

Garcia v Collins

2019 NY Slip Op 31238(U)

May 1, 2019

Supreme Court, Suffolk County

Docket Number: 14-12690

Judge: Sanford Neil Berland

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ORIGINAL

INDEX No. 14-12690
CAL. No. 18-00422OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 6-5-18
ADJ. DATE 7-3-18
Mot. Seq. # 004 - MG

-----X
JOSE A. GARCIA and NORMA GARCIA,

Plaintiffs,

- against -

VIOLET COLLINS, C.W. ZIMMERMAN and
HOUSEIN BARZIL,

Defendants.
-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment: Notice of Motion and supporting papers 1- 18; Answering Affidavits and supporting papers 19-20; and Replying Affidavits and supporting papers 21-22, it is,

ORDERED that the motion by defendant Housein Barzil seeking summary judgment dismissing the complaint and cross-claims as against him is granted.

This is an action to recover damages for personal injuries allegedly sustained as a result of a multi-vehicle and pedestrian accident that occurred on the southbound side of Horseblock Road near its intersection with Manor Road in Medford on the night of April 23, 2013. Plaintiffs Norma and Jose Garcia, and Norma's young daughter, Samantha, were standing on the grass near the borrowed car in which the three had been traveling southbound on Horseblock Road until smoke started coming out of the front of the car and then, after Norma, the driver, had brought it to a stop behind a line of vehicles in the roadway's right-turn lane, just north of Manor Road, the car "ceased to function" altogether. They were waiting for the arrival of a friend Norma had called when defendant Housein Barzil, who had been traveling north on

Horseblock Road, saw the Garcias' vehicle stopped on the opposite side of the road with its hazard lights flashing and, hearing the sound of babies crying, turned his car around and stopped near the broken-down car to offer assistance. As Jose Garcia was talking with Barzil through the open passenger-side window of Barzil's SUV, Jose Garcia saw a third vehicle rapidly approaching on the same side of Horseblock Road, "coming straight at" the two stopped vehicles. Jose Garcia screamed, and the series of impacts that are alleged to have resulted in plaintiffs' injuries followed. The third vehicle was a 2006 Nissan owned by defendant Violet Collins and driven by defendant Christopher Zimmerman, who was arrested and subsequently convicted of operating a motor vehicle under the influence of illegal drugs at the time of the incident.

Barzil now moves for summary judgment in his favor dismissing the complaint and the cross-claims against him on the grounds that the accident was caused by the operation of the Collins-Zimmerman vehicle, which struck his vehicle from the rear after it had been stopped for several minutes on the roadway with its lights on, and that there is no evidence of any negligence on his part that caused or contributed to plaintiffs' injuries. In support of the motion, Barzil submits copies of the pleadings, the New York State Police Accident Report ("MV-104A"), transcripts of his deposition testimony and the deposition testimony of Jose and Norma Garcia, and a certified copy of the certificate of disposition for Christopher Zimmerman from the accident.

Plaintiffs oppose the motion, arguing that there are material issues of fact as to whether Barzil's conduct was a proximate cause of the accident, that the certified copies of the MV-104A and Zimmerman certificate of disposition are inadmissible, and that if "the court takes into consideration all of [Barzil's] submissions" - including, in particular, Zimmerman's statement, in the first count of the misdemeanor information encompassed by the certificate of disposition, that "I didn't see the cars stopped in the road, I had a green light" and the deposed parties' differing testimony concerning whether Barzil's vehicle's hazard lights were on while he was stopped and whether he stopped his SUV in the center through lane of Horseblock Road or in the right-turn lane - create material issues of fact. In reply, Barzil's counsel argues that the certified copy of the certificate of disposition is in the proper evidentiary form and that any differences in the testimony concerning the precise location or illumination of Barzil's stopped vehicle in the moments prior to impact do not raise any material issue as to any negligence on the part of Barzil.

Norma Garcia testified at her examination before trial that at approximately 11:15 p.m. on the accident date, she was driving southbound on Horseblock Road in her friend Guadalupe Gonzalez's 2001 Honda sedan, with her brother, Jose Garcia, and her daughter in the car with her. The front of the car began to smoke as she was approaching the intersection of Horseblock Road and Manor Road. She turned on the vehicle's hazard lights and very slowly moved the vehicle a bit further into the right turn lane, behind a line of vehicle's waiting for the traffic light to change. She intended to make the right turn, onto Manor Road, but when the light changed and the other cars moved, the Honda had "ceased to function." Ms. Garcia testified that she, her brother and her daughter then exited the vehicle and stood in the grass on the side of the road to wait for help from a friend. She further testified that as they waited, Barzil pulled his SUV approximately three to four meters behind her vehicle and asked her brother if they needed assistance. She testified that her brother walked toward the passenger side of Barzil's SUV and spoke with Barzil. Ms. Garcia stated that both the headlights and taillights of Barzil's vehicle were illuminated as it was parked

behind hers and that the intersection was well illuminated. She further testified that Barzil's vehicle was stopped behind hers for approximately two minutes when it was suddenly struck from behind by a Nissan vehicle and that as a result of the vehicle impacts, she, her brother and her daughter were thrown to the ground and injured.

Jose Garcia testified at his examination before trial that he was a passenger in the vehicle being driven by his sister, when it broke down at the intersection of Horseblock Road and Manor Road. He testified that they exited the vehicle and stood on a grassy area next to the road. Mr. Garcia testified that a man pulled up behind and to the left of their vehicle and offered assistance. He testified that within a minute after he started to speak with Barzil he saw a third vehicle, a Nissan, being driven very fast toward them from behind. He testified that the Nissan struck his Honda and that perhaps it struck Barzil's vehicle. Mr. Garcia testified that Barzil's vehicle did not move before it was struck by the Nissan. Garcia testified that as a result of the Nissan's impact, he was thrown to the ground and could not recall how he got there. He testified that while he was on the ground, he saw the Nissan stopped between Barzil's SUV and his Honda, but that the Honda was moved forward in its lane from its initial position.

Barzil testified at his deposition that on the accident date, he was driving his Mitsubishi SUV on Horseblock Road when he observed a vehicle, with its hazard lights activated, stopped in the right shoulder on the opposite side of Horseblock Road. He testified that he heard the sound of babies crying and turned his vehicle around, put on his SUV's hazard lights and stopped his vehicle in the same lane as the other vehicle and approximately one to two car lengths "in back" of it in order to render assistance. Barzil testified that Mr. Garcia walked over toward the passenger side of his car, and he asked Garcia whether he needed any help. Barzil testified that as Mr. Garcia began to reply, he suddenly began screaming and then Barzil's SUV was struck. Barzil testified that he felt two impacts to his vehicle: the first impact pushed his vehicle forward about one foot, and then he felt second another impact, which caused him to pass out. He testified that he did not hear any sounds of screeching tires or a car horn before the first impact to his car. He further testified that the second impact into his vehicle was in the rear and right passenger side of his vehicle, and that it moved his vehicle in a forward direction into the middle lane. He testified that the area where the accident took place was straight, dry, and well lit.

A party moving for summary judgment must make a prima facie case of entitlement to judgment as a matter of law, offering sufficient evidence in an admissible form, to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The movant's failure to make this prima facie showing requires denial of the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). When the moving party makes this showing, the burden shifts to the opposing party to produce evidentiary proof that establishes the existence of a material issues of fact (*Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Based upon the adduced evidence, Barzil has made a prima facie showing that he did not contribute to the accident's occurrence (*see Plummer v Nourddine*, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; *Ferguson v Honda Lease Trust*, 34 AD3d 356, 826 NYS2d 10 [1st Dept 2006]; *Jaffe v Miller*, 295 AD2d 404, 743 NYS2d 294 [2d Dept 2002]). Although the issue of proximate cause generally is one for the jury

(see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]), “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” (*Shatz v Kutshers Country Club*, 247 AD2d 375, 375, 688 NYS2d 643 [2d Dept 1998], quoting *Sheehan v City of New York*, 40 NY2d 496, 503, 387 NYS2d 92 [1976]; see *Peralta v Manzo*, 74 AD3d 1307, 905 NYS2d 245 [2d Dept 2010]; *Wechter v Kelner*, 40 AD3d 747, 835 NYS2d 653 [2d Dept 2007]). Here, the testimony reveals, without contradiction, that Barzil brought his vehicle a stop in near proximity to the Garcias’ disabled vehicle and in an area that was sufficiently illuminated; that the Garcia vehicle’s hazard lights were on; that the running lights on Barzil’s vehicle were on and, as Barzil testified, its hazard lights were on as well; and that Barzil was attempting to render assistance to the Garcias when his stopped vehicle was suddenly struck from behind by the vehicle driven by defendant Zimmerman. Thus, Barzil has demonstrated prima facie that there was no conduct on his part that could be characterized as negligent or otherwise tortious and a proximate cause of plaintiffs’ claimed injuries. Thus, even apart from Zimmerman’s attributed admission that he “didn’t see the stopped cars,” the bare possibility that the accident might or might not have occurred had Barzil not stopped his vehicle to render assistance to the plaintiffs does not dictate otherwise; as the Court of Appeals held in *Sheehan v City of New York*, supra, conduct that “merely furnish[es] the condition or occasion for the occurrence of the event” - in that case, stopping a city bus in the travel lane of a street, where it was struck by a sanitation truck with faulty brakes, rather than pulling over to a designated bus stop to receive or discharge passengers - does not render such conduct a proximate cause of an accident (40 NY2d at 503). Thus, the burden shifted to the plaintiffs to raise a triable issue of fact as to whether Barzil was negligent and whether such negligence was a proximate cause of plaintiffs’ injuries (see *Bucceri v Frazer*, 297 AD2d 304, 670 NYS2d 559 [2d Dept 2002]; *Colon v Cruz*, 277 AD2d 195, 715 NYS2d 647 [2d Dept 2000]; *Hanak v Jani*, 265 AD2d 453, 696 NYS2d 237 [2d Dept 1999]).

The plaintiffs have failed to raise a triable issue of fact in opposition to the movants’ prima facie showing, (see *Canfield v Beach*, 305 AD2d 440, 761 NYS2d 71 [2d Dept 2003]; *Marsella v Sound Distrib. Corp.*, 248 AD2d 683, 248 NYS2d 683 [2d Dept 1998]; *Sorrentino v Riemer*, 252 AD2d 522, 675 NYS2d 296 [2d Dept 1998], *lv denied* 92 NY2d 815, 683 NYS2d 174 [1998]). The plaintiffs’ opposition merely seeks to assert immaterial issues of fact as to the location of Barzil’s vehicle, which are insufficient to defeat a motion for summary judgment (see *Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256, 664 NYS2d 826 [2d Dept 1997]), or to establish a triable issue as to whether negligence on the part of Barzil contributed to the collision and to plaintiffs’ subsequent injuries (see *Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]; *Jumandeo v Franks*, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]; *Lundy v Llatin*, 51 AD3d 877, 858 NYS2d 341 [2d Dept 2008]; *Campbell v City of Yonkers*, 37 AD3d 750, 833 NYS2d 101 [2d Dept 2007]; *Belitsis v Airborne Express Frgt. Corp.*, 306 AD2d 507, 761 NYS2d 329 [2d Dept 2003]). On the contrary, the uncontradicted testimony reveals that there was adequate street lighting to illuminate the stopped vehicles, that the running lights on Barzil’s vehicle were on and that the hazard lights were activated on the Garcia vehicle and, as Barzil testified, on the SUV as well. Any discrepancy as to the exact location of the Barzil vehicle is, as discussed above, insufficient to raise a material issue of fact bearing either on negligence or proximate cause.

Further, a driver has a duty to maintain control of his vehicle so that when approaching another vehicle from the rear, the driver is bound to maintain a reasonably safe rate of speed, and to use reasonable care to avoid colliding with the other vehicle (see *Tutrani v County of Suffolk*, 64 AD3d 53, 878 NYS2d

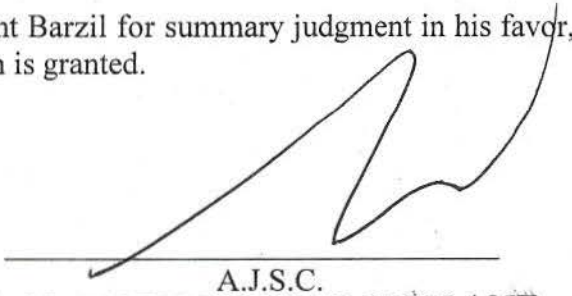
412 [2d Dept 2009]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *Chepal v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]). The occurrence of a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see Hauser v Adamov*, 74 AD3d 1024, 904 NYS2d 102 [2d Dept 2010]; *Arias v Rosario*, 52 AD3d 551, 860 NYS2d 168 [2d Dept 2008]; *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]). Here, it was incumbent on defendant Zimmerman, who operated his vehicle in an impaired state, to avoid a rear-end collision with both stopped vehicles, regardless of the exact location in which each was situated immediately prior to impact, particularly given the testimony of plaintiff Norma Garcia, who had herself driven the same section of southbound Horseblock Road not long before the collision occurred, that visibility at the intersection in question on the night of the accident was “[l]ike half a mile, perhaps.”

Moreover, the statement attributed to defendant Zimmerman, in the first count of the misdemeanor information encompassed by the certified certificate of disposition, that he “didn’t see the cars in the road,” further contradicts plaintiffs’ effort to shift some of the responsibility for the accident from Zimmerman to Barzil. Although plaintiffs argue against the admissibility of the statement attributed to Zimmerman, that statement constitutes an admission by a party and is admissible as an exception to the hearsay rule (*see Sydnor v Home Depot U.S.A., Inc.*, 74 AD3d 1185, 906 NYS2d 279 [2d Dept 2010]; *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]; *Guevara v Zaharakis*, 303 AD2d 555, 756 NYS2d 465 [2d Dept 2003]; *cf. Bailey v Reid*, 82 AD3d 809, 918 NYS2d 364 [2d Dept 2011]). No affidavits on personal knowledge or other admissible evidence has been offered by plaintiffs or any other party¹ in opposition to Barzil’s motion, and the affirmation of plaintiffs’ attorney is insufficient to raise a triable issue of fact (*see Lampkin v Chan*, 68 AD2d 727, 891 NYS2d 113 [2d Dept 2009]; *Browne v Castillo*, 288 AD2d 415, 733 NYS2d 494 [2d Dept 2004]).

For all of the above reasons, the motion by defendant Barzil for summary judgment in his favor, dismissing the complaint and all cross-claims as against him is granted.

This constitutes the decision and order of the court.

Dated: 5/1/2019



A.J.S.C.
HON. SANFORD NEIL BERLAND

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

¹ It should be noted that Zimmerman repeatedly failed to appear for deposition and has been precluded from offering testimony in his own behalf (*see* order dated October 30, 2017).