

Vaccaro v Lesch

2018 NY Slip Op 34381(U)

June 25, 2018

Supreme Court, Westchester County

Docket Number: Index No. 50865/2017

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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
WESTCHESTER COUNTY
P R E S E N T: HON. SAM D. WALKER, J.S.C.

-----X
ANTHONY VACCARO and MARIE-LOUISE ERICSEN,

Plaintiff,

-against-

AMENDED
DECISION & ORDER
Index No.50865/2017
Seq. 1 & 2

JACKSON W. LESCH and RICHARD C. LESCH and
ROHAN OSCAR ANDERSON,

Defendants.
-----X

The following papers were read on two motions for summary judgment:

Notice of Motion/Affirmation/Exhibits A-C	1-5
Affirmations in Opposition/Exhibits A-C	6-9
Notice of Cross-Motion/Affirmation/Exhibits 1-3	10-13
Affirmation in Opposition to Cross-Motion & in further support of Motion	14
Reply Affirmation	15

Upon the foregoing papers it is ordered that the motions are DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

This action is to recover damages for injuries allegedly sustained by the plaintiff, Anthony Vaccaro ("Vaccaro"), in a motor vehicle accident. Marie-Louise Ericson has a derivative action. Vaccaro alleges that on December 8, 2015, the vehicle operated by Jackson W. Lesch ("Lesch") and owned by Richard C. Lesch came into contact with the plaintiff's vehicle traveling southbound on the Bronx River Parkway and that the vehicle

owned and operated by Rohan Oscar Anderson ("Anderson") came into contact with the vehicle operated by Lesch, causing that vehicle to come into contact with the plaintiff's vehicle a second time.

Anderson now files the instant motion seeking summary judgment and dismissal of the complaint against him. In support of his motion, Anderson submitted an attorney's affirmation, an affidavit, the police report¹, and copies of the pleadings. The plaintiffs also seek summary judgment against all the defendants. In support of their motion, they submitted an attorney's affirmation, the affidavits of Anderson and Lesch, and copies of the pleadings.

DISCUSSION

"[T]he 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 demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (see *Finney v Morton*, 127 AD3d 1134 [2d Dept 2015]).

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

¹The police report is not certified and therefore, is not in admissible form.

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. NY VTL § 1129 (a)

Anderson avers that he was operating his vehicle in the right lane, traveling at approximately 45 mph, at a distance of about one car length behind the plaintiff's vehicle. He states that suddenly and without warning or signal, the Lesch's vehicle swerved from the right lane into the left lane directly in front of his vehicle, between his vehicle and the Vaccaro's vehicle. Anderson states that Lesch's vehicle then rear ended Vaccaro's vehicle less than three seconds after swerving into the lane in front of his vehicle and his vehicle did not make any contact with Lesch's vehicle before Lesch's vehicle rear ended Vaccaro's vehicle. Anderson states that after Lesch's vehicle struck Vaccaro's vehicle, then his vehicle tapped the rear of Lesch's vehicle, but did not cause Lesch's vehicle to again strike Vaccaro's vehicle.

In opposition and in support of their own motion, the plaintiffs submitted the same affidavit from Anderson and an affidavit from Lesch stating that he was driving in the right lane on the Bronx River Parkway. He states that he merged into the lane to the left and continued to travel southbound. After about 500 feet he came around a corner and observed Vaccaro's vehicle, which was stopped in his lane. Lesch avers that he applied his brakes but was unable to avoid coming into contact with Vaccaro's vehicle. Lesch states that shortly thereafter, his vehicle was rear-ended by Anderson's vehicle, while his vehicle was still in contact with Vaccaro's vehicle. Lesch states that he did not merge his vehicle directly in between Vaccaro's vehicle and Anderson's vehicle as stated by Anderson.

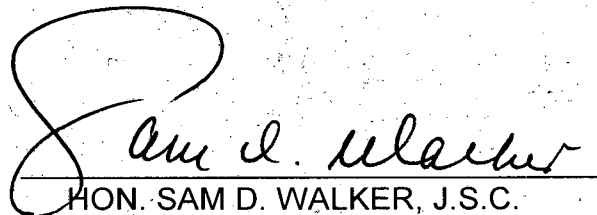
The affidavits offer conflicting accounts of the accidents and therefore, there are issues of material fact which require a jury's determination. Further, while it seems clear that Lesch's vehicle struck the plaintiff's vehicle prior to being struck, Anderson's vehicle also struck Lesch's vehicle and may have caused Lesch's vehicle to again strike Vaccaro's vehicle. A jury may find Anderson negligent in addition to Lesch and would then have to determine whether both acts of negligence were concurrent proximate causes of Vaccaro's injuries or only one was the proximate cause (see *Vavoulis v Adler*, 43 AD3d 1154 [2d Dept 007]).

Accordingly, it is

ORDERED that the motions for summary judgment on the issue of liability, are both denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 25, 2018


HON. SAM D. WALKER, J.S.C.