

Moses v Forsythe

2020 NY Slip Op 35689(U)

April 30, 2020

Supreme Court, Queens County

Docket Number: Index Number 716171/2017

Judge: Lourdes M. Ventura

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SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

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JANICE G. MOSES and TIM MOSES,
Plaintiffs,

Index
Number: 716171/2017

-against-

Motion
Date: February 24, 2020

AARON T. FORSYTHE, and
ARTHUR L. CUMBERBATCH, and
BRENDA P. CUMBERBATCH,
Defendants.

Motion
Seq. No.: 4

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The following numbered papers read on this Motion by Defendant Aaron T. Forsythe for an Order: pursuant to CPLR 3212 granting summary judgment to Defendant Aaron T. Forsythe, dismissing the Complaint against him and for such other and further relief as this Court may deem just and proper.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-3
Affirmation in Opposition - Exhibits.....	4-6
Reply in affirmation.....	7-8

Upon the foregoing papers, it is ORDERED that the Motion by Defendant Aaron T. Forsythe for an Order pursuant to CPLR 3212 granting summary judgment to Defendant Aaron T. Forsythe and dismissing the Complaint against him is hereby denied.

In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (see *Valentin v. Parisio* , 119 AD 3d 854 (2014); *Escobar v. Velez* , 116 A.D.3d 735 (2014); *Bravo v. Vargas* , 113 AD 3d 579 (2014); *Green v. Quincy Amusements, Inc.*, 108 AD 3d 591 (2013).

In addition, a plaintiff moving for summary judgment on the issue of liability in an action alleging negligence must establish prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault (see *Thoma v. Ronai* , 82 N.Y.2d 736 (1993); *Valentin v. Parisio* , 119 AD 3d 854 (2014); *Freeman v. Tawil* , 119 AD 3d 521(2014); *Sirlin v. Schreib* , 117 AD 3d 819 (2014).

It is well established that “[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent

explanation for the collision” *Tumminello v. City of New York*, 148 A.D.3d 1084 (N.Y. App. Div. 2017) citing *Theo v. Vasquez*, 136 A.D.3d 795, 796, 26 N.Y.S.3d 85; *Le Grand v. Silberstein*, 123 A.D.3d 773, 774, 999 N.Y.S.2d 96; *Cheow v. Cheng Lin Jin*, 121 A.D.3d 1058, 1058–1059, 995 N.Y.S.2d 186; *Volpe v. Limoncelli*, 74 A.D.3d 795, 795, 902 N.Y.S.2d 152).

“A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause” *Tumminello v. City of New York*, 148 A.D.3d 1084 (N.Y. App. Div. 2017) citing (*see Binkowitz v. Kolb*, 135 A.D.3d 884, 885, 24 N.Y.S.3d 186; *Etingof v. Metropolitan Laundry Mach. Sales, Inc.*, 134 A.D.3d 667, 20 N.Y.S.3d 589; *D’Agostino v. YRC, Inc.*, 120 A.D.3d 1291, 1292, 992 N.Y.S.2d 358; *Sayed v. Murray*, 109 A.D.3d 464, 970 N.Y.S.2d 279).

Plaintiff commenced the instant personal injury action to recover damages for injuries allegedly sustained from a motor vehicle collision that occurred on or about September 25, 2017 on 147th Avenue in the County of Queens. It is alleged that Plaintiff Janice Moses was a passenger in a vehicle owned and operated by Defendant Aaron Forsythe (hereinafter “Defendant Forsythe”) at the time of the collision. It is further alleged that Defendant Forsythe’s vehicle and a vehicle owned and operated by Defendant Arthur L. Cumberbatch collided.

Defendant Forsythe filed the instant motion for summary judgment and asserts that there is no evidence before this court establishing that he is liable and as such summary judgment in his favor is appropriate. In support of Defendant Forsythe’s moving papers, he submits the following evidence: police accident report, Summons and Verified Complaint, transcript of Defendant Forsythe’s deposition testimony, supporting affidavit of Defendant Forsythe, google map photo, and transcript of Defendant Cumberbatch’s deposition testimony.

Defendant Cumberbatch opposes Defendant Forsythe’s motion for summary judgment and asserts there is an issue of fact as to the cause of the accident and as such, Defendant Forsythe’s motion should be denied. In support of Defendant Cumberbatch’s opposing papers, he submits the following evidence: transcript of Defendant Forsythe’s deposition testimony and transcript of Defendant Cumberbatch’s deposition testimony.

Plaintiffs also oppose Defendant Forsythe’s motion for summary judgment and asserts that they adopt and incorporate portions of the argument submitted by co-defendants Arthur L. Cumberbatch and Brenda P. Cumberbatch. Plaintiffs also assert that Defendant Forsythe has failed to establish that he is free from liability of causing the accident and that questions of fact regarding his liability should preclude the granting of summary judgment in Defendant Forsythe’s favor. Plaintiffs did not attach any evidence in support of their opposing papers.

The transcript of Defendant Forsythe’s testimony in pertinent part reads as follows:

Q. How many seconds from when you passed through that intersection until you felt an impact?

A. Couldn’t be more than about ten seconds.

Q. In terms of distance, after you passed the intersection of 147th and 228th, how far did you travel?

- A. I stop [sic] when I felt the impact. I stopped just about two car lengths.
Q. You were two car lengths from the intersection of –
A. When I stopped.
Q. Why did you stop?
A. I felt an impact.
Q. You felt an impact where?
A. In the back of the vehicle. (page 51, lines 2- 19).

The transcript of Defendant Cumberbatch's testimony in pertinent part reads as follows:

- Q. Can you describe to me how the accident happened in your own words?
A. As I turned out as I was about to straighten out I just saw this flash of this van come down.
Now again, it happen [sic] so quickly. The van came, its not that it came out of somewhere but as if it was parked and then started it moved. Because when I looked to my right there was nothing and I don't know if they drop off anybody but the van just suddenly appear [sic] right onto my bumper that's when the impact was.
Q. So the first time you saw it was when it was in front of your bumper, or something else?
A. Just as it was making contact just that second before.
Q. That's when you saw the van?
A. Yes.
Q. Is it fair to say you saw the van when it was in front of your vehicle?
A. To the right.
Q. To the right and in front?
A. To the right, yes.
Q. When you first observed the van was the bumper of the van, the rear bumper in front of your vehicle whether to the right or left or something else?
A. I don't recall. Like I said it was a flash. (Page 37, lines 16-25 and Page 38 lines 2-22).

The Court finds that the deposition testimony of Defendant Forsythe and Defendant Cumberbatch raises triable issues of fact as to the factual account of how the collision occurred. (See *Corvino v. Schineller*, 168 A.D.3d 812 [N.Y. App. Div. 2019] where the Appellate Division, Second Department agreed “with the Supreme Court's determination denying the plaintiff's motion for summary judgment on the issue of liability as the parties' factual accounts differ.”). The Court further finds that Defendant Cumberbatch's testimony raises triable issues of fact as to whether he was in fact the only proximate cause of the collision and whether co-defendant Forsythe is completely free from comparative fault of causing the collision.

Accordingly, Defendant Forsythe's motion for summary judgment pursuant to CPLR 3212 on the issue of liability is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: April 30, 2020



LOURDES M. VENTURA, J.S.C.

FILED
05/05/2020
COUNTY CLERK
QUEENS COUNTY