Peters v Rice
2014 NY Slip Op 30296(U)
January 31, 2014
Sup Ct, Queens County
Docket Number: 700440/2011
Judge: Robert J. McDonald

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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SEAN M. PETERS and JOSEPH McFADDEN, Index No.: 700440/2011

Plaintiffs, Motion Date: 12/02/13

- against - Motion No.: 130

EUSTON A. RICE, ROGER W. HALL, KENNETH GARRETT and LELA L. GARRETT, Motion Seq No. 5

Defendants.

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The following papers numbered 1 to 14 were read on this motion by defendants, KENNETH GARRETT and LELA L. GARRETT, for an order pursuant to CPLR 3212(b) granting said defendants summary judgment dismissing the plaintiffs' complaint and all cross-claims against them on the ground that defendants KENNETH GARRETT and LELA L. GARRETT bear no liability for the occurrence of the accident:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 7
Plaintiff's Affirmation in Opposition-Exhibits.....8 - 11
Reply Affirmation.....12 - 14

In this negligence action, the plaintiffs, Sean M. Peters and Joseph McFadden, seek to recover damages for personal injuries they each allegedly sustained as a result of a motor vehicle accident that occurred on December 10, 2009, between the vehicle operated by plaintiff, Euston A. Rice and owned by Roger Hall, and the vehicle owned and operated by defendant Kenneth Garrett. At the time of the accident, defendant, Kenneth Garrett, was operating his vehicle on 222nd Street and was stopped at a stop sign at the intersection of 145th Avenue in Queens County, New York, when his vehicle was struck in the rear by the vehicle operated by defendant Euston A. Rice. Plaintiffs Sean M. Peters and Joseph McFadden were passengers in the Euston Rice vehicle. Each plaintiff was allegedly injured as a result of the impact.

The plaintiffs commenced this action by filing a summons and complaint on August 3, 2011. Issue was joined by service of defendant Garrett's verified answer with cross-claims dated January 25, 2012. The matter is presently calendared in the Trial Scheduling Part for February 25, 2014. Defendants Kenneth Garret and Lela L. Garrett now move for an order pursuant to CPLR 3212(b), dismissing the plaintiffs' complaint on the ground that said defendants bear no liability for the occurrence of the accident. In support of the motion, defendants submit an affirmation from counsel, Nicholas Sciarrino, Esq., a copy of the pleadings, copies of the transcripts of each plaintiff's examination before trial, a copy of the police accident report (MV-104), and an affidavit of fact from defendant, Kenneth Garrett.

In his examination before trial, taken on June 5, 2013, plaintiff, Sean M. Peters, age 26, testified that he was involved in a motor vehicle accident on December 10, 2009. He was a rear seat passenger in a vehicle operated by his uncle's friend. He stated that he was texting on his cell phone when he felt an impact to the front of the vehicle. He observed the other vehicle involved in the accident in front of his vehicle. An ambulance came to the scene but he declined to go to the hospital. He stated he did not know if the car in front was moving or stopped at the time of the accident. When the police came to the scene he told them that the vehicle in which he was a passenger struck the vehicle in front of it.

Joseph McFadden, Sean Peters' uncle, was a front seat passenger in the vehicle. He testified on August 21, 2012. He stated that he works as a crane operator for Muss Construction. He stated that at the time of the impact he was turning around talking to his nephew when the operator of his vehicle, Mr. Rice, struck the vehicle in front of him. He stated that the vehicle in front was stopped at a stop sign intersection when it was struck in the rear. He testified that Mr. Rice told him that his foot slipped off the brake. When the police came he declined to go to the hospital.

Defendants also submit an affidavit from Kenneth Garrett, the operator of the vehicle that was struck in the rear. He states that he was operating a 2010 Lexus SUV on December 10, 2009. He was proceeding on 222nd Street and brought his vehicle to a complete stop at a stop sign at the intersection of 145th Avenue. He was stopped for at least five seconds when his vehicle was struck in the rear by the vehicle operated by co-defendant, Mr. Rice. He states that he is a paraplegic and his vehicle is specially equipped and modified to allow him to operate his

vehicle in a proper manner. At the time of the impact his control lever was pushed forward holding the vehicle in the stopped position for at least five seconds prior to the impact in the rear.

The police report in its description of the accident states, "at t/p/o OP #1 (Rice) states that his foot slipped of the pedal ...causing him to rear end OP #2(Garrett). OP #2 (Garrett) states OP # 1 (Rice) hit him while he was stopped at a stop sign."

Garretts' counsel contends that the accident was caused solely by the negligence of the co-defendant, Euston A. Rice, in that Rice's vehicle was traveling too closely in violation of VTL § 1129 and defendant Rice failed to safely stop his vehicle prior to rear-ending the Garrett vehicle. Counsel asserts that Rice's version of how the accident occurred contained in the police report constitutes an admission of negligence in that he told the officer that he struck Garretts' stopped vehicle when his foot slipped off the brake. Counsel contends, therefore, that the Garrett defendants are entitled to summary judgment dismissing the plaintiffs' complaint because co-defendant, Rice, was solely responsible for causing the accident while Garrett, who was lawfully stopped at a stop sign at the time of the accident, was free from culpable conduct.

In opposition to the motion, plaintiff's counsel states that the affidavit of Mr. Garrett, stating he was stopped at the stop sign for five seconds prior to being struck in the rear is merely self serving. He states that Mr. Garrett does not assert that his brake lights were functioning properly on the date of the incident. Counsel states it is incredible that Mr. Garrett remained stopped at the stop sign for five seconds despite stating that there were no cars coming across the intersection. Plaintiffs also claim that both passengers in the Rice vehicle stated that they did not see the accident because they were either texting or turned around.

The Rice/Hall co-defendants have 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" (Macauley 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, Mr. Garrett submitted a sworn affidavit stating that his vehicle was at a complete stop at a stop sign for at least five seconds when it was suddenly struck from behind by defendants' vehicle. The plaintiffs who were passengers in the Rice vehicle, also testified at an examination before trial that the Garrett vehicle was stopped and struck in the rear by the vehicle operated by defendant Rice. Thus, the Garrett defendants satisfied their prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Robayo v Aghaabdul, 2013 NY Slip Op 5889 [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 co-defendant Rice to raise a triable issue of fact as to whether Garrett 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]). This Court finds that the Mr. Rice, who did not oppose the motion, and told the officer at the scene that he struck the Garrett when his foot slipped off the brake pedal, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Grimm v Bailey, 105 AD3d 703 [2d Dept. 2013]; 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]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). Further, plaintiff's counsel also failed to provide a non-negligent explanation for the accident or to raise a question of fact as to whether Mr. Garrett's conduct was in any way a proximate cause of the accident. The plaintiff's contention the Garrett vehicle may not have had its brake lights on is insufficient to rebut the presumption of negligence created by the rear-end collision and raise a triable issue of fact to

defeat summary judgment (see Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2004][defendant's testimony that she did not recall seeing brake lights or tail lights illuminated on the plaintiff's vehicle before the collision did not adequately rebut the inference of negligence]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003][the defendant failed to provide evidence sufficient to raise a triable question of fact as to whether the alleged malfunctioning brake lights on the plaintiff's vehicle proximately caused the accident]; Waters v City of New York, 278 AD2d 408 [2d Dept. 2000][defendant's statement that he did not observe any illuminated brake lights indicating that the truck was stopped is insufficient to establish a genuine issue of material fact precluding summary judgment]; also see Santarpia v. First Fid. Leasing Group, Inc., 275 AD2d 315 [2d Dept. 2000]; Lopez v. Minot, 258 AD2d 564 [2d Dept. 1999]).

As the evidence in the record demonstrates that no triable issues of fact have been put forth as to whether co-defendant Garrett may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby,

ORDERED, that the motion by defendants KENNETH GARRETT and LELA L. GARRETT for summary judgment is granted, and the plaintiffs' complaint is dismissed against defendants KENNETH GARRETT and LELA L. GARRETT, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: January 31, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.