

Bong Sun Shin v Castillo
2023 NY Slip Op 35245(U)
August 17, 2023
Supreme Court, Queens County
Docket Number: Index No. 715318/2018
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE KARINA E. ALOMAR
JUSTICE

IAS PART 23

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BONG SUN SHIN,

Plaintiff,

-against-

Index No.: 715318/2018
Motion Date: 07/20/2023
Motion Seq. No.: 7, 9

EDWIN A. CASTILLO and JOSEPH SHOU CHIU,

Defendants.

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JOSEPH SHOU CHIU,

Third-Party Plaintiff,

-against-

EMMANUEL A. MARTINEZ, YONG BOK KANG,
and LISA M. SCHEPPKE,

Third-Party Defendants.

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The following numbered papers 129 to 207 read on these: motions by third-party defendants Emmanuel A. Martinez (“Martinez”) and Yong Bok Kang (“Kang”) for an order pursuant to CPLR §3212 dismissing the third-party complaint as against the third-party defendants Martinez and Kang; third-party defendant Kang’s motion for an order pursuant to CPLR §§ 3211(a)(3) and/or 3211(a)(5) dismissing the third-party complaint; and third-party defendant Lisa M. Scheppke’s (“Scheppke”) cross-motion for an order pursuant to CPLR §3212 dismissing the third-party complaint as against Scheppke

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibits.....	129 – 132
Notice of Motion, Affidavit, Exhibits.....	147 – 165
Notice of Cross-Motion, Affidavit, Exhibits.....	166 – 171
Affirmation in Opposition, Exhibits.....	184 – 187
Affirmation in Opposition, Affidavits.....	190 – 193
Affirmation in Reply.....	204
Affirmation in Reply, Affidavit, Exhibits.....	199 – 203
Affirmation in Reply.....	207

Upon the foregoing cited papers, it is ordered that third-party defendants’ motions and cross-motion for an order pursuant to CPLR §3212 dismissing the third-party complaint, and third-party defendant Kang’s cross motion for an order pursuant to CPLR §3211(a)(3) and/or 3211(a)(5) dismissing the third-party complaint are decided as follows:

Plaintiff commenced the instant action on October 8, 2018, to recover for personal injuries allegedly sustained as the result of a five-chain motor vehicle accident which occurred on March 1, 2018, on the Southbound lanes of the Hutchinson River Parkway, Bronx, New York. Defendant Edwin A. Castillo (“Castillo”) was the owner and operator of a certain 2016 motor vehicle bearing



New York State registration number HMP6447 (“Castillo’s vehicle”). Defendant/Third-party plaintiff Joseph Shou Chiu (“Chiu”) was the owner and operator of a certain 2015 motor vehicle bearing New York State registration number 168CHIU (“Chiu’s vehicle”). Plaintiff was a passenger in a certain 2011 Toyota motor vehicle bearing New York State registration number FTE2055 (“Kang’s vehicle”).

With respect to Kang’s motion for an order pursuant to CPLR §§ 3211(a)(3) and/or 3211(a)(5) dismissing the third-party complaint. Third-party defendant Kang contends that dismissal of defendant/third-party plaintiff Chiu’s third-party complaint is warranted because Kang had entered into a General Claims Release with plaintiff Bong Sun Shin.

The third-party action was commenced by defendant/third-party plaintiff Chiu on November 15, 2022, seeking, inter alia, adjudication of the proportionate responsibility of all party defendants, and full or partial indemnity from the third-party defendants for any damages award against the third-party plaintiff. Third-party defendant Martinez was the owner and operator of a certain 2013 Cadillac motor vehicle bearing New York State registration number M4NNY (“Martinez vehicle”). Third-party defendant Kang was the owner and operator of a certain 2011 Toyota motor vehicle bearing New York registration number FTE2055, in which plaintiff’s was a passenger. Third-party defendant Schepke was the owner and operator of a certain 2009 Nissan motor vehicle bearing New York State registration number GKY1592 (“Schepke’s vehicle”). All third-party defendants now move for an order dismissing the third-party complaint as against them.

Pursuant to CPLR §3211(a)(5) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of, inter alia, arbitration and award, collateral estoppel, payment, or release. Pursuant to General Obligations Law §15-108(b) “a release given in good faith by the injured person to one tortfeasor as provided in [General Obligations Law § 15-108] (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.” Moreover, “when a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury...it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor’s equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.” A valid general release will apply not only to known claims, but “may encompass unknown claims, ... if the parties so intend and the agreement is ‘fairly and knowingly made’ ” (*Travelers Home & Marine Ins. Co. v Fiumara*, 164 AD3d 592, 82 NYS3d 502 [2d Dept 2018] internal quotations omitted).

Here, third-party defendant Kang contends that a General Release entered into by plaintiff Bong Sun Shin and Yong Pok Kang bars third-party plaintiff from bringing an action for contribution as against Yong Pok Kang pursuant to General Obligations Law §15-108. In support of their motion third-party defendant Kang submits, inter alia, the General Release Form dated March 6, 2018, releasing Chun-Yong Kang and Yong Pok Kang from “all known and unknown personal injuries and damages resulting from an automobile accident which occurred on or about 3/1/18, located at or near Hutchinson Pkwy, Bronx, NY.” In opposition, third-party plaintiff Chiu contends that the subject General Release is invalid because plaintiff may have entered into the contract without “fairly and knowingly” made aware of the injuries at issue.

However, “a release is a contract, and its construction is governed by contract law.” (*Travelers Home & Marine Ins. Co. v Fiumara*, 164 AD3d 592, 82 NYS3d 502 [2d Dept 2018] quoting *Schiller v Guthrie*, 102 AD3d 852, 958 NYS2d 736 [2d Dept 2013]). As such, “it is well settled that in order to have standing to challenge a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third-party beneficiary thereof.” (*Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 756 NYS2d 147 [1st Dept 2003]). Herein, third-party defendant was not a party to the General Release and does not allege any “direct harm flowing from the contract” or that it was a third-party beneficiary. As such, third-party plaintiff has no standing to challenge the validity of the General Release. Moreover, plaintiff Bong Sun Shin does not oppose defendant Kang’s motion to dismiss the third-party action and does not challenge the validity of the General Release contract. Accordingly, third party defendant may not bring an action for contribution as against Yong Pok Kang pursuant to General Obligations Law §15-108.

With respect to third-party defendant’s indemnification claims, third-party plaintiff is correct that indemnification claims are not barred by General Obligations Law §15-108. However, “an indemnity cause of action can be sustained only if the third-party plaintiff and the third-party defendant have breached a duty to plaintiff and also if some duty to indemnify exists between them.” (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 484 NE2d 1354 [1985]). Moreover, “a party seeking indemnification must show that it is not responsible in any way for the injuries to the plaintiff.” (*Barry v. Hildreth*, 9 AD3d 341, 780 NYS2d 159 [2d Dept 2004]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; *Williams v New York City Transit Auth.*, 9 AD3d 308, 780 NYS2d 580 [1st Dept 2004]). Pursuant to CPLR §3211(a)(7), a party may move for judgment dismissing a cause of action asserted against them on the ground that the pleading fails to state a cause of action.

Here, third-party plaintiff makes no allegations that third-party defendant agreed to indemnify or hold it harmless from any personal injuries or damages sustained as a result of the subject motor accident. Moreover, third-party plaintiff has not demonstrated itself to be free from liability. In fact, third-party plaintiff’s deposition dated September 19, 2022, demonstrates that plaintiff had operated its vehicle in violation of Vehicle and Traffic Law §1129 and failed to see that which through reasonable use of her senses she should have seen. Specifically, third-party plaintiff testified in his deposition dated September 19, 2022, that the vehicle he rear-ended was fully stopped at the time of the accident. Mr. Chiu further testified that he did not see the stopped vehicle until he was “already so close to it” to avoid the collision and also testified that if he had been “able to observe it this would not have happened.” As such, by third-party plaintiff’s own admission, it cannot demonstrate that it is free from liability. Accordingly, third-party plaintiff’s cause of action for indemnification is dismissed as against defendant Kang.

With respect to third-party defendants Emmanuel A. Martinez’s motion and third-party defendant Lisa M. Scheppke’s cross-motion for an order pursuant to CPLR §3212 dismissing the third-party complaint as against Martinez and Scheppke.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8, 167 NE2d 328 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

“When an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context.” (see, *Fergile v Payne*, 202 AD3d 928, 163 NYS3d 216 [2d Dept 2022]).

In support of their motion third-party defendants submit, inter alia, the police accident report dated March 1, 2018. The accident report provides that third-party defendant Martinez was traveling on the Hutchinson River Parkway when he noticed an object on the road. Then after Mr. Martinez was coming to a stop he was struck by Ms. Kang. Ms. Kang in turn stated that, as Mr. Martinez came to an abrupt stop, she proceeded to stop when Mr. Castillo struck her in the rear-end causing her to strike the Martinez vehicle. The accident report further provides that Mr. Castillo states that he came to a complete stop when third-party plaintiff Chiu rear-ended his vehicle causing Mr. Castillo to rear-end the Kang vehicle. Mr. Chiu is turn stated that he observed the accident in front of him and attempted to stop but could not in time and struck the Castillo vehicle. Mr. Chiu further stated that Ms. Scheppke rear-ended his vehicle. However, Ms. Scheppke stated that she came to a complete stop and avoided the accident when Mr. Chiu struck her vehicle.

Third-party defendants also submit, inter alia, the affidavit of Emmanuel A. Martinez dated May 3, 2023, and the affidavit of Lisa M. Scheppke dated May 18, 2023. Mr. Martinez deposed that he was travelling southbound on the Hutchinson River Parkway several car lengths behind a red SUV. At some point, the tire carried on the undercarriage of the red SUV suddenly dislodged in the lane directly in front of him. Mr. Martinez was able to avoid hitting the tire and then attempted to stop his vehicle. As he was stopping his vehicle, he was struck from behind by Ms. Kang. After being rear-ended by Ms. Kang, Mr. Martinez’s vehicle was propelled forward into the dislodged tire and rim. Thereafter, after about 45 minutes the Kang vehicle was rear-ended by another vehicle. Mr. Martinez’s affidavit also provides a photograph depicting the dislodged tire directly in front of the Martinez vehicle.

With respect to Ms. Scheppke’s affidavit, Ms. Scheppke deposed that she was travelling in the left lane of the Hutchinson River Parkway southbound, in the Bronx. Prior to the second accident she had brought her vehicle to a complete stop for about seven to eight seconds when her vehicle was struck by the Chiu vehicle. Chiu had struck the vehicle in front of his and had also struck the right side of her stopped vehicle. Ms. Scheppke’s affidavit also provides a photograph of the scene allegedly depicting the Scheppke vehicle in the left lane and the Chiu vehicle immediately to the right of her vehicle with noticeable damage to the front of the Chiu vehicle and no noticeable damage to the front of the Scheppke vehicle.

In opposition, third-party plaintiff testified in his deposition dated September 19, 2022, that as he was stopping his vehicle, he was rear-ended by another vehicle causing him to rear-end the vehicle in front of him. Chiu also testified that he told a police officer that “it was a very short distance I have not time to react...it was too close. And then I immediately braked and vehicle behind me pushed me.” However, Chiu also stated that he didn’t observe the vehicle in front of

him until he was “already so close to it” and further testifies that if he were able to observe the vehicle in front of him, he would not have rear-ended the vehicle in front of him.

With respect to Mr. Martinez, it is apparent that Mr. Martinez was faced with a sudden and unexpected circumstance which left him with little or no time for thought, deliberation or consideration, or which caused him to be reasonably so disturbed that he had to make a speedy decision without weighing alternative courses of conduct. Specifically, Mr. Martinez was forced to maneuver his vehicle in such a manner, and make a sudden stop, as to avoid colliding with a dislodged tire heading in his direction. As depicted by the photograph attached to his affidavit, the dislodged tire landed/stopped in front of Mr. Martinez’s vehicle and Mr. Martinez was thereafter rear-ended causing him to strike the tire immediately in front of him. As the emergency was not of his own creation, Mr. Martinez could not be held negligent as the actions taken were reasonable and prudent in the emergency context.

With respect to Ms. Schepke there are issues of credibility as to how the second accident occurred. Chiu testified that his vehicle was rear-ended by Ms. Schepke’s vehicle which caused his vehicle to rear-end the vehicle in front of him. However, Mr. Chiu also testified that he did not observe the vehicle in front of him until it was too late to avoid a collision. Whereas Ms. Schepke testified that her vehicle was struck on the right side by Mr. Chiu’s vehicle and affirms that she did not collide with any other vehicle. Ms. Schepke also provided a photograph, which Mr. Chiu does not oppose, allegedly depicting the Schepke vehicle without any noticeable damage to the front of the vehicle stopped on the left lane and the Chui vehicle immediately to the right lane, both cars stopped side by side. As such, “the court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine but feigned.” (*Omrami v Socrates*, 227 AD2d 459, 642 NYS2d 932 [2d Dept 1996] quoting *Glick & Dolleck, Inc. v Tri-Pac Exp. Corp.*, 22 NY2d 439, 239 NE2d 725 [2d Dept 1968]).

Accordingly, the conflicting statement as to the happening of the accident create a triable issue of fact as to whether Ms. Schepke contributed to the accident.

Accordingly, it is hereby

ORDERED, that third-party defendant Yong Bok Kang’s motion for an order pursuant to CPLR §§ 3211(a)(5) and (a)(7) dismissing the third-party complaint as against Yong Bok Kang is granted, it is further

ORDERED, that third-party defendant Edwin A. Martinez’s motion for an order pursuant to CPLR §3212 dismissing the third-party complaint as against the third-party defendant Edwin A. Martinez is granted, and it is further

ORDERED, that third-party defendant Lisa M. Schepke’s cross-motion for an order pursuant to CPLR §3212 dismissing the third-party complaint as against Lisa M. Schepke is denied, and it is further

ORDERED, that third-party defendants Yong Bok Kang and Edwin A. Castillo shall serve a copy of this order, with notice of entry upon all parties within thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: August 17, 2023



Karina E. Alomar, J.S.C.

