

Prophet v Gonzalez

2013 NY Slip Op 31092(U)

May 15, 2013

Sup Ct, Suffolk County

Docket Number: 6791-2010

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

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INDEX NO.: 6791-2010
 MTN. SEQ.#: 005
 SUBMIT DATE: 4-3-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

MOTION DATE: 2-28-2013
 MOTION NO.: MOT D

-----X
 LaCHELE M. PROPHET,

Plaintiff,

-against-

JUAN GONZALEZ, CLAUDIA BRUNO a/k/a
 CLAUDIA GONZALEZ, DAVID G. SALEMI
 MARIO'S PIZZERIA, ROBERT BUCKAKIAN
 (TRUST) GRACE PINAJIAN AND LYNN
 PINAJIAN : BEYLERIAN TRUSTS, ROCK
 MANAGEMENT, INC. IDA PROPHET,
 CATHERINE MAIMAN and QUINTANILLA
 GAMEZ, ACME CONSTRUCTION DESIGN
 CO. (the last name being fictitious and intended to
 represent individuals and/or entities that
 constructed the mall located at 302 Walt Whitman
 Road, Huntington Station, New York 11746),

Defendants.

-----X

RAWLINS LAW FIRM

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EPSTEIN, FRANKINI & GRAMMATICO

Attys. for Defendants Gonzalez & Bruno
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Attys. for Defendant Mario's Pizzeria of Huntington
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MONTFORT, HEALY, McGUIRE & SALLEY

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GAMEZ QUINTANILLA

3 Delane Place, Huntington, NY 11743

Upon the following papers numbered 1 to 35 read on this application for an order seeking renewal of argument of the orders of the Court granting dismissal of the complaint against Ida Prophet, Catherine Maiman and Quintanilla Gamez; Notice of Motion/Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-31; Replying Affidavits and supporting papers 32-25; Other ; it is

ORDERED that the motion by the plaintiff, LaChele Prophet [“LaChele”], seeking renewal of the argument of the orders of the Court dated October 19, 2012, dismissing the complaint against the defendants, Ida Prophet [“Ida”], Catherine Maiman [“Maiman”], and Quintanilla Gamez [“Gamez”], is granted, and, upon renewal, the Court adheres to its original decision dismissing the complaint against Ida, Maiman, and Gamez.

This is an action for serious personal injuries resulting from a motor vehicle accident that occurred in the parking lot of a strip mall on Route 110 in Huntington, Suffolk County, on September 7, 2009. The parties’ familiarity with the facts is assumed and will not be repeated here except to inform the instant decision.

By order dated October 19, 2012, two separate actions commenced in Supreme Court Suffolk County under Index Nos. 006791-2010 (Action No. 1), and 0028929-2011, (Action No. 2), respectively, were consolidated under Index No. 006791-2010. Ida, LaChele’s mother, was originally a plaintiff in the former Action No. 1 but separately moved for an order granting leave to voluntarily discontinue her claim. Leave was granted in a separate order dated October 19, 2012.

Ida was also a named defendant in the former Action No. 2 and before the consolidation made a motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. The motion was supported by a copy of the pleadings and a certified copy of the police report.

The complaint in former Action No. 2 alleged that at the time of the accident, defendant David Salemi, who was driving southbound on Route 110, lost control of his vehicle when another unidentified vehicle made a U-turn from the northbound lane and cut Salemi off. Salemi’s vehicle, a 2002 Ford pick-up truck, left the travel portion of Route 110 and entered a parking lot adjacent to a strip mall where three vehicles, including Ida’s vehicle, were parked side-by-side. Salemi’s vehicle made contact with at least one and as many as all three of the parked vehicles pushing Ida’s vehicle into LaChele who had just exited one of the stores in the strip mall accompanied by Ida.

LaChele opposed Ida’s dismissal motion¹ with her affidavit. LaChele’s affidavit stated that on the afternoon of the accident upon her arrival at 301 Walt Whitman Road, LaChele exited the passenger side of her mother’s (Ida’s) vehicle and noticed it was parked some distance away from the parking barrier located at the front of the parking stall. LaChele asked her mother if Ida wanted to move up and Ida responded that if she moved up she would be blocking the pedestrian walkway. Notably, according to LaChele, the other cars to her right were parked in the same way as Ida’s car with the back of the car partially in the roadway of the parking lot.

¹ LaChele has continually referred to Ida’s motion as one for summary judgment (see CPLR 3212). In fact, Ida’s motion was a motion to dismiss LaChele’s complaint pursuant to CPLR 3211 (a) (7).

Again, according to LaChele's affidavit, as LaChele and Ida were returning to Ida's parked car, LaChele noticed a pick-up truck speeding through the parking lot. The pick-up's driver [Salemi], did not clear the three cars that LaChele attested were not completely parked in the stalls. According to LaChele, the pick-up struck the back of the two cars that were to the right of Ida's car and the rear of Ida's car. Ida's car was pushed forward striking LaChele and pushing her through a plate glass window causing the injuries for which she now sues.

The certified copy of the police report that supported Ida's dismissal motion in the former Action No. 2, identified the driver of the pick-up as the defendant, David Salemi, and the owners of the three parked and unattended vehicles as the defendants, Ida, Maiman and Gamez. Notably, the allegations in the complaint confirm the information contained in the police report.

In opposing Ida's dismissal motion, LaChele's attorney argued that the police report was inadmissible as the officer who took the report did not witness the accident; rather, only Ida and LaChele witnessed it. Counsel also argued that according to LaChele's affidavit, the vehicles owned by Ida, Maiman and Gamez were not parked properly in the parking stalls, i.e., a portion of the defendants' cars were in the travel portion of the parking lot. Counsel also urged that there were issues of fact as to whether the defendants' vehicles actually came in contact with one another and whether Salemi's vehicle came in contact with Ida's vehicle. LaChele's counsel's statement contradicted LaChele's affidavit which unequivocally stated that the pick-up struck the back of the two cars that were to the right of Ida's car and then the rear of Ida's car pushing it forward into LaChele.

The opposition also argued that whether Salemi would have been able to pass through the parking lot safely but for the negligence of Ida and the other two owners of the parked vehicles is an issue of fact precluding [dismissal]. Finally, counsel asserted that the need for discovery warranted denial of the motion.

The Court granted Ida's motion to dismiss the complaint and, searching the record, granted dismissal in favor of Maiman and Gamez. The order was served, with written notice of its entry, on LaChele's attorney on December 5, 2012. The instant notice of motion dated January 30, 2013, seeks renewal of the argument of the October 19, 2012, orders (*see CPLR 2221 [e]*).

On renewal, LaChele now proffers the affidavit of her mother, Ida, dated December 19, 2012. Ida attests that her car pinned LaChele to a concrete divider and a glass store window when her car was propelled forward upon impact with a vehicle driven by Salemi. The affidavit states that after Ida parked her car, the vehicle was jutting out into the roadway/passageway of [] parking lot when Ida and LaChele left the vehicle to enter a shoe store.

Further, in 2012 when Ida's insurance company contacted her and told her that it would be making a motion to dismiss the complaint against her, Ida told the insurance company that she disagreed with its decision because Ida believed she contributed to her daughter's injuries. Notwithstanding Ida's objections, the insurance company filed the dismissal motion without her

cooperation. The affidavit further states that it is being provided to Ida's attorney, though it is unclear to whom Ida refers in this regard.

Prescinding from the issues raised in opposition to the renewal motion by Ida's defense counsel regarding 1) LaChele's standing to move to renew a motion made by Ida, or 2) the movant's failure on renewal to attach a copy of the original motion papers, or 3) the ethical questions raised by LaChele's attorney unilaterally obtaining an affidavit from Ida who is represented by counsel, and asserting a position diametrically opposed to the position previously taken on Ida's behalf by defense counsel, nothing about Ida's affidavit alters this court's view that dismissal of LaChele's complaint against Ida, Maiman and Gamez was proper. If anything, Ida's affidavit reinforces LaChele's account of the accident.

Even assuming that all three vehicles were parked in a manner such that the backs of the three vehicles were extending out beyond the marked parking stalls and into the travel portion of the parking lot, a description given by LaChele in her affidavit opposing Ida's dismissal motion, and by Ida on renewal, the failure to park completely within the parking stall was not a proximate cause of the accident and LaChele's injuries as a matter of law (*Iqbal v. Thai*, 83 A.D.3d 897, 920 N.Y.S.2d 789 [2d Dept. 2011]).

Although, in general, the issue of proximate cause is for the jury (*see Derdarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666; *Ely v. Pierce*, 302 A.D.2d 489, 755 N.Y.S.2d 250), liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes (*see Ely v. Pierce*, 302 A.D.2d at 489, 755 N.Y.S.2d 250; *see also Saviano v. City of New York*, 5 A.D.3d 581, 774 N.Y.S.2d 82).

Although LaChele's counsel made a generic statement that dismissal is not warranted because little or no discovery has been conducted, there was no showing that facts essential to justify opposition might exist but could not then be stated as required by *CPLR* 3211 (d). On the contrary, in challenging the consideration of any portion of the police report, plaintiff's counsel contended that the only witnesses to the accident were LaChele and Ida.

Reliance by the court on some of the information contained in the police report in support of the dismissal motion is a nonissue. Even assuming that the use of some portions of the police report to establish the position of the vehicles before the impact was improper, any error was harmless in light of LaChele's affidavit describing the position of the vehicles before the accident.

Further, nothing about Ida's recently obtained affidavit contradicts LaChele's affidavit. LaChele's uncontradicted affidavit filled in any gaps missing from the complaint and warranted its dismissal notwithstanding that discovery had not yet taken place. With or without the police report, dismissal was warranted (*see Sheehan v. City of New York*, 40 N.Y.2d 496, 503, 387 N.Y.S.2d 92, 354 N.E.2d 832; *Ely v. Pierce*, 302 A.D.2d 489, 755 N.Y.S.2d 250; *Esposito v. Rea*, 243 A.D.2d 536, 537, 665 N.Y.S.2d 287; *Williams v. Envelope Tr. Corp.*, 186 A.D.2d 797, 589 N.Y.S.2d 345; *Dunlap v. City of New York*, 186 A.D.2d 782, 589 N.Y.S.2d 343).

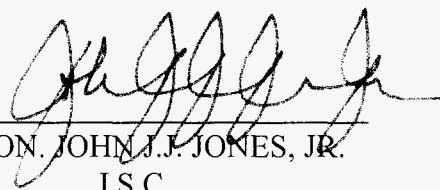
In light of the conclusion that the complaint in former Action No. 2 should be dismissed as against Ida, Maiman and Gamez, LaChele's separate motion to amend the complaint to add a fourth cause of action alleging that Ida negligently parked her vehicle was properly denied as academic.

Finally, the court declines plaintiff's counsel's invitation to recuse based upon the fact that more than thirty years ago the judge was employed by the law firm that originally represented, and no longer represents, LaChele and Ida in former Action No.1. Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist (*People v. Alomar*, 93 N.Y.2d 239, 246, 689 N.Y.S.2d 680, 711 N.E.2d 958 [citation omitted]).

Here, LaChele has failed to allege a statutory basis to disqualify the Justice presiding over the instant matter, and nothing in the record indicates that the Court has any interest in the outcome of this litigation (*see generally Judiciary Law* § 14; *Ashmore v. Ashmore*, 92 A.D.3d 817, 939 N.Y.S.2d 504 [2d Dept. 2012]).

The motion to renew is granted, and upon renewal, the court adheres to its original decision.

DATED: 15 May 2013


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION