

Evangelisti v Franzese

2020 NY Slip Op 35709(U)

May 1, 2020

Supreme Court, Queens County

Docket Number: Index No. 708204/2018

Judge: Pam Jackman Brown

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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

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LAUREN C. EVANGELISTI and ERIN M. O'SHAUGHNESSY,

Index No.: 708204/2018

Motion Date: 3/9/2020

Plaintiffs,

Mot. Seq. No.: 002

-against-

JOSEPH O. FRANZESE, GUSTAVO A. FRANZESE, GUSTAVO FRANZESE TILE & MARBLE, INC., and DANE S. DOODNATH,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the following papers filed numbered 37 to 57 read on this motion by Defendant Dane S. Doodnath for an order: (1) pursuant to CPLR § 2221 granting Plaintiff's Motion to renew; (2) pursuant to CPLR § 3212, granting summary judgment in favor of Defendant Dane S. Doodnath, dismissing Plaintiffs' complaint and all cross-claims on the grounds that no triable issues of material facts exist as to any negligence or liability on the part of Defendant Dane S. Doodnath, for the happening of the subject incident and/or Plaintiff's alleged injuries; and (3) for such other and further relief as to this Court may seem just and proper. Plaintiffs cross motion to renew and for summary judgment.

	<u>FILED PAPERS NUMBERED</u>	
	Papers	Exhibits
Notice of Motion – Affirmation(s), Affidavit(s), and Exhibit(s) Annexed	37-39	40-52
Notice of Cross-Motion – Affirmation(s), Affidavit(s), and Exhibits(s) Annexed	53-54	55-57

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is an action by Plaintiffs' to recover damages for personal injuries allegedly sustained as a result of a multi-vehicle accident on April 9, 2018. Plaintiff, Lauren C. Evangelisti (hereinafter referred to as "Plaintiff Evangelisti"), was a passenger in a motor

vehicle owned and operated by Plaintiff Erin M. O'Shaughnessy (hereinafter referred to as "Plaintiff O'Shaughnessy"). Plaintiff Evangelisti was a passenger in and Plaintiff O'Shaughnessy was the operator of, the automobile that was struck in the rear by a motor vehicle owned and operated by Defendant Dane S. Doodnath (hereinafter referred to as "Defendant Doodnath"). Prior to Defendant Doodnath hitting the Plaintiffs' vehicle, Defendant Doodnath alleged that his vehicle was struck in the rear by a motor vehicle being operated by Joseph O. Franzese, and owned by Defendants Joseph O. Franzese, Gustavo A. Franzese, and Gustavo Franzese Tile & Marble, Inc. (hereinafter referred to as "Franzese Defendants").

Plaintiffs commenced this action with the filing of a summons and complaint on May 27, 2018. Issue was joined on June 4, 2018, when the Franzese Defendants filed a verified answer with cross-claims and counterclaims. On August 20, 2018, Defendant Doodnath filed a verified answer.

Now, upon motion, Defendant Doodnath seeks an order: (1) pursuant to CPLR § 2221 granting Plaintiff's motion to renew; (2) pursuant to CPLR § 3212, granting summary judgment in favor of Defendant Doodnath, dismissing Plaintiffs' complaint and all cross-claims on the grounds that no triable issues of material facts exist as to any negligence or liability on the part of Defendant Doodnath, for the happening of the subject incident and/or Plaintiffs' alleged injuries. Plaintiffs filed a cross motion seeking to renew the Plaintiffs motion for an Order pursuant to CPLR § 3212, granting summary judgment in Plaintiffs' favor and against defendants Joseph O. Franzese, Gustavo A. Franzese and Gustavo Franzese Title & Marble, Inc. There is no opposition to the motion and cross motion.

In order to seek leave to renew, there must be standing to make the application. The motion was filed first by Defendant Doodnath on February 11, 2011, seeking an application to grant Plaintiff's motion to renew. Therefore, Defendant Doodnath application seeking to grant Plaintiff's motion to renew which was not filed at or before Defendant Doodnath's motion is denied for lack of standing. Curiously, Defendant Doodnath is arguing for Plaintiffs in his motion and Plaintiffs are arguing for Defendant Doodnath in their cross motion. To the extent that each is arguing for the other, their application is denied.

The Court now turns to Plaintiffs' cross motion filed on February 13, 2020, seeking leave to renew. Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion (*see Matter of Gold v. Gold*, 53 A.D.3d 861 [2d Dept 2008]; *Matter of Surdo v. Levittown Pub. School Dist.*, 41 A.D.3d 837 [2d Dept 2007]). However, "[a] motion for leave to renew is not a second chance freely given to

parties who have not exercised due diligence in making their first factual presentation” (Elder v. Elder, 21 A.D.3d 802 [2d Dept 2005]).

The Court turns to Defendant Doodnath’s application for summary judgment and Plaintiffs cross-motion to renew and for summary judgment. The Order dated August 12, 2019, and filed August 15, 2019, the Court stated that “the applications are denied with leave to renew after completion of discovery”. Accordingly, Defendant Doodnath application for summary judgment and Plaintiffs application to renew and for summary judgment are granted.

In support of both applications, both Defendant Doodnath and Plaintiffs point to the deposition testimony of Defendant Doodnath wherein he testified that he was stopped for five seconds when his automobile was hit in the rear by the Defendants’ Franzese’s vehicle. The testimony of Defendant Joseph Franzese show that he dozed off when his foot slid off the brake. In the Plaintiffs deposition testimony, they testified that they heard a loud crash and the back of their car got smashed. They further testified that the driver got out and said he fell asleep. The police report states from the information received at the accident that Plaintiffs vehicle was hit in the rear by Defendant Doodnath’s vehicle and Defendant Doodnath’s vehicle was hit in the rear by Franzese Defendants vehicle because he fell asleep.

“The proponent of a summary judgment motion must make, *prima facie*, showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY 2d 320, 324 [Ct App 1986]). Thereafter, the opponent to the motion must show that there are issues of fact to be determined. In addition, “plaintiff motorist, moving for summary judgment in an action against defendant motorist to recover for personal injuries allegedly sustained when defendant’s vehicle struck plaintiff’s vehicle in the rear, has the burden of showing that plaintiff’s own negligence in double-parking his vehicle was not a proximate cause of the accident (34 RCNY § 4-08[f][1]; *see also Marta Gonzalez v. Amie Ceesay*, 98 AD3d 1078 [2d Dept 2012]).

Moreover, the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and traffic (Vehicle and Traffic Law § 1129[a]); *see also Napolitano v. Galletta*, 85 AD3d 925 [2d Dept 2011]). Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation (*Id.*). Here, Plaintiffs failed to establish, *prima facie*, that their vehicle was hit in the rear by Defendant Doodnath’s vehicle after it was hit in the rear by Franzese Defendants’ vehicle. Plaintiffs vehicle was the lead vehicle and Defendant Doodnath was the middle vehicle. From the testimony, both vehicles have established that they were free from negligence at the time of the accident (*see Polanco-Espinal v. City of New York*, 84

A.D.3d 921 [2d Dept 2011]). Notably, there is no opposition filed to the motion or cross motion by the Franzese Defendants.

Upon review of the application by Defendant Doodnath for summary judgment, Plaintiffs application for summary judgment and after a conference with the Court on March 9, 2020, both applications for summary judgment are granted. Plaintiffs application for summary judgment on the issue of liability is granted against Franzese Defendants. Defendant Doodnath's application for summary judgment is granted against Plaintiffs and Franzese Defendants. The Complaint against Defendant Doodnath and the cross-claims are dismissed.

Accordingly, Defendant Doodnath motion for summary dismissing the Plaintiffs' complaint and any and all cross claims is granted. Plaintiffs' cross-motion is granted in its entirety.

The foregoing constitutes the Decision and Order of this Court.



Dated: May 1, 2020
Jamaica, NY

HON. PAM JACKMAN BROWN, JSC

FILED
5/6/2020
COUNTY CLERK
QUEENS COUNTY