Toner v Basak
2011 NY Slip Op 33416(U)
December 23, 2011
Supreme Court, Queens County
Docket Number: 3183/2010
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ANTHONY G. TONER,

Plaintiff,

- against -

APURBA K. BASAK, JESUS R. VASQUEZ, AND FELIX RISO SOLIS,

Defendants.

- x

Index No.: 3183/2010

Motion Date: 12/08/11

Motion No.: 38

Motion Seq.: 1

The following papers numbered 1 to 13 were read on this motion by plaintiff ANTHONY TONER for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 6
Defendants' Affirmation in Opposition-Affidavits	7 - 9
Plaintiffs' Reply Affirmation	10 - 13

In this negligence action, the plaintiff, Anthony G. Toner, seeks to recover damages for personal injuries that he sustained as a result of a motor vehicle accident that occurred at approximately 4:00 p.m. on September 17, 2009.

The three-car, chain reaction accident, took place on Lincoln Avenue in front of the building numbered 151 Lincoln Avenue in New Rochelle, New York. Plaintiff alleges that he was injured when his vehicle, which was stopped in traffic, was hit in the rear by the vehicle owned and operated by defendant Apurba K. Basak. The impact caused the front of plaintiff's vehicle to be pushed into the rear of the vehicle owned by defendant Feliz Riso Solis and operated by defendant Jesus R. Vasquez.

The plaintiff commenced this action by filing a summons and complaint on February 8, 2010. Issue was joined by service of Basak's verified answer dated March 16, 2010. Defendants Feliz Riso Solis and Jesus R. Vasquez failed to answer or otherwise appear. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for assessment of damages.

In support of the motion, the plaintiff submits an affidavit from counsel, Ryan Canavan, Esq; a copy of the pleadings; and a copy of the transcript of the examination before trial of the plaintiff and a copy of the examination before trial of defendant Basak.

In his examination before trial, taken on October 15, 2010, plaintiff testified that he was proceeding on Lincoln Road when he stopped his vehicle in traffic which had built up as a result of construction on the roadway. Plaintiff stated that after being stopped for approximately 10 to 30 seconds his vehicle was struck in the rear by the vehicle being operated by defendant Basak. The impact caused plaintiff's vehicle to be pushed into a pickup truck that was stopped in front of him. Plaintiff testified that immediately after the impact, Basak approached and stated that "as he was slowing down, the car just shot forward." Plaintiff spoke to the police officer at the scene and told him that his vehicle was struck in the rear causing him to strike the vehicle in front of his.

In his deposition, also taken on October 15, 2010, defendant Basak testified that the first time he saw the plaintiff's vehicle it was completely stopped because the traffic was at a standstill due to construction in the road. Defendant testified that he stopped his vehicle immediately behind the plaintiff's vehicle but that at some point while plaintiff's vehicle was still stopped, his vehicle moved forward and struck the plaintiff's car. When asked if he knew what caused his vehicle to come into contact with the car in front of him he stated, "I don't know." He testified that when the police officer at the scene asked him what happened, he told the officer that his car moved and hit the car in front.

The plaintiff contends that Basak was negligent in the operation of his vehicle in striking his vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that his vehicle was traveling too closely in violation of VTL § 1129 and that the defendant driver failed to provide a reasonable explanation as to why he rear-ended the plaintiff's vehicle. Counsel contends,

therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendant's counsel, Djordje Caran, Esq., does not assert that the record raises any triable issues of fact with regard to the defendant's actions or with regard to any possible culpable conduct on the part of the plaintiff. However, the defendant argues that the motion must be denied because the transcripts of the examinations before trial of both parties, which were submitted with the plaintiff's motion, were not executed and therefore not in proper evidentiary form.

In reply plaintiff submits that plaintiff's counsel forwarded a copy of Basak's transcript to defendant's attorneys on November 15, 2010 but that a signed copy of the transcript was not returned until April 22, 2011. Counsel contends that pursuant to CPLR 316(a) a transcript may be used as evidence in a summary judgment motion when a signed copy of the transcript is not returned within 60 days. In addition, the transcript of the plaintiff's testimony, submitted with the motion, was fully executed and certified by both the plaintiff and the stenographer.

The proponent of a 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 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiff testified that he was completely stopped in traffic when his vehicle was suddenly struck from behind by defendant's motor vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]). This court finds that the defendant, who testified at his deposition that he did not know why his vehicle moved forward from its stopped position and hit the plaintiff's vehicle, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]).

The defendant's contention that the deposition transcripts are not in evidentiary form is without merit. Pursuant to CPLR 3116(a), the transcript of the deposition of a deponent must be provided to the deponent for his or her review and signature. If a deponent fails to sign his or her deposition under oath within 60 days, it may be used as if fully signed. Here the plaintiff provided satisfactory proof that a copy of the transcript was sent to the defendant for review on November 15, 2010 and that the defendant failed to sign and return it within 60 days (see Franzese v Tanger Factory Outlet Ctrs., Inc., 2011 NY Slip Op 7200 [2d Dept. 2011]; cf. Pina v Flik Intl. Corp., 25 AD3d 772 [2d Dept. 2006]). Therefore, the unsigned deposition testimony of the defendant and the signed deposition of the plaintiff were in admissible form.

As the evidence in the record demonstrates that the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is

ORDERED, that the plaintiff's motion is granted, and the plaintiff, ANTHONY G. TONER, shall have partial summary judgment on the issue of liability against the defendant APURBA K. BASAK and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for trial on the issue of damages.

Dated: December 23, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.