

**Coba v Phoenix Ins. Co.**

2019 NY Slip Op 35204(U)

October 11, 2019

Supreme Court, Queens County

Docket Number: Index No. 717075/2017

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED  
OCT 18 2019  
COUNTY CLERK  
QUEENS COUNTY

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

EDWARD COBA,

Index No.: 717075/2017

Plaintiff,

Motion Date: 10/10/19

- against -

Motion No.: 7

THE PHOENIX INSURANCE COMPANY,

Motion Seq.: 1

Defendant.

----- x

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff on the issue of liability:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 15 - 23
Affirmation in Opposition.....	EF 24
Reply Affirmation.....	EF 35 - 38

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on July 12, 2016 on Queens Boulevard at its intersection with 63<sup>rd</sup> Drive, in Queens County, New York. Plaintiff's vehicle was rear ended by the taxicab operated by Sarbjit Kaur and owned by MPR Cab NYC LLC.

Plaintiff alleges that following the subject accident, the insurance carrier for MPR Cab NYC LLC and Sarbjit Kaur, Fiduciary Insurance of America (Fiduciary), was placed into liquidation and is now insolvent. Accordingly, the insurance policy issued by Fiduciary for the MPR Cab NYC LLC and Sarbjit Kaur vehicle was cancelled. As a result, plaintiff is proceeding against the Supplemental Uninsured/Underinsured Motorist Policy issued by defendant, The Phoenix Insurance Company, to plaintiff.

This action was commenced by the filing of a summons and complaint on December 8, 2017. Defendant joined issue by service of an answer on January 18, 2018. Plaintiff now seeks partial summary judgment on the issue of liability.

In support of the motion, plaintiff submits an affidavit dated May 28, 2019, affirming that on the date and at the time of the accident, the vehicle he was operating was completely stopped at a red traffic light on Queens Boulevard at its intersection with 63<sup>rd</sup> Drive. While stopped, he was struck from behind by the taxicab owned by MPR Cab NYC, LLC and operated by Sarbjit Kaur. He was stopped for approximately fifteen seconds prior to the accident. The driver of the taxicab did not sound the horn or give any warning before the accident.

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

AT TIME PLACE OF OCCURRENCE DRIVER OF VEHICLE 1 (SARBJIT KAUR) STATES SHE WAS TRAVELING EASTBOUND RIGHT LANE MAIN ROAD ON QUEENS BOULEVARD WHEN DRIVER OF VEHICLE 2 SUDDENLY STOPPED SHORT AND CAUSED VEHICLE 1 TO STRIKE VEHICLE 2. VEHICLE 2 (PLAINTIFF) STATES HE WAS STOPPED AT A STEADY RED LIGHT WHEN VEHICLE 1 SUDDENLY STRUCK VEHICLE 2 FROM BEHIND.

Based on the evidence submitted, plaintiff's counsel contends that as plaintiff's vehicle was stopped when it was hit in the rear, plaintiff did not cause the accident, and thus, plaintiff is entitled to summary judgment. Moreover, counsel contends that Sarbjit Kaur failed to maintain a safe distance between her vehicle and the vehicle in front of her in violation of Vehicle and Traffic Law 1129(a).

In opposition, counsel for defendant contends that summary judgment is not proper as plaintiff failed to prove and plead how MPR Cab NYC, LLC and Sarbjit Kaur's negligence is computed to the insurance company. Additionally, counsel contends that the only discovery to date has been the service of the Bill of Particulars and Response to Discovery Demands. No depositions have been held. Defendant concedes that the first and fourth affirmative defenses contained in its answer, which are assumption of risk and comparative negligence on plaintiff's part, should be stricken.

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]).

"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" (Maccauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle 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 Delgado v Bang, 120 AD3d 608 [2d Dept. 2014]; Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Here, plaintiff satisfied his prima facie burden of establishing entitlement to summary judgment as a matter of law by affirming that his vehicle was rear-ended by MPR Cab NYC, LLC and Sarbjit Kaur's vehicle (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

In opposition, defendant concedes that plaintiff was not liable for the subject accident. However, defendant contends that plaintiff has failed to establish that his claim to proceed under the Supplementary Uninsured/Underinsured Motorist coverage was timely and, inter alia, that the insurance carrier for the vehicle that struck plaintiff's vehicle in the rear is in liquidation and the policy is cancelled, requiring plaintiff to proceed under the Supplementary Uninsured/Underinsured Motorist policy.

Here, this Court finds defendant's arguments to be insufficient to defeat plaintiff's summary judgment motion. In its answer, defendant admits that there was a valid insurance policy with Supplementary Uninsured/Underinsured coverage on the subject vehicle on the date of the accident. Moreover, plaintiff has submitted a copy of the Order of Liquidation pertaining to Fiduciary Insurance Company of America. As it is well settled that when the insurance carrier for the offending vehicle/tortfeasor becomes insolvent due to liquidation, and the injured plaintiff is covered by a Supplementary Uninsured/Underinsured insurance policy, the Supplementary Uninsured/Underinsured insurance coverage is triggered and the injured party is able to commence a lawsuit against the Supplementary Uninsured/Underinsured insurance carrier to seek those benefits (see Matter of Metropolitan Prop. & Cas. Ins. Co. v Carpentier, 7 AD3d 627 [2d Dept. 2004]).

Lastly, defendant failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. Defendant concedes that plaintiff is not liable for the subject accident and that plaintiff held a valid insurance policy with Supplementary Uninsured/Underinsured coverage on the day of the subject accident. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that plaintiff's partial summary judgment motion is granted, and plaintiff shall have partial summary judgment on the issue of liability against defendant; and it is further

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the court, this action shall be placed on the trial calendar of the court for a trial on serious injury and damages.

Dated: October 11, 2019  
 Long Island City, N.Y



ROBERT J. MCDONALD  
 J.S.C.

FILED  
 OCT 18 2019  
 COUNTY CLERK  
 QUEENS COUNTY