Halpern-Rappa v Skiba

2018 NY Slip Op 30318(U)

February 6, 2018

Supreme Court, Suffolk County

Docket Number: 15-5249

Judge: Peter H. Mayer

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[* 1]

SHORT FORM ORDER

INDEX No. 15-5249

CAL. No. 17-00063MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-15-17 (001, 002)
ADJ. DATE 8-18-17
Mot. Seq. # 001 - MG
002 - MotD

LISA J. HALPERN-RAPPA and GIUSEPPE C. RAPPA,

Plaintiffs,

- against -

RICARDO SKIBA, LAURA A. SKIBA and JORGE A. GARAYSARAVIA,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Jorge A. Garaysaravia, dated May 4, 2107, and supporting papers; (2) Notice of Cross Motion by the plaintiffs, dated July 27, 2017, and supporting papers; (3) Affirmation in Opposition by the defendant Jorge A. Garaysaravia, dated August 7, 2017 and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant Jorge A. Garay Saravia, incorrectly sued herein as Jorge A. Garaysaravia, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against him is granted; and it is further

ORDERED that the cross motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the defendants' liability is granted as to the defendants Ricardo Skiba and Laura A. Skiba.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Lisa J. Halpern-Rappa (the plaintiff) in a motor vehicle accident that occurred at approximately 8:00 p.m. on September 25, 2013 at or near the intersection of Deer Park Avenue and Jericho Turnpike in the Town of Huntington, New York (the intersection). The accident allegedly happened when the plaintiff's vehicle was struck in the side by a vehicle owned by the defendant Laura A. Skiba (the Skiba vehicle) and operated by the defendant Ricardo Skiba (Skiba) (collectively, the Skiba defendants), and the plaintiff's vehicle then came into contact with the motor vehicle owned and operated by the defendant Jorge A. Garay Saravia, incorrectly sued herein as Jorge A. Garaysaravia (Garay Saravia). The complaint sets forth a cause of action on behalf of the plaintiff for personal injury, and a derivative cause of action on behalf of the plaintiff Giuseppe C. Rappa.

The plaintiffs commenced this action by the filing of a summons and complaint on March 25, 2015. In their answer dated June 2, 2015, the Skiba defendants set forth cross claims for indemnification and contribution against Garay Saravia. In his answer dated June 5, 2015, Garay Saravia sets forth cross claims for indemnification and contribution against the Skiba defendants.

It is undisputed that the plaintiff's vehicle and the motor vehicle owned and operated by Garay Saravia (the Garay Saravia vehicle) were stopped at a red light controlling the northbound lanes of travel on Deer Park Avenue at the intersection. It is further undisputed that the Skiba vehicle, a 1998 Ford, was attempting to make a right hand turn from the easterly travel lane and/or right hand turn lane of Jericho Turnpike to proceed southbound on Deer Park Avenue when this accident occurred.

Garay Saravia now moves for summary judgment dismissing the complaint and all cross claims against him on the grounds that he bears no responsibility for the happening of this accident. 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 Hosp.***, 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 trail 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 Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of his motion, Garay Saravia submits, among other things, the pleadings, and the transcript of his deposition testimony and that of the plaintiff. At his deposition, Garay Saravia testified that, after traveling northbound on Deer Park Avenue, he stopped for a red light at the intersection, that Deer Park Avenue consists of two lanes of travel and a left turn lane in the northbound direction at the intersection, and that he was stopped in the left lane of travel. He stated that there were approximately

three or four vehicles stopped in front of his vehicle for the red light, that a "mini van" was stopped directly to the left of his vehicle in the left turn lane, and that the mini van was stopped the entire time that he was stopped at the red light. He indicated that he then heard the screeching of tires, that he saw a vehicle "spinning," and that he heard an impact and saw the mini van move sideways approximately two or three feet and come into contact with his vehicle. Garay Saravia further testified that the subject traffic light was red the entire time, and that his vehicle did not come into contact with the third vehicle involved in this accident.

The plaintiff testified that she stopped in the left turn lane at the intersection because the traffic light was red, that there were three or four vehicles stopped in front of her vehicle, and that a yellow line separates the northbound and southbound lanes of travel on Deer Park Avenue. She stated that she first saw the "sedan" that struck her vehicle traveling eastbound on Jericho Turnpike while in the process of making a right hand turn onto Deer Park Avenue, that she heard the revving of an engine and the screeching of tires, and that she saw the sedan "fishtailing." She indicated that the first impact with her vehicle caused her vehicle to move to the right and into the left lane of travel on Deer Park Avenue, that her vehicle came into contact with a mini van stopped to her right, and, in her opinion," that mini van "was a completely passive participant" in this incident.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, *supra*; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]; ***Schindler v Ahearn***, *supra*). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, *supra*).

The adduced evidence demonstrates that Garay Saravia has made a prima facie showing that he did not contribute to the subject accident's occurrence (*see e.g.* ***Francis v J.R. Bros. Corp.***, 98 AD3d 940, 950 NYS2d 584 [2d Dept 2012][plaintiff made prima facie showing when struck while at a complete stop by vehicle attempting to make a left turn]). A party cannot be held liable absent proof that he or she operated his or her vehicle improperly, acted in any manner which helped bring about the collision with another vehicle, or that he or she was in a position to take steps to either reasonably foresee or avoid the collision (*see* ***Victor v Daley***, 150 AD3d 1307, 56 NYS3d 223 [2d Dept 2017]; ***Biddy v Vanmaltke***, 67 AD3d 845, 889 NYS2d 239 [2d Dept 2009]). In addition, liability may not be imposed upon a party who "merely furnished the condition or occasion for the occurrence of the event" but was not one of its causes (*see* ***Littles v Yorkshire Bus. Corp.***, 114 AD3d 646, 979 NYS2d 840 [2d Dept 2014]; ***Lee v D. Daniels Contr., Ltd.***, 113 AD3d 824, 978 NYS2d 908 [2d Dept 2014]). Here, the actions of Garay Saravia are not a proximate cause of the subject accident, and Garay Saravia has established his prima facie entitlement to summary judgment dismissing the complaint and all cross claims against him.

The Skiba defendants do not oppose Garay Saravia's motion for summary judgment and, as discussed herein, the plaintiffs essentially agree with the arguments and contentions set forth in said motion. However, the plaintiffs cross-move for summary judgment in their favor "against the defendants on the issue of liability" on the grounds that the facts establish that the plaintiff cannot be found comparatively negligent herein, and that Skiba's violations of a number of provisions of the Vehicle and Traffic Law constitutes negligence as a matter of law. In support of their motion, the plaintiffs submit the pleadings, the affirmation of their attorney, the transcript of the deposition testimony of Skiba, certain discovery requests, and an unauthenticated copy of the police accident report regarding this incident, Form MV-104A.

In her affirmation in support of the cross motion, counsel for the plaintiffs avers that the plaintiff's "application seeks identical relief to that sought by [Garay Saravia]," and that "[if] summary judgment is granted to [Garay Saravia] summary judgment must also be granted to [the plaintiffs]. Both vehicles are alleged to have been stopped for the same traffic signal at the time of the collision ... [and the plaintiffs' vehicle was] pushed into the [Garay Saravia] truck." Notwithstanding the contention by counsel for the plaintiffs that the two applications for summary judgment are somehow inexorably linked, the plaintiffs have not attempted to raise an issue of fact regarding Garay Saravia's motion for summary judgment, and essentially agree with the arguments and contentions proffered by Garay Saravia in his motion. Accordingly, Garay Saravia's motion for summary judgment is granted.

At his deposition, Skiba testified that he was operating a vehicle owned by his wife and used by his daughter on the day of this incident, that his intention had been to bring the vehicle to his mechanic that day regarding "trouble with the front end," and that he was heading eastbound in the right lane of travel on Jericho Turnpike as he approached the intersection. He stated that a right hand turn lane started approximately 40 feet from the intersection, that he "tried to make a turn into the right turning lane and the car kept going straight so I was probably between those two lanes," and that he did not come to a stop before he turned onto Deer Park Avenue. He indicated that he was responsible for the maintenance of the vehicle, that the vehicle had "[mechanical] problems before but they were taken care of," and that the vehicle "was an old vehicle [and] had little vibrations and things in it which I paid no attention to."

Skiba further testified that, as he made the turn onto Deer Park Avenue, he was traveling at 15 to 20 miles per hour and "going faster than a normal turn," that he saw his vehicle heading towards the first vehicle stopped in the left turn lane on Deer Park Avenue, and that he "overcompensated and then when it took, I turned the opposite way and that's what made me hit [the other vehicle]." He stated that his vehicle skidded in an eastern direction, that the rear end of the car skidded to his left and then to his right, and that the front of his vehicle struck the third car stopped at the left turn lane on Deer Park Avenue. He indicated that his vehicle struck only one other vehicle, and that the impact caused that vehicle to move "sideways toward the right."

Although the entire police accident report has not been considered herein (*see* CPLR 4518[c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]), the Court has considered the statements of two nonparty witnesses to the accident contained within the police accident report. It has been held that statements by eyewitnesses, verified pursuant to Penal Law § 210.45, are the equivalent of statements made under oath (*see* ***People v***

Sullivan, 56 NY2d 378, 452 NYS2d 373 [1982]; ***Antaki v Mateo***, 100 AD3d 579, 954 NYS2d 540 [2d Dept 2012]; ***Moore v County of Suffolk***, 11 AD3d 591, 783 NYS2d 72 [2d Dept 2004]; ***People v McCulloch***, 226 AD2d 848, 640 NYS2d 914 [3d Dept 1996]; *see e.g.* ***People v McCann***, 85 NY2d 951, 26 NYS2d 1006 [1995]; *but see* ***Sam v Town of Rotterdam***, 248 AD2d 850, 670 NYS2d 62 [3d Dept 1998]). Penal Law § 210.45, entitled "Making a punishable false written statement," provides:

> A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable.
>
> Making a punishable false written statement is a class A misdemeanor.

Here, the two statements contain the signature of the witnesses directly under a warning in bold type that false statements are punishable as a class "A" misdemeanor pursuant to Penal Law § 210.45. Under the circumstances, it is determined that the subject statements are admissible evidence in support of the plaintiffs' motion for partial summary judgment. In his statement dated September 25, 2013, Travis Horbach states "Man in Ford came around Jericho making a right turn onto Park Avenue too fast and the rear of the car came out and slid into lady in Honda van and in doing so slid the lady in the van into the side of a man in another car to the right of her." The remaining statement does not contain information necessary to the Court's determination herein.

It is well settled that when a driver of a motor vehicle crosses into the opposing lane of traffic he is held at fault in causing the accident. "[U]nexcused violations of the Vehicle and Traffic Law, such as crossing a double yellow line, constitute negligence per se" (***Hazelton v D.A. Lajeunesse Bldg. & Remodeling***, 38 AD3d 1071, 832 NYS2d 114 [3d Dept 2007]; *see also* ***DiSiena v Giammarino***, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]; ***Sullivan v Mandato***, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]; Vehicle and Traffic Law §§ 1120 [a], 1121). The plaintiff having demonstrated her entitlement to summary judgment, the Skiba defendants must come forward with evidence to establish the necessity for a trial (*see* ***DiSiena v Giammarino***, *supra*; ***Sullivan v Mandato***, *supra*; ***Chisholm v Mahoney***, 302 AD2d 792, 756 NYS2d 314 [3d Dept 2003]).

The Skiba defendants do not oppose the plaintiffs' motion for summary judgment. In addition, Skiba's testimony does not raise issues of fact whether he has a non-negligent explanation for the manner in which this accident occurred, or whether he was confronted with an emergency. It is the duty of an owner or operator of a motor vehicle to use reasonable care to ensure that the vehicle is in a reasonably safe condition and properly equipped so that the vehicle can be controlled and not be a source of danger to others (***Fried v Korn***, 286 App Div 107, 141 NYS2d 529 [1st Dept 1955], *affd* 1 NY2d 691, 150 NYS2d 798 [1956]; *see also* ***Michael v Wagner***, 151 AD3d 1574, 55 NYS3d 840 [4th Dept 2017]; ***Tully v Polito***, 49 AD2d 954, 374 NYS2d 56 [2d Dept 1975]). Vehicle and Traffic Law § 375 (1) (a) provides in pertinent part that "[e]very motor vehicle, operated or driven upon the public highways of the state, shall be provided with adequate brakes and steering mechanism in good working order and sufficient to control such vehicle at all times when the same is in use."

Skiba's testimony implying that a mechanical problem was a substantial factor in causing this accident, unsupported by any corroborating evidence, is insufficient to create any issue of fact regarding an unforeseeable emergency situation. While an unexpected mechanical failure might provide a non-negligent explanation for an accident, it is incumbent on a defendant to come forward with evidence showing that the problem was unanticipated and that reasonable care had been exercised to keep the party's vehicle in good working order (*see* ***Ballatore v HUB Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]; ***Elgendy v Pilpel***, 303 AD2d 446, 755 NYS2d 896 [2d Dept 2003]; ***Stanisz v Tsimis***, 96 AD2d 838, 465 NYS2d 592 [2d Dept 1983]).

Vehicle and Traffic Law § 388 provides that the owner of a vehicle is vicariously liable to third parties for injuries resulting from the "use and operation" of such vehicle by any person using it with permission. The statute creates a strong presumption of permissive use which can be rebutted only with substantial evidence showing that the driver of the vehicle was not operating it with the owner's express or implied permission (*see* ***Murdza v Zimmerman***, 99 NY2d 375, 756 NYS2d 505 [2003]; ***Amex Assur. Co. v Kulka***, 67 AD3d 614, 888 NYS2d 577 [2d Dept 2009]; ***Talat v Thompson***, 47 AD3d 705, 850 NYS2d 486 [2d Dept 2008]). The presumption can be rebutted by evidence that the driver exceeded restrictions placed on his or her use of the vehicle by the owner (***Murdza v Zimmerman***, *supra*; Walls v Zuvic, 113 AD2d 936, 493 NYS2d 628 [2d Dept 1985]; ***Aetna Casualty & Surety Co. v Brice***, 72 AD2d 927, 422 NYS2d 203 [1979] *affd* 50 NY2d 958, 431 NYS2d 528 [1980]), thereby exonerating the owner from vicarious liability under the statute. The Skiba defendants have admitted in their answer that Skiba operated the Skiba vehicle with the knowledge, permission, and consent of the owner, Laura A. Skiba.

The plaintiff has demonstrated her freedom from comparative negligence as she was not required to anticipate that another vehicle would cross over into her lane (***Saraniti v Brody Truck Rental, Inc.***, 269 AD2d 586, 703 NYS2d 275 [2d Dept 2000]; ***Coss v Sunnydale Farms, Inc.***, 268 AD2d 499, 702 NYS2d 349 [2d Dept 2000]). Accordingly, the plaintiff's motion for partial summary judgment is granted as to the Skiba defendants only.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: February 6, 2018

PETER H. MAYER, J.S.C.