Wortham v Mangrey
2021 NY Slip Op 32893(U)
December 28, 2021
Supreme Court, Kings County
Docket Number: Index No. 507802/2019
Judge: Ingrid Joseph
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of December, 2021.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

---x

TAMMIE WORTHAM and PETRICIA LEE,

Plaintiffs,

- against -

SHAM MANGREY, ENERGY HEALTH & FITNESS CORP., AMIN ABEL MARTINEZ GONZALEZ, HEART TO HEART SOCIAL ADULT SERVICES LLC and R.E. HANSEN INDUSTRIES INC.,

Defendants.

---x

Index No. 507802/2019

DECISION AND ORDER

2022 JAN 14 AM 9: 19
KINGS COUNTY CLERK FILED

The following e-filed papers read herein:	NYSCEF Nos:
Notice of Motion/ Affirmation/Exhibits Annexed	122 - 127
Opposing Affidavits	158, 160 - 161, 164
Reply Papers	166

In this matter to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 23, 2017, defendants Heart to Heart Social Adult Services LLC ("Heart to Heart") and Amin Abel Martinez Gonzalez ("Gonzalez") move by notice of motion (Motion Seq. 6) for leave to reargue the motion filed by plaintiffs Tammie Wortham and Petricia Lee (referred to collectively as ("plaintiffs") for summary judgment on the issue of liability and co-defendants Sham Mangrey ("Mangrey") and R.E. Hansen Industries Inc.'s ("Hansen") motion for dismissal of plaintiffs' claims against them. Both motions were granted by decision and order dated April 6, 2021 ("April 2021 decision") by predecessor justice Hon. Lara Genovesi. Upon reargument, Heart to Heart and Gonzalez request that this court deny

the motions. The matter was administratively reassigned to this court for a written decision.

A review of the instant motion reveals that the plaintiffs were passengers in the motor vehicle owned by Heart to Heart and driven by Gonzalez when such vehicle collided into the rear of the vehicle owned by Hansen and driven by Mangrey. In the April 2021 decision, the court found that Gonzalez and Heart to Heart failed to rebut the plaintiffs' prima facie showing that they were free from comparative fault, since both were mere passengers without control over the positioning of the Heart to Heart vehicle or the manner in which Gonzalez operated the vehicle. The court found that the operators of the vehicles involved (Gonzalez and Mangrey) failed to rebut plaintiffs' prima facie showing and neither driver suggested that the plaintiffs bore any fault in the happening of the accident.

The court considered Heart to Heart and Gonzalez's argument that the vehicle driven by Mangrey suddenly stopped but opined that such allegation fails muster as a non-negligent explanation for Gonzalez striking the rear of the Mangrey/Hansen vehicle. In support of this finding, the prior court quoted the *Taing v Drewery*, 100 AD3d 740 [2d Dept 2012] case, wherein the Second Department held that "[v]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead." Additionally, the court determined that Gonzalez was under a duty to maintain a safe distance between his vehicle and the Mangrey/Hansen vehicle, and the failure to do so, in the absence of an adequate, non-negligent explanation, constituted negligence as a matter of law.

In addressing Hansen/Mangrey's motion for summary judgment against Gonzalez and Heart to Heart, the prior court determined that Hansen and Mangrey demonstrated prima facie, their entitlement to summary judgment as a matter of law, through the affidavits submitted. The court recounted that Wortham and Lee stated that their vehicle was stopped or stopping when Gonzalez struck them in the rear and that Gonzalez admitted that he could not stop his vehicle in time to avoid striking the rear of the Hansen/Mangrey vehicle. The court opined in the April 2021 decision that Gonzalez failed to raise a triable issue of fact, based upon a sudden stop, in and of itself.

The cornerstone of Gonzalez's opposition to the plaintiffs' and Hansen/Mangrey's

As it is couched by Gonzalez's counsel, the cornerstone of Gonzalez's opposition to the plaintiffs' and Hansen/Mangrey's underlying motions for summary judgment was that the accident was caused by a phantom vehicle. Gonzalez's counsel contends that the prior justice mischaracterized Gonzalez's statement in his affidavit that he (Gonzalez) was told about the phantom vehicle by the reporting police officer, then the court incorrectly determined that there was nothing in the police report to support that there was a phantom vehicle involved in the accident. Gonzalez's counsel further contends that nowhere in the Gonzalez affidavit does he state that he was told of the involvement of a phantom vehicle by any responding police officer, but rather, Gonzalez "made it clear that he learned of the phantom vehicle from the police report (and not from a police officer). Gonzalez seeks reargument on the ground that the prior court's misapprehension of the source of Gonzalez's information materially effected its holding that Gonzalez failed to rebut the plaintiffs' and Hansen and Mangrey's motions for summary judgment.

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR § 2221 [d] [2]). A motion for reargument is addressed to the sound discretion of the court that decided the original motion (*see Fuessel v Chin*, 179 AD3d 899, 900 [2d Dept 2020]; *Bueno v Allam*, 170 AD3d 939, 940 [2d Dept 2020]). A court providently exercises its discretion in granting a party's motion for leave to reargue when the party has satisfactorily demonstrated the manner in which the court overlooked or misapprehended matters of fact or law in its original decision (*see Barrett v Jeannot*, 18 AD3d 679, 680 [2d Dept 2005]; *Matter of Progressive Northeastern Ins. Co. v Cipolla*, 119 AD3d 946, 947 [2d Dept 2014]).

Here, the court grants that branch of Hansen and Mangrey's motion for leave to reargue their opposition upon the above-stated reasons and upon reargument, the court adheres to the predecessor justice's decision and order dated April 6, 2021.

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR § 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, at 324; *Zuckerman*, at 562).

In the instant matter, Gonzalez and Heart to Heart failed to rebut Hansen and Mangrey's prima facie showing of entitlement to summary judgment as a matter of law. Contrary to Gonzalez and Heart to Heart's contention, the prior court's discussion of Gonzalez's statements in his affidavit had no material effect on Gonzalez's failure to provide a non-negligent explanation for the happening of the accident. In his affidavit, Gonzalez stated that,

> "[a]lmost immediately after the vehicle ahead of me started to move forward, it abruptly and suddenly stopped hard. In response I also stopped hard but not before coming in contact with the vehicle ahead of me. I did not see what caused the vehicle ahead of me to abruptly stop hard a moment after it had just started to move, however, I have been advised that the police report from this accident indicates at Box 19, as a contributing factor, factor 26, which is [a] 'reaction to involved vehicle' [indicator]."
>
> Gonzalez elaborated, that
>
> "[t]here being another vehicle which somehow cut off, obstructed, or otherwise necessitated the vehicle in front of me to hit their brakes hard is entirely consistent with what I experienced at the time of the accident, as the traffic light in my direction of travel was, at the time of the accident, green. Had another vehicle not somehow obstructed, cut off or blocked the vehicle in front of me, the accident would not have occurred.
>
> Gonzalez also stated, that
>
> "[t]he phantom vehicle was only 'uninvolved' to the extent that there apparently was no physical contact between the lead vehicle (the Hansen/Mangrey vehicle) and the phantom vehicle."

Consistent with the prior court's ruling, this court finds that Gonzalez's allegation of a phantom vehicle is based entirely upon hearsay information that was provided in the police report. Gonzalez had no independent recollection of a third vehicle and consequently, his non-negligent explanation, that a phantom vehicle caused the accident, is based entirely upon the indicator at Box 19 in the MV-104. This indicator was provided by the reporting police officer, who did not witness the accident but rather, arrived at the scene post-accident. The prior court

mistakenly indicated that there was no reference to a phantom vehicle in the police report. However, even if the court correctly observed what is indicated at Box 19, such information is hearsay and inadmissible and defendant failed to identify an applicable exception to the hearsay rule.

This court is not persuaded that a different result is warranted based upon the Second Department's holding in *Pollard v Independent Beauty & Barber Supply*, 94 AD3d 845, 846 [2d Dept 2012]. In that rear-end collision case, the court determined that the driver of the rearmost vehicle raised an issue of fact, based upon his averment that the lead vehicle began to proceed when the light turned green, but then stopped suddenly and without warning in the intersection despite the fact that it was clear of traffic and pedestrians (*Id.*). Contrarily, Gonzalez did not see what caused the Mangrey/Hansen vehicle to suddenly stop, and he failed to set forth a non-negligent explanation based upon his own personal knowledge. The Second Department has repeatedly held that the "assertion that a lead vehicle came to a sudden stop, standing alone in a rear-end collision, is insufficient to rebut the presumption of negligence on the part of the operator of the rear vehicle (*Perez v Persad*, 183 AD3d 771 [2d Dept 2020]).

Accordingly, the Heart to Heart Social Adult Services LLC and Amin Abel Martinez Gonzalez's motion for leave to reargue (Motion Seq. 6) is granted and upon reargument, the court adheres to the decision and order dated April 6, 2021.

This constitutes the decision and order of the court.

2022 JAN 14 AM 9:19
KINGS COUNTY CLERK
FILED

ENTER,

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice