

Davis v Boykin

2020 NY Slip Op 35710(U)

February 28, 2020

Supreme Court, Queens County

Docket Number: Index No. 703137/2018

Judge: Joseph Risi

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI, A.J.S.C.

IA Part 3

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NADINE KAY MARIE DAVIS,

Index
Number: 703137/2018

Plaintiff,

DECISION/ORDER

-against-

BOBBY BOYKIN, RAINFORD MOORE, RODGER
FIWLER and WENDY GOMEZ,

Motion Sequence No.3

Defendants.

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The following papers numbered 1-4 read on this motion by defendant Wendy Gomez ("Gomez"), seeking an order vacating the stay of this action and upon lifting the stay, for an order, pursuant to CPLR §3212, granting summary judgment in defendant Gomez' favor and dismissing the complaint and any and all cross-claims asserted against her.

	<u>Papers</u>
	<u>Numbered</u>
N.M., Aff., Exhibits and Service.....	1-4

Upon the foregoing papers, the unopposed motion is decided as follows:

Plaintiffs commenced this action by filing a summons and complaint on March 1, 2018, seeking to recover damages for personal injuries sustained as the result of a motor vehicle accident on October 20, 2017 on Merrick Boulevard at or near the intersection of 15th Avenue, County of Queens, City and State of New York. Defendants Rodger Fowler s/h/a Rodger Fiwler and Rainford Moore interposed an answer with cross-claim and various demands on May 10, 2018. Defendant

FILED
MAR 10 2020
COUNTY CLERK QUEENS COUNTY

Gomez filed an answer with cross-claim and various demands on June 28, 2018.

On or about October 10, 2018, defendant Gomez moved for summary judgment in her favor seeking dismissal of the complaint and any cross-claims. The motion was ultimately withdrawn on November 20, 2018 upon presentation of a death certificate of defendant Bobby Boykin, and the matter stayed.

Defendant Gomez now moves seeking an order vacating the stay of the instant action. Plaintiffs support their motion with a copy of Bobby Boykin's death certificate indicating his date of death as February 5, 2018. As Mr. Boykin was deceased prior to the commencement of the action, he was not a proper party to the proceeding.

In view of the foregoing, the stay is vacated.

Defendant Gomez simultaneously moves for summary judgment in her favor. In support of the motion, plaintiff submits an affirmation from counsel; a copy of the pleadings; and an affidavit of defendant Gomez and of co-defendant Rainford Moore.

Plaintiff states that at the aforesaid location she was operating a motor vehicle, which prior to the accident, was brought to a gradual stop on Merrick Boulevard for a red traffic light. Defendant Gomez stated that her vehicle was at a complete stop for approximately five (5) minutes with her right foot on the brake when she felt an impact to the rear of my vehicle by the vehicle owned and operated by co-defendants Fowler and Moore. In Mr. Moore's affidavit, he states that he was driving on Merrick Boulevard and he brought his vehicle to a stop for a red light at 115th Avenue "behind another car which had previously stopped for the red light". He continues to state that his vehicle had been stopped for approximately 30 seconds when his van was struck in the rear by another vehicle causing his vehicle to be propelled into the vehicle in front of him (the Gomez vehicle).

The proponent of 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 position (see *Zuckerman v. City of New York*, 49 N.Y.2d 557).

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under prevailing conditions to avoid colliding with the other vehicle (see *Plummer v. Nourddine*, 82 A.D.3d 1069; *Gubala v Gee*, 302 A.D.2d 911). As such, it is well-settled that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability as to the offending vehicle's driver and imposes a duty on that operator to provide a non-negligent explanation for the collision (*Katz v Masada II Car & Limo Service, Inc.*, 43 A.D.3d 876; *Mead v Marino*, 205 A.D.2d 669).

Defendant Gomez has tendered sufficient proof to establish her entitlement to summary judgment in her favor as a matter of law. Plaintiff has not opposed the motion and has therefore failed to raise a triable issue of fact.

Accordingly, the defendant Wendy Gomez' motion for summary judgment on the issue of liability is granted and the complaint and any and all cross-claims are dismissed as against Wendy Gomez only.

Furthermore, the caption shall be amended to reflect the removal defendants Bobby Boykin and Wendy Gomez and shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS

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NADINE KAY MARIE DAVIS,

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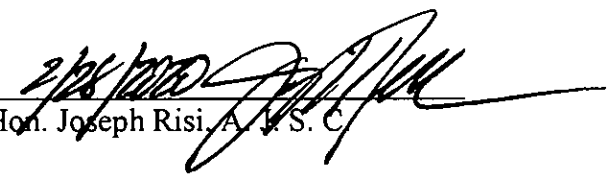
Plaintiff,
-against-

RAINFORD MOORE and RODGER FIWLER,

Defendants.
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This is the decision and order of the Court.

Dated: February 28, 2020


Hon. Joseph Risi, A. J. S. C.

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QUEENS COUNTY