

<b>Pacheco v Grabowski</b>
2013 NY Slip Op 33190(U)
December 17, 2013
Supreme Court, Queens County
Docket Number: 3768/2013
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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YESENIA PACHECO, Index No.: 3768/2013  
Plaintiffs, Motion Date: 12/04/13  
- against - Motion No.: 107  
Motion Seq.: 1

DONNA M. GRABOWSKI, BRUCE GRABOWSKI  
and ANGEL PACHECO,  
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendant, ANGEL PACHECO, for an order pursuant to CPLR 3212(b) granting said defendant summary judgment dismissing the plaintiff's complaint and all cross-claims on the ground that defendant Angel Pacheco bears no liability for the occurrence of the accident:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Defendant's Affirmation in Opposition.....	7 - 9
Reply Affirmation.....	10 - 12

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In this negligence action, the plaintiff, YESENIA PACHECO, seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on December 18, 2011, between the vehicle operated by her father, defendant, ANGEL PACHECO, and the vehicle owned by defendant BRUCE GRABOWSKI, and operated by defendant, DONNA M. GRABOWSKI. At the time of the accident, plaintiff, was a passenger in the vehicle operated by her father, defendant Angel Pacheco. At the time of the accident Pacheco was proceeding on Moriches Middle Island Road. When he reached the intersection of CR 46 in the

Town of Brookhaven, Suffolk County, New York, he stopped his vehicle with the intention of making a right turn when his vehicle was struck in the rear by the vehicle operated by defendant, Donna M. Grabowski. Ms. Yesenia Pacheco was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on March 11, 2013. Issue was joined by service of defendant Pacheco's verified answer on April 25, 2013. Defendant Pacheco now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint and all cross-claims against him on the ground that his vehicle was completely stopped at the intersection when it was struck in the rear by the Grabowski vehicle and, as such, the evidence shows that he could not be liable for the injuries sustained by the plaintiff.

In support of the motion, the moving defendant submits an affirmation from counsel, Evan B. Cohen, Esq; a copy of the pleadings; a copy of the transcript of the examination before trial of plaintiff, Yesenia Pacheco; a copy of the police accident report (MV-104); and an affidavit of facts from the defendant, Angel Pacheco.

The police accident report provides in the accident description section as follows:

"Driver one (Pacheco) reports he was stopped at light on Moriches Middle Island Road waiting to make a right turn when driver 2 (Grabowski), crashed into the rear of his vehicle. Driver 2 reports she thought Driver 1 was moving and did not see him stopped until she crashed into the back of his car. Driver 2 attempting a right hand turn onto CR 46 N/B.

In her examination before trial, taken on March 12, 2012, plaintiff, Yesenia Pacheco, age 40, a senior financial analyst for Cablevision, testified that on December 18, 2011, at approximately 10:30 a.m., she and her mother were passengers in her father's motor vehicle. Her mother was seated in the front passenger seat and she was seated in the rear behind the front passenger seat. She stated that her father was proceeding east on Moriches Middle Island Road intending to turn right on William Floyd Highway (CR 46). She states that her father's vehicle was completely stopped at a red light in the right turning lane for three of four seconds when their vehicle was struck in the rear. She stated that she felt pain in her neck and back and was removed from the scene by ambulance and transported to the emergency room at Brookhaven Memorial Hospital Medical Center.

In his affidavit, dated October 21, 2013, defendant Angel Pacheco states that on the date of the accident he was operating a 2012 Hyundai Genesis with two passengers, his daughter Yesenia Pacheco and his wife Maria Pacheco. He states that he was stopped at a traffic light on Moriches Middle Island Road at the intersection of CR 46 waiting to make a right turn onto CR 46 northbound. He states that while stopped his vehicle was struck from behind by the vehicle operated by co-defendant, Donna M. Grabowski.

Pacheco's counsel contends that the accident was caused solely by the negligence of the co-defendant, Donna Grabowski, in that co-defendant's vehicle was traveling too closely in violation of VTL § 1129 and the co-defendant driver failed to safely stop her vehicle prior to rear-ending the Pacheco vehicle. Counsel asserts that the co-defendant's statement to the police officer at the scene that she thought the vehicle in front of hers was moving and she did not see that Pacheco's vehicle was stopped until she crashed into it, constitutes an admission of negligence. Counsel contends, therefore, that defendant Pacheco is entitled to summary judgment dismissing the plaintiff's complaint because the evidence shows that co-defendant Grabowski was solely responsible for causing the accident while there is no evidence in the record that Pacheco, who was lawfully stopped prior to the impact, was negligent in any manner.

In opposition to the motion, counsel for Ms. Grabowski, Jeffrey A. Domoto, Esq., states that the instant motion should be denied as premature as discovery is incomplete. In addition, counsel claims that the question of whether Grabowski's conduct amounts to negligence is a question of fact for the trier of fact. The plaintiff, Yesenia Pacheco has not opposed the motion.

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" (Macaulley 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 Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Here, Pacheco testified that his vehicle was at a complete stop at a red traffic signal while waiting to make a right turn when it was suddenly struck from behind by the Grabowski vehicle. Thus, Pacheco satisfied his prima facie burden of establishing entitlement to judgment dismissing the plaintiff's complaint as a matter of law on the issue of liability (see Robayo v Aghaabdul, 109 AD3d 892 [2d Dept. 2013]; Sayyed v Murray, 109 AD3d 464 [2d Dept. 2013]; Prosen v Mabella, 107 AD3d 870 [2d Dept. 2013]; Xian Hong Pan v Buglione, 101 AD3d 706 [2d Dept. 2012]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the plaintiff or the co-defendant to raise a triable issue of fact as to whether Pacheco 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]). Here, there is no dispute that Donna Grabowski was driving the vehicle that rear-ended the Pacheco vehicle and no dispute that she admitted to the police officer at the scene that she did not see the Pacheco vehicle stopped in front of her until she crashed into it (see Brown v Pinkett, 110 AD3d 1024 [2d Dept. 2013] [plaintiff's affidavit, in addition to admission contained in a certified police report, sufficient to establish prima facie, that defendant driver was negligent]; Griffin v Pennoyer, 49 AD3d 341 [1<sup>st</sup> Dept. 2008]). This court finds, therefore, that defendant Donna Grabowski, who did not submit an affidavit in opposition to the motion, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; 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]; Kimyaqarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005] [the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]). Further, the lack of disclosure does not excuse the failure of the party with personal knowledge to submit an affidavit in opposition to the motion (see Rainford v Han, 18 AD3d 638 [2d Dept. 2005] citing Niyazov v Bradford, 13 AD3d 501 [2d Dept. 2004]).

Grabowski's contention that Pacheco's motion for summary judgment is premature is without merit. Defendant Grabowski failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

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

ORDERED, that the instant motion for summary judgment dismissing the plaintiff's complaint and all cross-claims against ANGEL PACHECO is granted, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: December 17, 2013  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.