

**Drogin v Florio**

2012 NY Slip Op 30327(U)

February 8, 2012

Supreme Court, Queens County

Docket Number: 16250/2010

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  
PHILLIP DROGIN and KAREN DROGIN,

Plaintiffs,

- against -

Index No.: 16250/2010  
Motion Date: 02/02/12  
Motion No.: 13

JOSEPH C. FLORIO and TRACEY A. FLORIO, Motion Seq.: 1

Defendants.

- - - - - x

The following papers numbered 1 to 9 were read on this motion by the plaintiffs, for an order pursuant to CPLR 3212, granting summary judgment to the plaintiffs on the issue of liability or in the alternative for an order pursuant to CPLR 3126 striking the defendants' answer for failing to appear for a court-ordered examination before trial:

Papers Numbered

- Notice of Motion-Affirmation-Affidavits-Exhibits.....1 - 4
- Affirmation in Opposition-Affidavits-Exhibits.....5 - 9

This is a personal injury action in which plaintiff, Phillip Drogin, seeks to recover damages for injuries he sustained as result of a motor vehicle accident that occurred on April 27, 2010, between the vehicle owned by defendant Tracey A. Florio and operated by defendant Joseph C. Florio and the plaintiffs' vehicle at the intersection of 34<sup>th</sup> Avenue and 30<sup>th</sup> Street, Queens County, New York. At the time of the accident plaintiff was traveling southbound on 30<sup>th</sup> Street crossing the intersection when his vehicle was struck in the intersection by the vehicle operated by defendant, Joseph C. Florio, which was traveling eastbound on 34<sup>th</sup> Avenue. Plaintiff claims that at the time of the collision his vehicle was proceeding through the intersection with the green light in his favor and that the defendant drove into the intersection against a red light.

Plaintiffs commenced the action by filing a summons and complaint on June 25, 2010. Issue was joined by service of defendants' answer dated August 24, 2010. Plaintiff contends that as a result of the accident he sustained a torn rotator cuff in his right shoulder for which he underwent arthroscopic surgery. His wife, Karen Drogin, asserts a cause of action for loss of her husband's services.

Plaintiffs now move for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and setting this matter down for assessment of damages. Plaintiffs also move in the alternative for an order striking the defendants' answer pursuant to CPLR 3126 on the ground that the defendant, Joseph C. Florio has failed to appear on several dates for a court ordered examination before trial.

In support of the motion for summary judgment the plaintiff submits an affidavit from his counsel, Steven C. Falkoff, Esq; a copy of the pleadings; a copy of the transcript of the examination before trial of plaintiff Phillip Drogin; an affidavit from Philip Drogin dated November 23, 2011; and a copy of the police accident report (MV-104).

Plaintiff, Phillip Drogin, age 46, testified at his examination before trial, taken on May 18, 2011, that on April 27, 2010, at approximately 1:30 p.m., he was operating his vehicle southbound on 30<sup>th</sup> Street in the direction of its intersection with 34<sup>th</sup> Avenue. The intersection is governed by a traffic signal. He first saw the traffic light when he was 30 yards away. When he was 25 yards away he saw that the light was green in his favor. He entered the intersection at a rate of speed of 25 miles per hour. As plaintiffs' vehicle entered the intersection, the defendants' vehicle, which was proceeding eastbound on 34<sup>th</sup> Avenue, struck the plaintiff's vehicle broadside on the passenger side. Mr. Drogin testified that when the police arrived on the scene he told the police officer that the defendant ran the red light. He stated that he did not actually see the red light in the defendant's direction.

In his affidavit dated November 23, 2011, Mr. Drogin states that he observed the traffic light at the intersection from about 25 yards away and the light was green in his favor. He states that the light did not change to any other color at any time before the accident. He states that he didn't observe the defendants' vehicle until a split second before the collision when he was in the intersection. Plaintiff states that after the collision he had a conversation with the defendant who apologized for running the red light and said that he should not have been

driving due to a back condition from which he was suffering.

The police officer at the scene, who did not witness the accident, provided a description of the accident in the MV-104 based upon the statements of the parties. The officer stated, "Veh 2 (defendant) was traveling E/B on 34<sup>th</sup> Avenue when he went through the red light and struck Veh 1 (plaintiff) which was heading S/B on 30<sup>th</sup> Street."

In his affirmation in support of the motion for summary judgment, plaintiffs' counsel states that the plaintiffs are entitled to summary judgment on the issue of liability as Mr. Drogin testified at his deposition that he was lawfully proceeding through the intersection at 34<sup>th</sup> Avenue with the green light in his favor when his vehicle was struck by defendants' vehicle which traveled through the red light striking plaintiffs' vehicle. Counsel contends that his client was free from negligence and that the accident would not have happened but for the negligence of the defendant who violated VTL § 1111 which requires a driver to stop when facing a red light at an intersection.

In opposition to the motion, defendants' counsel asserts that the plaintiff failed to make a prima facie case that the light was green in his favor at the time of the accident because he stated at his deposition that he did not remember if he kept the light under constant observation prior to the accident although he did state in his deposition that the light never changed from green prior to the accident. Counsel also states that he has been working diligently to reschedule the deposition of Joseph C. Florio and seeks leave to have an opportunity to have a new deposition scheduled.

In order to succeed on a motion for summary judgment it is necessary that the movant tender evidentiary proof in admissible form, sufficient to establish his cause of action so as to warrant the court, as a matter of law, directing judgment in his favor (Zuckerman v New York, 49 NY2d 557 [1980]; CPLR 3212). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the opponent is required to lay bare its proof in admissible form and to demonstrate the existence of a triable issue of fact (Zuckerman, supra).

The plaintiff submitted an affidavit and a copy of his deposition testimony which established that he was lawfully proceeding through the intersection with a green light in his

favor when the defendant entered the intersection against a red light in violation of VTL § 1111. As such, this Court finds that the plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability by demonstrating that the defendant driver violated Vehicle and Traffic Law § 1111 (see Cox v Weil, 66 AD3d 634 {2d Dept. 2009}).

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]).

In opposition to the plaintiffs' prima facie showing, the defendant failed submit an affidavit from the defendant or any other evidence which contradicted the plaintiff's version of the accident or which raised a material question of fact with regard to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420 [2d Dept. 2005]). In addition, the defendant failed to submit an affidavit from any individual or any physician with personal knowledge as to the mental ability or inability of defendant Joseph C. Florio to provide an affidavit of facts or to testify at trial or at an examination before trial. Therefore the plaintiffs' motion for summary judgment on the issue of liability is granted.

The defendant has not yet testified at a deposition and the plaintiff's counsel states that defendant failed to appear on several dates selected for the deposition including February 28, 2011, June 17, 2011, July 8, 2011, July 20, 2011, August 11, 2011, September 9, 2011 and October 19, 2011. Plaintiff seeks an order striking the defendants' answer for wilful failure to comply with the prior orders of the court to appear for a deposition or in the alternative directing the immediate appearance of the defendant for a deposition.

In view of the determination of this Court granting the plaintiffs' motion on the issue of liability this court finds that the branch of the plaintiffs' motion to strike the defendants' answer or to compel a deposition of the plaintiff is denied as moot.

Thus, as the plaintiff has made a prima facie showing of entitlement to summary judgment and as the evidence in the record demonstrates that there are no triable issues of fact 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 plaintiffs' motion is granted, and the plaintiffs PHILLIP DROGIN and KAREN DROGIN, shall have partial summary judgment on the issue of liability against the defendants, JOSEPH C. FLORIO and TRACEY A. FLORIO, 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 a trial on damages.

Dated: February 8, 2012  
Long Island City, N.Y.

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ROBERT J. McDONALD  
J.S.C.