

Nguyen v Gerolemou
2013 NY Slip Op 30192(U)
January 22, 2013
Sup Ct, Queens County
Docket Number: 9160/2011
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

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DANNY D. NGUYEN, Index No.: 9160/2011
Plaintiff, Motion Date: 01/10/13
- against - Motion No.: 126
CHRISTALLA GEROLEMOU, Motion Seq.: 1
Defendant.

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The following papers numbered 1 to 15 were read on this motion by the plaintiff 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
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 15

This is a personal injury action in which plaintiff, DANNY D. NGUYEN, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 14, 2010, on Kissena Boulevard near the intersection with 60th Street Queens County, New York.

At the time of the accident, plaintiff was operating his vehicle in a northbound direction on Kissena Boulevard and was stopped waiting for a red traffic signal when he was struck by the defendant while backing her vehicle out of her driveway. As a result of the impact the plaintiff allegedly sustained serious physical injuries.

Plaintiff commenced an action by filing a summons and complaint on April 13, 2011. Issue was joined by service of defendant's verified answer dated June 27, 2011. Plaintiff filed a note of issue on October 3, 2012.

Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiff submits an affidavit from counsel, John S. Park, Esq; a copy of the pleadings; a copy of the police accident report (MV-104); and copies of the transcripts of the examinations before trial of plaintiff and defendant.

The police report contains the Officer's description of the accident based upon his conversations with the drivers. His report states,

"At t/p/o driver of Vehicle #1 (defendant), states she was in her driveway on Kissena Boulevard when by accident she stepped on the gas pedal while she was in reverse and struck Vehicle #2 (plaintiff), who was stopped in traffic in front of the location going northbound on Kissena Boulevard. Driver of Vehicle #2 (plaintiff), states he was stopped in traffic at above location when he was struck by Vehicle #1 who was reversing out of driveway."

In her examination before trial taken on August 16, 2012, the defendant, Christalla Gerolemou, testified that she has lived at her present address on Kissena Boulevard for fifty years. She stated that she was involved in a motor vehicle accident on January 14, 2010 in front of her house on Kissena Boulevard. She was the owner and operator of a 2003 Toyota Corolla. On the afternoon of the accident, she was backing her vehicle slowly out of her driveway in order to reposition it to be in the center of the garage door when she struck the plaintiff's vehicle that was stopped in traffic in front of her driveway. She struck plaintiff's minivan on the front passenger side door with the rear of her vehicle. When asked if she saw the plaintiff's vehicle before making contact with it she answered. "I'm not sure." She also testified she was not sure if her foot was on the accelerator at the time of the accident. She stated that it was not her intention to back out of the driveway but only to reposition the vehicle. When the police responded to the scene she told the Officer she was trying to back out of the driveway. When the officer asked if she stepped on the gas pedal while she was in reverse she told him it was possible but that she did not know.

Together with his reply affirmation, the plaintiff's counsel provided the entirety of the transcript of plaintiff's deposition testimony taken on August 16, 2012. Plaintiff Nguyen testified that he is a self-employed taxi driver. On the day of the accident he was driving his own vehicle back

home after work. He stated that he was proceeding on

Kissena Boulevard in heavy traffic. He stopped his vehicle behind two other vehicles at a red traffic signal. He was completely stopped for a few seconds looking straight in front of him when he felt a heavy impact on the right passenger side of his minivan causing the left side of his body to make contact with the interior of his vehicle. He left the scene in an ambulance and was transported to New York Hospital of Queens.

The plaintiff claims that he is entitled to summary judgment based upon the defendant's negligence in failing to yield the right of way and backing her vehicle from her driveway into the plaintiff's vehicle that was at a complete stop on the street in front of the defendant's driveway. Plaintiff's counsel contends that the actions of the defendant in backing her vehicle into traffic when it was not safe to do so was a violation of VTL § 1121(a) [unsafe backing up] and VTL § 1143 [failure to yield right of way] and was the sole proximate cause of the accident. Moreover, counsel contends that plaintiff, who was lawfully proceeding in his proper lane of traffic, is not required to anticipate that a vehicle unsafely backing out of the driveway would fail to yield the right of way and would strike his stopped vehicle.

In opposition to the motion, defendants' counsel, Marcella Gerbasi Crewe, Esq. asserts that summary judgment in favor of the plaintiff is not warranted because the transcript of the deposition testimony of the plaintiff annexed to the plaintiff's motion papers is not signed and therefore cannot be relied upon to establish plaintiff's entitlement to summary judgment (citing Marks v Robb, 90 AD3d 863 [2d Dept. 2011]).

Upon review of the plaintiff's motion, the defendant's opposition and the plaintiff's reply thereto this court finds as follows:

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 plaintiff's contention that defendant, Christalla Gerolemou, was negligent as a matter of law in backing her vehicle out of her driveway into the plaintiff's lane of traffic and striking the plaintiff's vehicle which was at a complete stop on Kissena Boulevard waiting for a red traffic signal and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony as well as the deposition testimony of the defendant both of whom stated that defendant's vehicle while backing out of her driveway in order to reposition her vehicles struck the plaintiff's vehicle which was traveling lawfully in the proper lane of traffic and was stopped waiting for a light to change at the intersection. The defendant testified that she did not see the defendant's vehicle prior to colliding with it and she was not sure if she was accelerating while her vehicle was in reverse and while the plaintiff's vehicle was stopped in front of her driveway. Thus, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting proof that the defendant violated Vehicle and Traffic Law § 1211 (a) (unsafe backing-up) and § 1143 (failure to yield the right-of-way). Pursuant to VTL 1211(a) "the driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic" (see Gill v Braasch, 953 NYS2d 783 [4th Dept. 2012]; Bukharetsky v Court St. Off. Supplies, Inc., 82 AD.3d 812 [2d Dept. 2011]; Recinos v Priamo, 94 AD3d 848 [2d Dept. 2012]; Sanabria v Paduch, 61 AD3d 839 [2d Dept 2009]; Ortiz v. Calavera, 26 AD3d 319 [2d Dept. 2006]).

Further, the plaintiff established, prima facie, his entitlement to judgment as a matter of law as the evidence submitted in support of his motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of the plaintiff. The evidence submitted by the plaintiff in support of his motion for summary judgment established that he was stopped in traffic waiting for the traffic signal. Plaintiff was not required to anticipate that defendant would back her vehicle towards or into the plaintiff's vehicle (see Gill v Braasch, 953 NYS2d 783 [4th Dept. 2012]).

In opposition to the plaintiff's prima facie showing, the defendant failed to raise any material questions of fact as to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The contention of defendant, raised in opposition to the motion, that the deposition transcripts are not in evidentiary form is without merit. Although the depositions were unsigned, the transcripts annexed to the motion and reply papers were certified by the court reporter and the defendant did not raise any challenges to their accuracy. Thus, the transcripts qualify 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]). In addition, the

transcript of the plaintiff's deposition is admissible under CPLR 3116(a) since that transcript was submitted by the party deponent himself it was adopted as accurate by the plaintiff (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

Thus, 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 hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, Danny D. Nguyen, shall have partial summary judgment on the issue of liability against the defendant, Christalla Gerolemou, 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 the issues of serious injury threshold and damages.

Dated: January 22, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.