

Gold v Singh

2022 NY Slip Op 34464(U)

December 28, 2022

Supreme Court, Kings County

Docket Number: Index No. 525603/2020

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 27th day of December, 2022.

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PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MOSHE GOLD,
Plaintiff,

Index No. 525603/2020

-against-

DECISION AND ORDER

BALJINDER SINGH, RENE DIAZ, GELCO FLEET TRUST, ARON LEIFER and ROIZY LEIFER,
Defendants.

Motion Sequence #1, #2, #3, #4, #5

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed 16-23, 32-42, 49-56, 65-70, 71-73,
Opposing Affidavits (Affirmations)..... 46-47, 58-61, 74-75, 76,
Reply Affidavits (Affirmations) 62, 64, 77, 78

After a review of the papers and oral argument, the Court finds as follows:

The instant action is a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on September 18, 2020. Plaintiff Moshe Gold (hereinafter the "Plaintiff") alleges that he was injured when his vehicle was involved in a collision with a vehicle owned and operated by Defendant Baljinder Singh (hereinafter "Defendant Singh"), a vehicle operated by Defendant Rene Diaz (hereinafter "Defendant Diaz") and owned by Defendant Gelco Fleet Trust (hereinafter the "Defendant Gelco"), and a vehicle operated by Defendant Aron Leifer and owned by Defendant Roizy Leifer (hereinafter the "Leifer Defendants"). The accident occurred on the Brooklyn Queens Expressway at or near the Fort Hamilton Parkway Pedestrian Bridge in Brooklyn, New York.

The Plaintiff now moves (motions sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability as against Defendant Singh. The Plaintiff contends that summary judgment should be granted because at the time of the accident the Plaintiff's vehicle was struck in the rear and there is no non-negligent explanation for this collision. In support of his motion, the Plaintiff relies primarily on his own affidavit and a Police Accident Report. Defendant Singh opposes the Plaintiff's motion.

The Leifer Defendants cross-move (motion sequence #2) for an order, pursuant to CPLR 3212, granting them summary judgment and dismissal of the complaint. The Leifer Defendants argue that their vehicle did not strike the Plaintiff's vehicle and only made contact with the vehicle operated by Defendant Diaz and owned by Defendant Gelco after the Diaz/Gelco vehicle had already struck the Singh vehicle, and the Singh vehicle had struck the Plaintiff's vehicle. Therefore, the Leifer Defendants contend that their vehicle was not a proximate cause of the motor vehicle collision with the Plaintiff. The Plaintiff opposes the motion by the Leifer Defendants.

Defendant Gelco moves (motions sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint and any cross-claims against it. Defendant Gelco argues that it is not a proper party to the action as it is immune from claims of vicarious liability as the owner of the vehicle pursuant to 49 U.S.C. §30106 (hereinafter "the Graves Amendment"). In support of its position Defendant Gelco relies on an affidavit from Cindy Clipper, and the purported lease agreement. The Plaintiff opposes this motion as insufficient to meet Defendant Gelco's *prima facie* burden. The Plaintiff also contends that the motion is premature.

The Plaintiff also moves (motions sequence #4) for an order pursuant to CPLR §602(a) consolidating the instant action with a purportedly related action (Moshe Gold v. Rene Diaz and

Jones Lang LaSalle Americas, Inc, Supreme Court, Kings County Index No: 518181/2021)
(Action #2).

Defendant Singh cross-moves (motion sequence #5) for an order, pursuant to CPLR 3212, granting him summary judgment and dismissal of the complaint. Defendant Singh argues that he is not a proximate cause of the accident and the complaint should be dismissed as against him given that his vehicle was first struck by the Diaz/Gelco vehicle and pushed forward into the Plaintiff's vehicle. Defendant Singh relies primarily on his own affidavit. The Plaintiff opposes this motion.

As an initial matter, and without opposition, the Court finds that the Plaintiff has provided sufficient evidence in support of his motion to consolidate (motion sequence #4) this action with Action #2 (Moshe Gold v. Rene Diaz and Jones Lang LaSalle Americas, Inc, Supreme Court, Kings County Index No: 518181/2021). CPLR 602 states that "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (CPLR 602). The decision whether to consolidate actions rests with the sound discretion of the Court. *See Pitney Bowes Credit Corp. v. Biometrics/Seafield Ctr.*, 302 AD2d 508, 508, 755 N.Y.S.2d 254 [2d Dept 2003]. Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion. *See Perini Corp. v. WDF, Inc.*, 33 AD3d 605, 606, 822 N.Y.S.2d 295, 296 [2d Dept 2006]; *see also Nationwide Assoc. v. Targee St. Internal Med. Group, P.C. Profit Sharing Trust*, 286 AD2d 717, 730 N.Y.S.2d 349 [2d Dept 2001]. Here, there is clearly a legitimate interest in consolidating the matters in order to avoid unnecessary costs, delay and

possible inconsistent determinations. As a result, the motion seeking consolidation (motions sequence #4) is granted.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *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. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d

Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the motion by the Plaintiff (motion sequence #1), the Plaintiff relies on a Police Accident Report and his own affidavit. In the Police Accident Report,¹ Defendant Singh admits that “[h]e was standing in traffic when Vehicle #3 [Diaz/Gelco] hit him from the rear and pushed his car into vehicle #1 [Plaintiff] causing his car to hit vehicle #1.” The Plaintiff states in his affidavit that, “[a]fter my vehicle was stopped it was violently struck in the rear.” The Plaintiff’s affidavit also states that “[m]y vehicle had been stopped for five to ten seconds before it was struck in the rear by Defendants’ vehicle.” This evidence taken together is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because “[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007]. See also VTL 1129(a).

Defendant Singh has raised a material issue of fact that would prevent this Court from granting the Plaintiffs’ motion. As part of his affidavit, Defendant Singh states that “[s]uddenly vehicle # 1 [Plaintiff’s vehicle] came to a stop in front of me.” Defendant Singh states that “I slammed on my brakes and came to a stop very close behind vehicle # 1.” Defendant Singh then

¹ Each party relies on this report, and although a certified copy is proffered, the Plaintiff’s is not certified. In any event, no party objects to the admission of the Police Report.

states that “[a]t that moment, vehicle # 3 [Diaz/Gelco vehicle] rear-ended me (heavy impact), pushing my vehicle into vehicle # 1 (very light impact).” (See Defendant Singh’s Affirmation in Opposition, Affidavit). “Defendants made a prima facie showing that the accident was not due to their negligence, namely, that their vehicle was pushed into the rear of plaintiffs’ vehicle when it was itself hit in the rear by another vehicle.” *Hatzis v. Belliard*, 13 AD3d 106, 786 N.Y.S.2d 40 [2d Dept 2004]; *see also Cerda v. Parsley*, 273 A.D.2d 339, 340, 709 N.Y.S.2d 585 [2d Dept 2000]; *Higgins v. Ridgewood Sav. Bank*, 262 A.D.2d 357, 358, 691 N.Y.S.2d 175 [2d Dept 1999].

Turning to the merits of the Leifer Defendants’ cross-motion (motion sequence #2), the Leifer Defendants argue that the Police Accident Report contains an admission by Defendant Singh that he struck the Plaintiff’s vehicle after he was struck by the Diaz/Gelco vehicle. As part of his affidavit, Defendant Roizy Leifer states that, “[j]ust before the accident, I was traveling about four car lengths behind the car in front of me when I saw and heard an impact in front of me.” He also states that, “[a]s I saw and heard the impact, I pressed on my brakes forcefully. I was able to stop my car just as it tapped the car in front of me.” (See Leifer Defendants’ Motion, Exhibit “D”, Paragraphs 7 and 8). What is more, as part of the Police Accident Report, Defendant Diaz admits that “he slammed on his brakes but had collided into vehicle #2 [Defendant Singh’s Vehicle], and vehicle #4 [the Leifer Defendants’ vehicle] hit him from the rear.” *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020].

In opposition to the motion, the Plaintiff has not raised a material issue of fact that would prevent this Court from granting the Leifer Defendants’ motion. The “motion was not premature since the [plaintiff] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept

2016]. The Plaintiff does not submit an affidavit directly rebutting the statements made by the Leifer Defendants and although his attorney speculates that the Plaintiff requires further discovery to address the motion, the Plaintiff does not state that he is unable to address it because he lacks information. No other party opposes the Leifer motion. Plaintiff fails to raise a triable issue of fact. As such the Leifer Defendants' motion for summary judgment is granted.

Turning to the merits of the motion by Defendant Gelco (motion sequence #3), the Court finds that Defendant Gelco has failed to provide sufficient evidence establishing that Defendant Gelco is entitled to a defense pursuant to the Graves Amendment. In general, "[u]nder the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent." *Cukoviq v. Iftikhar*, 169 AD3d 766, 767, 93 N.Y.S.3d 710 [2d Dept 2019].

In support of Defendant Gelco's motion, Defendant Gelco relies on its Litigation Administrator's, Cindy Clipper's, affidavit, a Master Lease Agreement, and the Police Accident Report. In her affidavit, Ms. Clipper stated that "[t]his affidavit is based on my own personal knowledge as well as on a review of the records and books maintained by GELCO in the regular course of business." Ms. Clipper testified that "GELCO is in the business of leasing / renting motor vehicles and was so on September 18, 2020, the date of the alleged accident." She then stated that "GELCO was the lawful owner of a 2015 Chevrolet Cargo Van (Vehicle Identification Number 3N63M0ZN1FK696656) bearing New York Registration Number 27440MH." She further stated that "[t]he above referenced vehicle owned by GELCO was leased to Jones Lang LaSalle Americas, Inc. ("JLL"), pursuant to a Master Lease Agreement ("MLA")." She also stated that "GELCO never had possession of the vehicle at any time during the lease period including on September 18, 2020." She stated that "[t]here were no mechanical problems or defects with the

vehicle and it was otherwise in good working order on the date it was delivered to JLC...” “Renee A. Diaz is not an employee, agent or representative of GELCO.” “According to our records, Renee A. Diaz has never been an employee, agent or representative of GELCO.” (See Plaintiff’s Motion, Clipper’s Affidavit, Paragraphs 1, 2, 3, and 4) Additionally, Defendant Gelco provides the Master Lease Agreement between Defendant Gelco and Jones Lang LaSalle Americas, Inc.

Plaintiff argues that Defendant Gelco has failed to establish that the Van involved in the accident is in fact the van Gelco is claiming to have owned and leased to Jones Lang LaSalle Americas, Inc.. Plaintiff argues that there is no admissible evidence matching the VIN referenced by Ms. Clipper to the Van. The Plaintiff argues that Ms. Clipper’s Affidavit is the only evidence relating to ownership and leasing of the Van. The Police Report does not include the vehicle’s VIN identifying the Van involved in the accident as being the van owned by Defendant Gelco and leased to Defendant Jones Lang LaSalle Americas, Inc. In fact, the only document offered is the Lease, which does not identify any vehicle. No other documents are proffered. “[I]t is the business record itself, not the foundation affidavit, that serves as proof of the matter asserted.” *Wilmington Sav. Fund, FSB v. Peters*, 189 AD3d 937, 939, 138 N.Y.S.3d 193 [2d Dept 2020], quoting *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 205, 97 N.Y.S.3d 286, 293 [2d Dept 2019]; see also *Khan v. Duncan*, 2020 NY Misc LEXIS 18588, 2020 NY Slip Op 34618 [Sup. Ct. Queens County, May 28, 2020]. The Court finds that the movant has not established a connection for purposes of summary judgment. The Court finds that Defendant Gelco was unable to provide evidence that the Van is a vehicle leased by Defendant Gelco. Therefore, Gelco’s summary judgment motion is denied.

Turning to the merits of the motion by Defendant Singh (motion sequence #5), as indicated above, Defendant Singh states in his affidavit that “I slammed on my brakes and came to a stop

very close behind vehicle # 1.” Defendant Singh then states that “[a]t that moment, vehicle # 3 rear-ended me (heavy impact), pushing my vehicle into vehicle # 1 (very light impact).” (See Defendant Singh’s Affirmation in Opposition, Affidavit). This testimony is sufficient for Defendant Singh to meet his *prima facie* burden. As stated above, “[d]efendants made a *prima facie* showing that the accident was not due to their negligence, namely, that their vehicle was pushed into the rear of plaintiffs’ vehicle when it was itself hit in the rear by another vehicle.” *Hatzis v. Belliard*, 13 AD3d 106, 786 N.Y.S.2d 40 [2d Dept 2004]; *see also Cerda v. Parsley*, 273 A.D.2d 339, 340, 709 N.Y.S.2d 585 [2d Dept 2000]; *Higgins v. Ridgewood Sav. Bank*, 262 A.D.2d 357, 358, 691 N.Y.S.2d 175 [2d Dept 1999].

In opposition to the motion, the Plaintiff has not raised a material issue of fact that would prevent this Court from granting Defendant Singh’s motion. First, it should be noted that the “motion was not premature since the [plaintiff] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. What is more, the Plaintiff does not submit an affidavit directly rebutting the statements made by Defendant Singh and as a result fails to raise a triable issue of fact. As such, Defendant Singh’s motion for summary judgment is granted.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff’s motion for summary judgment (motion sequence #1) is denied.

The Leifer Defendants’ motion for summary judgment (motion sequence #2) is granted. The complaint and any cross claims are dismissed as against the Leifer Defendants.

Defendant Gelco’s motion for summary judgment (motions sequence #3) is denied.

The Plaintiff's motion for consolidation (motion sequence #4) is granted. The new caption will read as follows:

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MOSHE GOLD,

Index No. 525603/2020

Plaintiff,

-against-

RENE DIAZ, JONES LANG, GELCO FLEET TRUST,
LASALLE AMERICAS, INC.,

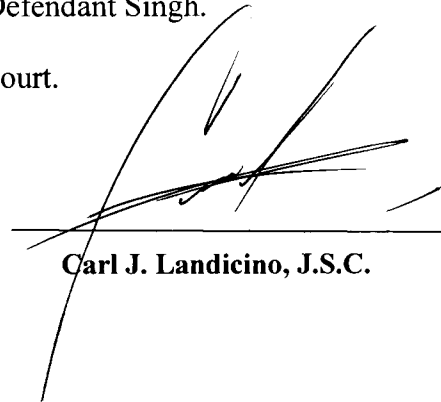
Defendants.

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Defendant Singh's motion for summary judgment (motion sequence #5) is granted. The complaint and any cross-claims are dismissed as against Defendant Singh.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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