

Wei Feng v Tsai-Tung Tao

2012 NY Slip Op 32034(U)

July 25, 2012

Sup Ct, Queens County

Docket Number: 24488/2010

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

WEI FENG, Index No.: 24488/2010
Plaintiff, Motion Date: 06/14/12
- against - Motion No.: 13
Motion Seq.: 4

TSAI-TUNG TAO, JAMES KU, LI-YUEN KU
and KEVIN CHIN,

Defendants.

- - - - - x

The following papers numbered 1 to 28 were read on this motion by
defendant KEVIN CHIN and cross-motion by defendants JAMES KU and
LI-YUEN KU for an order pursuant to CPLR 3212(b) granting summary
judgment and dismissing plaintiff's complaint and all cross-
claims against them on the ground that they are not liable for
the causation of the accident:

Table with 2 columns: Document Name and Page Number. Includes entries like 'FENG Notice of Motion' (1-6), 'KU Notice of Cross-Motion' (7-11), etc.

In this action for negligence, the plaintiff, Wei Feng,
seeks to recover damages for personal injuries he sustained as a
result of a motor vehicle accident that occurred on March 20,
2010. The four-car, chain reaction accident, took place on the
southbound lanes of Union Street near the intersections of
Roosevelt Avenue in Flushing, New York.

Defendant Kevin Chin, moves for an order pursuant to CPLR
3212(b), granting summary judgment and dismissing the plaintiff's

complaint and all cross-claims against him. Chin contends that his vehicle, the second in the chain, was stopped at a red traffic signal behind the plaintiff's vehicle, the first vehicle in the chain, when it was struck in the rear by the vehicle owned by Li-Yuen Ku and operated by defendant James Ku, the third vehicle in the chain. The impact caused the Chin vehicle to be propelled into the plaintiff's vehicle which was being operated by Wei Feng. The Ku defendants cross-move for summary judgment dismissing the plaintiff's complaint against them on the ground that their vehicle was also lawfully stopped at the red traffic signal when it was struck in the rear by the vehicle owned and operated by Tsai-Tung Tao the fourth vehicle in the chain which caused the Ku vehicle to be propelled into the Chin vehicle.

In support of the instant motion for summary judgment, defendant Chin submits an affirmation from counsel, Robert J. Pape, Jr., Esq., a copy of the pleadings; a copy of plaintiff's amended verified bill of particulars; a copy of the police accident report (MV-104); and copies of the transcripts of the examinations before trial of the four drivers involved in the accident, Wei Feng, Tsai-Tung Tao, Kevin Chin and James Ku.

In his examination before trial, taken on January 18, 2012, Tsai-Tung Tao, the driver of the last vehicle in the chain, a Nissan Pathfinder, testified that he was employed as a cook at the Mulan Restaurant. He stated that he was the driver of a vehicle that was involved in a motor vehicle accident in Flushing, in March 2010. Although he had limited memory of the incident, he did state that at the time of the accident he was on his way home from work and had four bottles of beer prior to leaving the job. He stated that his vehicle struck the vehicle in front of his while he was proceeding at a rate of 5 - 10 miles per hour. He was issued a summons and arrested at the scene for driving while intoxicated for which he later pleaded guilty. He does not remember if the vehicle in front of his was stopped or if there were any vehicles in front of the vehicle that he struck.

James Ku, age 73, the operator of the third vehicle in the chain that was struck by Tao's vehicle, testified at his examination before trial on January 18, 2012 that he was employed as a real estate sales person at First Choice Realty. He stated that on March 20, 2010 he was also involved in a motor vehicle accident on Union Street in Flushing between 9:00 and 10:00 p.m. He stated that he was traveling southbound on Union Street and when he was approximately 200 feet from the intersection of 41st Avenue, he brought his vehicle to a complete stop. He stated that he stopped his vehicle because the vehicle in front of his came

to a gradual stop. He stated that after 5 - 6 seconds his vehicle was struck in the rear causing his vehicle to be propelled into the stopped vehicle in front of his vehicle. When the police came to the scene he told the officer that his vehicle was stopped and was struck in the rear pushing his vehicle into the vehicle in front of his.

Kevin Chin, age 32, the driver of the second vehicle, positioned behind the plaintiff's vehicle, was deposed on February 10, 2012. He testified that on the date of the accident he was driving home after going to the TD Bank. He was on Union Street heading toward Sanford Avenue. He stated that his vehicle was stopped behind one other vehicle waiting for the red traffic signal at the intersection ahead of him. After he made a complete stop, his vehicle was struck in the rear forcing his vehicle to strike the rear of the plaintiff's vehicle in front of him. He stated that the driver of the fourth vehicle, Tsai-Tung Tao was arrested at the scene.

Plaintiff, Wei Feng, age 50, stated that on the date of the accident he was driving on Union Avenue and was stopped a red traffic signal at the intersection of Roosevelt Avenue. Three to five seconds after he stopped his vehicle was struck in the rear.

Counsel for Chin contends that the evidence submitted in support of his motion for summary judgment demonstrates that the Chin vehicle, the second vehicle of the four cars, was lawfully stopped at a red traffic signal when his car was rear-ended by the Ku vehicle which propelled his vehicle into the plaintiffs' vehicle. Counsel contends that summary judgment should be awarded to Chin, dismissing the plaintiffs' complaint and all cross-claims against him because the evidence showed that Chin was completely stopped at the red traffic signal at the time of the accident and the sole proximate cause of the accident was the negligence of Tsai-Tung Tao in rear-ending the Ku vehicle and further, there is no evidence in the record that Chin was negligent in any manner. As Chin, in the second vehicle, was stopped and propelled into the plaintiffs' vehicle, counsel contends that the proof submitted shows that the complaint should be dismissed against Chin as Chin could not be liable for any of the injuries claimed by any of the plaintiffs (see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011]; Parra v Hughes, 79 AD3d 1113 [2d Dept. 2011]; Ferguson v Honda, 34 AD3d 356 [1st Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 139 [1st Dept. 2004]; McNulty v DePetro, 298 AD2d 566 [2d Dept. 2002]; Harris v Ryder, 292 AD2d 499 [2d Dept. 2002]; Cerda v Paisley, 273 AD2d 339 [2d Dept. 2000]).

Further, Chin contends that it is clear that Tao, in the moving vehicle, who pled guilty to driving while intoxicated, was negligent and started the chain reaction accident because he failed to maintain a proper lookout, failed to maintain a proper speed and a safe distance from the vehicle in front of her in Violation of VTL § 1129(a).

Defendants James Ku and Li-Yuen Ku cross-move for summary judgment dismissing the complaint and all cross-claims against them for the same reasons as Chin. Ku contends that he was the operator of the third vehicle, that his vehicle was stopped at the light and that his vehicle was rear-ended by Tao causing it to be propelled into the Chin vehicle which was the second vehicle in the chain. Counsel for defendant Ku contends that the proof submitted shows that the complaint should be dismissed against Ku as his vehicle was lawfully stopped at a red signal at the time of the accident and therefore he could not be liable for any of the injuries claimed by the plaintiff.

Steven Louros, Esq., counsel for the plaintiff, Wei Feng, opposes the Chin motion for summary judgment stating that "the moving papers contain no evidence in admissible form to support the motion." Counsel maintains that the deposition transcripts were not signed by the respective parties and therefore are not in admissible form. With respect to Ku's cross-motion, plaintiff's counsel states that a cross-motion is an improper vehicle for seeking affirmative relief from a non-moving party (citing Mango v Long Island Jewish Hillside Medical Center, 123 AD2d 843[2d Dept. 1986]).

Counsel for defendant Tao, Andrea Ferrucci, Esq., opposes Chin's motion and Ku's cross-motion on the ground that the deposition transcripts are not executed and do not contain any correspondence demonstrating that the transcripts were forwarded for execution in compliance with CPLR 3116. Defendant contends, therefore, that both Chin and Ku have failed to submit sufficient evidence in admissible form to demonstrate their entitlement to summary judgment as a matter of law.

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]).

It is well established law that a rear-end collision with a

stopped or stopping vehicle 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 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]).

Here, Chin testified that his vehicle was at a complete stop when Tao's vehicle struck The Ku vehicle in the rear causing the chain reaction accident. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199[1st Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Franco v. Breceus, 70 AD3d 767 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). In multiple-car, chain-reaction accidents the courts have recognized that the operator of a vehicle which has come to a complete stop and is propelled into the vehicle in front of it as a result of being struck from behind is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision (see Mohamed v Town of Niskayuna, 267 AD2d 909 [3rd Dept. 1999]). Here, Chin and Ku, who were both stopped at the time of the impact, demonstrated that their conduct was not a proximate cause of the rear-end collision between their vehicles and the plaintiff's vehicle in front of them (see Abrahamian v Tak Chan, 33 AD3d 947 [2d Dept. 2006]; Calabrese v Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]). Thus, defendant Chin and defendant Ku satisfied their prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that their vehicles were completely stopped at the time they were struck in the rear and propelled into the vehicles in front of them in a chain reaction which was commenced by defendant Tao.

Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to the plaintiff or co-defendant Tao to raise a non-negligent explanation for the rear end collision or a triable issue of fact as to whether Chin or Ku were 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 defendant Chin's motion and defendant Ku's

cross-motion neither plaintiff Feng nor co-defendant Tao submitted any evidence sufficient to raise a triable issue of fact (see Arias v Rosario, 52 AD3d 551 [2d Dept. 2008]; Smith v Seskin, 49 AD3d 628 [2d Dept. 2008]; Campbell v City of Yonkers, 37 AD3d 750 [2d Dept. 2007]).

This court finds that both the plaintiff and co-defendant Tao failed to submit evidence as to any negligence on the part of Chin or Ku or to provide 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]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). The evidence demonstrated that both Chin and Ku operated their vehicles in a nonnegligent manner, and no evidence was presented to show that they contributed to the happening of the injury-producing event (see Aikens-Hobson v. Bruno, 2012 NY Slip Op 5604 [2d Dept. 2012]; Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011]; Franco v Breceus, 70 AD3d 767 [2d Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]).

The contention of defendant Tao and the plaintiff raised in opposition to the motion that the deposition transcripts are not in evidentiary form is without merit. Although the depositions of the defendant Tao and plaintiff Feng were unsigned, the transcripts were certified by the court reporter and the respective parties did not raise any challenges to their accuracy. Thus, the transcripts qualified as admissible evidence for purposes of the motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Zalot v Zieba, 81 AD3d 935 [2d Dept. 2011]). The deposition transcripts of Chin and Ku are admissible as they were certified and are also admissible under CPLR 3116(a) since those transcripts were submitted by the party deponents themselves and therefore were adopted as accurate by the deponents, Chin and Ku (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

In addition, the plaintiff's argument that the cross-motion was procedurally defective pursuant to CPLR 2215 and may not be decided by the Court as a cross-motion can only be made against a moving defendant, is without merit. Here, the plaintiff was not prejudiced as plaintiff was permitted to submit opposition papers and had a sufficient opportunity to be heard on the merits (see

Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011][although a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party, a technical defect of this nature may be disregarded where there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought]; also see Sheehan v Marshall, 9 AD3d 403 [2d Dept. 2004]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant KEVIN CHIN and the cross-motion of JAMES KU and LI-YUEN KU for summary judgment dismissing the complaint and all cross-claims against them are granted, and it is further

ORDERED that the Clerk of Court is authorized to enter judgment accordingly.

Dated: July 25, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.