Ha Jung Chung v Oh
2016 NY Slip Op 32008(U)
September 19, 2016
Supreme Court, Queens County
Docket Number: 700202/2015
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

- x

HA JUNG CHUNG and SEOK JIN WHANG, Index No.: 700202/2015

Plaintiffs, Motion Date: 9/7/16

- against - Motion No.: 46

JASON OH, Motion Seq.: 3

Defendant.

- x

The following electronically filed documents read on this motion by plaintiff on the counterclaim, SEOK JIN WHANG, for an Order pursuant to CPLR 3212, dismissing the counterclaim of defendant against plaintiff on the counterclaim on the grounds that plaintiff on the counterclaim bears no liability for the subject accident:

	Papers Numbered
Notice of Motion.....	EF 23
Affirmation in Opposition...	EF 24
Reply Affirmation.....	EF 25

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on October 22, 2014, at or near the intersection of Northern Boulevard and Parsons Boulevard, in Queens County, New York.

This action was commenced by the filing of a summons and complaint on January 9, 2015. Issue was joined by defendant serving a verified answer with counterclaim on May 8, 2015. Plaintiff on the counterclaim now seeks summary judgment, dismissing the counterclaim asserted against him.

In support of the motion, plaintiff on the counterclaim submits his own affidavit dated July 29, 2016. He affirms that he was involved in the subject accident. At the time of the accident, he was stopped at a red traffic signal on westbound Northern Boulevard at or near its intersection with Parsons Boulevard. The weather was rainy and wet. He was in the right moving lane. He was at a complete stop for "a good ten seconds" prior to the accident. He then felt an impact from behind his vehicle. His foot was on the brake at the time of impact. He did not change lanes before the impact. He did not hear any horns, brakes, or screeching tires prior to the impact.

Plaintiff on the counterclaim also submits a copy of the Police Accident Report (MV-104AN). In the accident description portion of the report, the responding officer notes:

> "At T/P/O vehicle #1 (plaintiff on the counterclaim) states while stopped at a red signal vehicle #2 (defendant) did strike him from behind. Vehicle #2 (defendant) states while trying to stop his tires lost traction on the wet pavement and caused him to strike rear of vehicle #1 (plaintiff on the counterclaim)."

Based on plaintiff on the counterclaim's sworn affidavit and the police accident report, counsel argues that plaintiff on the counterclaim was not at fault for the happening of the accident, and therefore, was not negligent as his vehicle was fully stopped when it was rear ended by defendant's vehicle.

In opposition, counsel for defendant, Ryan Mainhardt, Esq., submits an affirmation contending that summary judgment is premature as examinations before trial have not been held.

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 or her 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 Delgado v Bang, 120 AD3d 608 [2d Dept. 2014]; 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, plaintiff on the counterclaim established that his vehicle was stopped at a red light when it was rear-ended by defendant's vehicle. Thus, plaintiff on the counterclaim satisfied his prima facie burden of establishing entitlement to summary judgment as a matter of law (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 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving party to raise a triable issue of fact as to whether plaintiffs were also negligent, and if so, whether their negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

Here, no evidence has been submitted disputing that plaintiff on the counterclaim's stopped vehicle was struck in the rear by defendant's vehicle. This Court finds that defendant, who did not submit an affidavit in opposition to the motion, failed to provide evidence of 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]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]).

Defendant's counsel's argument that this motion for summary judgment is premature is without merit. Defendant himself already has personal knowledge of the relevant facts, but failed to submit an affidavit or deny the accuracy of the Police Accident Report or plaintiff on the counterclaim's affidavit. Additionally, defendant 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]; Medina v

Rodriquez, 92 AD3d 850[2d Dept. 2012]; 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]).

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that plaintiff on the counterclaim SEOK JIN WHANG's motion for summary judgment against defendant is granted, and defendant's counterclaim against plaintiff on the counterclaim SEOK JIN WHANG is hereby dismissed.

Dated: September 19, 2016
Long Island City, N.Y

ROBERT J. MCDONALD
J.S.C.

FILED

SEP 29 2016

COUNTY CLERK
QUEENS COUNTY