

Thorne v Wilson

2020 NY Slip Op 35546(U)

December 23, 2020

Supreme Court, Bronx County

Docket Number: Index No. 30884/2019E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



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KEVIN THORNE,

Index No. 30884/2019E

-against-

Hon. MARY ANN BRIGANTTI

SUSAN MARIE WILSON, et al.

Justice Supreme Court

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The following papers numbered 1 to 9 were read on this motion (Seq. No. 003)
for SUMMARY JUDGMENT DEFENDANT noticed on December 4, 2020

Table with 2 columns: Document Name, No(s). Rows include Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, and Replying Affidavit and Exhibits.

Upon the foregoing papers, the defendants Jacqueline M. Martin and Juliana Alexia Mauro move for summary judgment, dismissing the complaints of the plaintiffs Kevin Thorne (Action 1) and Lemeatrice Harris (Action 2) pursuant to CPLR 3212. Plaintiff Thorne submits an affirmation in partial opposition to the motion. Co-defendants Susan Marie Wilson ("Wilson") and Robert Dylan Brown ("Brown")(collectively the "Brown Defendants") oppose the motion. Plaintiff Harris oppose the motion and cross-moves for summary judgment on the issue of liability as against all defendants¹.

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident" (see Cabrera v Rodriguez, 72 A.D.3d 553 [1st Dept. 2010] citing Tutrani v County of Suffolk, 10 NY3d 906, 908 [2008]; Agramonte v City of New York 288 AD2d 75, 76 [1st Dept. 2001]; see also Dattilo v Best Transp. Inc 79 A.D.3d 432 [1st Dept. 2010]). Furthermore, "[i]n a chain reaction collision, responsibility presumptively rests with the rearmost driver" (see Mustafaj v. Driscoll, 5 A.D.3d 138 [1st Dept. 2004][internal citations omitted]).

In this matter, the Mauro Defendants have established their entitlement to summary judgment².

Motion is Respectfully Referred to Justice:
Dated:

¹The Court will consider the allegedly untimely cross-motion and opposition from plaintiff Harris, because movant's counsel alleges that he was prevented from filing his opposition and cross-motion due to pandemic-related shut downs which delayed the related Kings County matter from being transferred to Bronx County. In addition, after this motion was marked fully submitted, it was administratively adjourned again to July 29, 2020, and thus Mauro Defendants had the opportunity to submit written opposition to the cross-motion.

²Mauro Defendants have standing to make this motion because the motion indicates that they served an answer to the complaint with crossclaims on November 4, 2019, therefore issue was joined (CPLR 3212[a]; Leff v. Leff, 182 A.D.2d 401 [1st Dept. 1992]; Siegel-NYPRAC §279 Time to Move for Summary Judgment ["The statute

Mauro states that she brought her vehicle to a stop behind a Nissan Sentra (operated by Plaintiff), and completely within her lane of travel, when she observed a Subaru Impreza operated by owned by codefendant Wilson and operated by Brown strike her in the rear. As a result of this sudden impact, Mauro's vehicle was pushed into the rear of Plaintiff's vehicle. His tail lights and brake lights were properly functioning. Mauro Defendants also submit an affidavit from Plaintiff, alleging that he stopped his vehicle due to traffic conditions ahead of him when a 2005 Honda (Mauro Defendants' vehicle) collided with the rear of his vehicle. Plaintiff stated that at the time of the impact, he was stopped for 3-4 seconds. At the moment before the collision, he observed that the Mauro Defendant's vehicle was stopped behind him. Immediately prior to the impact he heard a large crash behind his vehicle, and saw the Mauro Defendant's vehicle being forced into the rear of his vehicle as a result of being struck in the rear by a 2013 Subaru owned by Wilson and operated by Brown, causing Mauro Defendant's vehicle to collide into the rear of his vehicle. These affidavits establish that Mauro Defendants were the "middle" vehicle in this three vehicle chain collision, thus establishing that they are free from liability for the accident (*Ferguson v. Honda Lease Trust*, 34 A.D.3d 356 [1st Dept. 2006]; *Morales v. Morales*, 55 A.D.3d 306 [1st Dept. 2008]; *Chang v. Rodriguez*, 57 A.D.3d 295 [1st Dept. 2008]).

Mauro Defendants' motion papers also contain the police accident report and an affidavit from defendant Brown, driver of the rearmost vehicle. Brown claims that he was traveling in the left lane of the New Jersey Turnpike when he saw the 2005 Honda traveling in front of him (the Mauro Defendants' vehicle) strike the rear of the 2019 Nissan in front of it (Plaintiff's vehicle). Brown states that he applied his brakes and reduced his speed to 15 miles per hour, but was unable to avoid the accident because the codefendants' brake lights were not illuminated. Brown further stated that he could not change lanes because the middle lane was occupied by other non-involved vehicles. Brown alleged that the impact to the rear of the Honda was very light, and the Honda did not move forward as a result of the impact - in other words there was no second impact between the Honda and Plaintiff's Nissan. Brown further claimed that the Honda and Nissan were stopped after the first impact- not due to traffic conditions. The police report contains a statement attributed to Brown, which asserts "The car in front of me stopped. I tried to stop but could not and hit the car in front of me."

Plaintiff Thorne previously moved for, among other things, summary judgment on the issue of liability against the Brown Defendants (motion sequence #001). In support of the motion Plaintiff submitted, *inter alia*, his above-referenced affidavit and the police report. In opposition to the motion, the Brown Defendants relied on the above-referenced affidavit from Brown, as well as post-accident photographs that allegedly depict vehicle damage. Brown Defendants claimed that there were issues of fact

allows for motion to be made after issue is joined - in the usual case meaning after the answer has been served..").

as to liability and that the photographs were more consistent with Brown's version of the accident. In reply, Plaintiff noted that Brown admitted liability for the accident in the police accident report, and Brown's affidavit was an attempt to raise a feigned issue of fact to avoid the consequences of his earlier admission to police. On May 5, 2020, the Court (Hon. Ben Barbato, J.S.C.) issued a decision and order granting Plaintiff's motion. The Court found that the admissions attributed to Brown in the uncertified police report were admissible as an admission against his interest. The Court also found that Wilson and Brown failed to raise a triable issue of fact in opposition because Brown failed to deny the accuracy of the police report statements. The Court held that "his affidavit sworn January 15, 2020, nine months after the accident is a belated attempt to avoid the consequences of his prior statement to the police and raise an issue of fact and is insufficient to defeat the motion" (May 5, 2020 Decision and Order [Barbato, J]). The Brown Defendants did not appeal this decision or make a motion to renew/reargue Plaintiff's motion for summary judgment.

Now, in opposition to the Mauro Defendants' motion, the Brown Defendants are relying on the same post-accident photographs and affidavit that they submitted in opposition to Plaintiff's earlier motion. Even if the "law of the case" doctrine does not apply, in light of the recent joining of co-plaintiff Harris who was not a party to prior proceedings (*see generally People v. Evans*, 94 N.Y.2d 499 [2000]), Brown's affidavit would be inadmissible since it is tailored to avoid the admission that he gave to responding police officers (*Thompson v. Coca-Cola Bottling Co.*, 170 A.D.3d 588, 589 [1st Dept. 2019], citing *Garzon-Victoria v. Okolo*, 116 A.D.3d 558 [1st Dept. 2014]; *Colon v. Vals Ocean Pacific Sea Food, Inc.*, 157 A.D.3d 462 [1st Dept. 2018]). In addition, the post-accident photographs, even if admissible, do not alone raise fact issues as to the Mauro Defendants' lack of liability.

The affidavit from plaintiff Harris also fails to raise a fact issue as to the Mauro Defendants' liability. Harris, a passenger in Plaintiff Thorne's vehicle, alleges - like Thorne does - that the vehicle was stopped in traffic when it was struck in the rear by the Mauro Defendants' vehicle. Harris states "I learned that [the Mauro Defendants' vehicle] was hit by the vehicle owned by Defendant Susan Marie Wilson, and operated by Defendant Robert Dylan Brown." Harris does not dispute the sequence of impacts as described by Thorne or the Mauro Defendants and her description of the accident does not conflict with Plaintiff or the Mauro Defendants'. Harris further failed to demonstrate that the Mauro Defendants' motion is premature as he was able to submit an affidavit in opposition to the motion, thus Harris was "able to submit facts 'essential to justify opposition [to the motion]'" (*Jeffrey v. Dejesus*, 116 A.D.3d 574 [1st Dept. 2014], quoting CPLR 3212[f]).

Harris' cross-motion for summary judgment on the issue of liability is granted only against the Brown Defendants. Harris alleged that he was a rear seated passenger in the Plaintiff Thorne's vehicle at the time of this accident, and as previously found, the Brown Defendants are liable for the accident.

Accordingly, it is hereby

ORDERED, that the Mauro Defendants' motion for summary judgment is granted, and the plaintiffs' complaints and any cross-claims asserted against the Mauro Defendants are dismissed, and the Clerk of this Court is hereby directed to enter judgment accordingly, and it is further,

ORDERED, that Harris's cross-motion for summary judgment is granted only as against the Brown Defendants.

This constitutes the Decision and Order of this Court.

Dated: DECEMBER 23, 2020

Hon. *Mary Ann Brigantti*
MARY ANN BRIGANTTI **J.S.C.**

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT