

Giraud v Viener

2020 NY Slip Op 30954(U)

April 16, 2020

Supreme Court, New York County

Docket Number: 159661/2018

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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CYNTHIA GIRAUD and KEITH GIRAUD

Plaintiffs,

- v -

MERYL B. VIENER a/k/a MERYL SANDERS VIENER,
S.M. KABIR and D&G TAXI INC.,

Defendants.

INDEX NO. 159661/2018

MOTION DATE 3/13/2020

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 54, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant Meryl B. Viener a/k/a Meryl Sanders Viener’s (hereinafter “defendant Viener”) motion for an order for summary judgment pursuant to CPLR 3212 to dismiss the complaint and all cross claims on the basis that movant defendant did not breach any duty owed to the plaintiff is denied. Plaintiff’s cross-motion for an Order granting plaintiff partial summary judgment on the issue of liability against defendants Meryl Viener, D&G Taxi, Inc., and S.M. Kabir; summary judgment declaring plaintiff Cynthia Giraud free from culpable conduct on the issue of liability, and; dismissing defendants’ affirmative defenses of culpable conduct or comparative negligence on the part of plaintiff is granted.

This action stems from a two vehicle motor vehicle incident which occurred on June 29, 2016, on Park Avenue, near the intersection of 75th Street in the County, City and State of New York, when plaintiff was injured while a passenger in a vehicle operated by defendant S.M.

Kabir and owned by defendant D&G Taxi Inc. (Collectively “Co-Defendants”) was allegedly struck by a vehicle operated by defendant Viener.

The motion, which alleges that defendant Viener’s vehicle was stopped when it was rear-ended by Co-Defendant’s vehicle, has made a prima facie case of negligence, and the burden shifts to the opposing party to raise a triable issue of fact (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). “[A] rear-end collision with a stopped ... vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, ... [and] shift[s] the burden to defendant to come forward with an adequate nonnegligent explanation for the accident” (*Cruz v Lise*, 123 AD3d 514 [1st Dep’t 2014]).

Here, defendant Viener affirms that the accident occurred when Co-Defendants vehicle struck the rear of defendant Viener’s vehicle. Movant attaches the deposition of defendant Viener who testified that the sole impact was to the rear of her vehicle and that after the impact Co-Defendants’ vehicle pulled around her vehicle on the driver side (Mot, Exh E at 13-16, 18-20, 22, 54, 56). Movant has made a prima facie case of negligence and the burden shifts to plaintiffs and Co-Defendants in opposition.

In opposition, Co-Defendants raise an issue of fact as to the occurrence of the accident and claim that defendant Viener is liable for the accident. In support of their opposition Co-Defendants attach the Police Report recorded at the scene of the accident (Co-Defendant Aff in Op, Exh A). According to the police report defendant Viener’s vehicle had damage to the left side of the vehicle toward the rear tire area and not at the actual rear of the vehicle. Co-Defendants attach photographs of defendant Viener’s vehicle which depict damage to the side of the vehicle (*id.*, Exh B). Further, Co-Defendants note that plaintiff testified that following the

impact she exclaimed, “we got hit” (*id.* Exh C at 27 ¶¶ 13-19). Plaintiff’s testimony demonstrates that defendant Viener’s vehicle struck Co-Defendants. Thus, an issue of fact exists as to the occurrence of the underlying incident and defendant’s motion on the issue of liability is denied.

Plaintiff’s cross-motion for an Order granting plaintiff partial summary judgment on the issue of liability against defendants Meryl Viener, D&G Taxi, Inc., and S.M. Kabir is denied in part and granted in part. An issue of fact exists as to the occurrence of the accident; however, “[i]t is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles” (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001] citing *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1990]). Thus, the Court finds that plaintiff is free from any contributory negligence involving the accident at issue. Plaintiff’s cross-motion is denied on the issue of liability as against defendants and granted as to finding plaintiff free from culpable conduct on the issue of liability and to dismiss defendants’ affirmative defenses of culpable conduct or comparative negligence on the part of plaintiff.

Accordingly, it is

ORDERED that defendant’s motion for an order for summary judgment pursuant to CPLR 3212 to dismiss the complaint on the basis that defendant did not breach any duty owed to the plaintiff is denied; and it is further

ORDERED that the branch of plaintiff’s cross-motion for an order granting partial summary judgment on the issue of liability as against defendants is denied; and it is further

ORDERED that the branch of plaintiff’s cross motion for an order finding plaintiff free from culpable conduct on the issue of liability is granted;

ORDERED that the branch of plaintiff's cross motion to dismiss defendants' affirmative defenses of culpable conduct or comparative negligence on the part of plaintiff is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

4/16/2020
DATE

HON. ADAM SILVERA JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE