yet, the court finds it is premature to grant the motion, given the factual discrepancies. *Cole v JW's Pub*, 133 AD3d 815 [2d Dept 2015] (question of fact as to whether assault was unforeseeable and unexpected); *Betz v N.Y.C. Premier Properties*, 38 AD3d 815 [2d Dept 2007] (plaintiff raised issues warranting further discovery; summary judgment denied to defendants as premature).

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." *Alvarez v. Prospect Hospital*, 68 NY2d 329 [1986]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]. The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept 2011]. Accordingly, it is hereby

ORDERED that the plaintiff's motion for partial summary judgment as to liability on the first cause of action pursuant to CPLR 3212, as against defendants Sana Gilani and Saeeda Asa Gilani is granted; and it is further

ORDERED that the motion for partial summary judgment as to liability on the second cause of action made pursuant to CPLR 3212, as against Hunter Klein and Stuart Klein is denied; and it is further

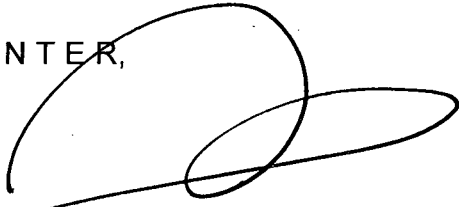
ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811 on July 17, 2017 at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court. ²

Dated: White Plains, New York

June 19, 2017

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

²The court acknowledges, with appreciation, the contribution of Maryclaire Kennedy, law student intern, in the preparation of this Decision/Order.

Appearances

Hausman & Pendzick
Attorneys for Plaintiff
Via NYSCEF

Law Offices of Moira Doherty, P.C.
Attorneys for Defendants Sana Gilani and Saeeda Asad Gilani
Via NYSCEF

Vincent J. Aceste
Attorney for Defendants Hunter Klein and Stuart Klein
Via NYSCEF