Ordonez v Rilling
2015 NY Slip Op 31545(U)
July 20, 2015
Supreme Court, Queens County
Docket Number: 700456/2015
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

JACINTO ORDONEZ,

Plaintiff,

- against -

MARTIN J. RILLING and INSTANT AIR CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - - - - x

Index No.: 700456/2015

Motion Date: 06/11/15

Motion No.: 120

Motion Seq.: 1

FILED
JUL 27 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 13 were read on this motion by plaintiff, JACINTO ORDONEZ, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting this matter down for a trial on serious injury and damages:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law.......	1 - 6
Defendant's Affirmation in Opposition..................	7 - 10
Reply Affirmation......................................	11 - 13

In this negligence action, the plaintiff, Jacinto Ordonez, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on August 26, 2014, between the plaintiff's vehicle and the vehicle owned by defendant, Instant Air Corporation, and operated by defendant, Martin J. Rilling. The accident took place on South Conduit Avenue near the intersection with Lefferts, Queens County, New York. At the time of the accident, plaintiff, Jacinto Ordonez, was traveling on South Conduit Avenue when his vehicle was allegedly struck in the rear by the vehicle being operated by defendant Rilling. The plaintiff allegedly sustained serious physical injuries as a result of the impact including a rotator cuff tear of the left shoulder and several herniated discs in the cervical and lumbar spines.

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The plaintiff commenced this action by filing a summons and complaint on January 19, 2015. Plaintiff now moves, prior to depositions, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on serious physical injury and damages.

In support of the motion, the plaintiff submits an affirmation from counsel, Jennifer M. Gerdes, Esq., a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; an affidavit of facts from the plaintiff; and a copy of the police accident report (MV-104).

In his affidavit, dated May 7, 2015, Mr. Jacinto Ordonez, states that on August 26, 2014, at approximately 4:00 p.m., he was operating a Chevrolet motor vehicle on South Conduit Avenue near its intersection with Lefferts Boulevard when his vehicle was hit in the rear by the Ford motor vehicle operated by defendant Martin J. Rilling.

The police report which is based upon the statements of the drivers states:

"Driver of motor vehicle #1 (plaintiff), states that motor vehicle #2 (defendant), collided with the rear of his vehicle causing damage. Driver of motor vehicle #2 states that he did rear-end motor vehicle #1."

Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that he failed to safely stop his vehicle prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment on the issue of liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition, defendant Martin Rilling submits an affidavit dated June 1, 2015, in which he states that on the date in question he was operating a 2011 Ford van registered to his employer, Instant Air Corporation. He was traveling eastbound on South Conduit Avenue at approximately 40 miles per hour. He states that there were four lanes of eastbound travel in that area of South Conduit Avenue. Two lanes fork to the left and two lanes fork to the right. He was traveling behind the plaintiff's vehicle a 2004 Chevrolet. He states that a third vehicle, a black sedan, suddenly began to merge to the right and cut across all four lanes of South Conduit Avenue in an attempt to take the right merge. He states that in reaction to the maneuver by the

driver in the black sedan, the plaintiff slammed on his brakes and stopped short. Defendant states that he immediately applied his brakes and pulled toward the left in an attempt to avoid contact with the plaintiff's vehicle but the right front of his vehicle came into contact with the rear of the plaintiff's vehicle.

In opposition to the motion, defendant's counsel, Marcella Gerbasi Crewe, Esq., states plaintiff is not entitled to summary judgment as there are questions of fact as to whether the plaintiff was negligent in causing or contributing to the accident. In addition, counsel asserts that plaintiff has not provided sufficient details in his affidavit to establish his freedom from liability. Counsel asserts that pursuant to the defendant's affidavit it was the action of the plaintiff in stopping short on South Conduit Avenue which was the cause of the accident or at least raises a question of fact as to who was responsible for causing the accident. Counsel claims there are questions of fact as to whether the plaintiff observed a black sedan cutting across the lanes of traffic and whether the plaintiff could have taken evasive action to avoid stopping short.

Further, defendant's counsel asserts that the motion is premature as depositions of the parties have not been conducted and all discovery is stayed pending the determination of the instant 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 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 Parra v Hughes, 79 AD3d 1113 [2d Dept. 2010][the defendant's claim that the vehicle immediately in front of him made a sudden stop, standing alone, was insufficient, under the circumstances of this case, to

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rebut the presumption of negligence]; DeLouise v S.K.I. Wholesale Beer Corp., 75 AD3d 489 [2d Dept. 2010]; Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiff testified that his vehicle was proceeding on South Conduit Avenue when it was suddenly struck from behind by defendant's vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff 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 defendant, who testified that he struck the plaintiff's vehicle because he came to a sudden and unexpected stop failed to provide evidence as to 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]; 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]).

Although defendant contends that the accident was the result of an uninvolved vehicle maneuvering in front of the plaintiff's vehicle requiring the plaintiff to come to a sudden and unexpected stop, this does not explain defendant's failure to maintain a safe distance from the vehicle in front of his especially in view of the fact that he observed the uninvolved vehicle maneuvering across four lanes of traffic and could have anticipated the plaintiff's actions(see Dicturel v Dukureh, 71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan,68 AD3d 727 [2d Dept. 2009]; Zdenek v Safety Consultants, Inc.,63 AD3d 918 [2d Dept. 2009]). Although the defendant claims that the plaintiff's vehicle came to an abrupt stop, a claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (see Kastritsios v Marcello, 84 AD3d 1174 [2d dept. 2011]; Franco v Breceus, 70 AD3d 767 [2d Dept. 2010]; Mallen v Su, 67 AD3d 974 [2d Dept. 2009]). Even accepting defendant's version of the accident it was forseeable that the plaintiff would have to slow down or stop because of the actions of the third vehicle. The defendant did not provide any evidence that he maintained a reasonably safe speed and reasonable safe

distance behind the plaintiff's vehicle under the circumstances so as to avoid the accident (see Robayo v Aghaabdul, 109 AD3d 892 [2d Dept. 2013]; Hackney v Monge, 103 AD3d 844 [2d Dept. 2013]; Hearn v Manzolillo, 103 AD3d 689 [2d Dept. 2013]).

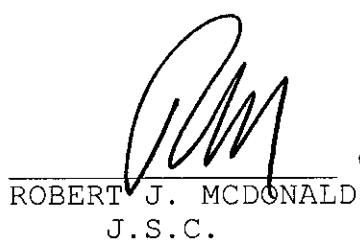
The defendant's contention that the plaintiff's motion for summary judgment is premature is without merit. The defendant failed to offer a sufficient evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion 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 the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth 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 plaintiff's motion is granted, and the plaintiff, JACINTO ORDONEZ, shall have partial summary judgment on the issue of liability against the defendants, MARTIN J. RILLING and INSTANT AIR CORPORATION, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of physical injury and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: July 20, 2015
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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