Chin v Drive Any Car R Us LLC
2017 NY Slip Op 30923(U)
April 5, 2017
Supreme Court, Bronx County
Docket Number: 22879/14
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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WALKIN CHIN,

Plaintiff(s),

DECISION AND ORDER

Index No: 22879/14

- against -

DRIVE ANY CAR R US LLC, EDMUND KWABENA, ADRIAN PERDOMOM, SHERIAN PERDOMO, HERIBERTO OLMO, AND GESENIA ABREU,

Defendant(s).
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In this action for the negligent operation of motor vehicles, defendants ADRIAN PERDOMO (AP) and SHERIAN PERDOMO (SP) move seeking an order granting them summary judgment thereby dismissing the complaint and cross-claims asserted against them. AP and SP contend that insofar as their negligence, if any, was not the proximate cause of this multi-vehicle accident, they are entitled to summary judgment. Plaintiff opposes this motion asserting that questions of fact with regard to proximate causation precluded summary judgment.

For the reasons that follow hereinafter, AP and SP's motion is granted.

The instant action is for alleged personal injuries arising from a multi-vehicle accident. The complaint alleges that on July 8, 2011, plaintiff was involved in a motor vehicle accident at or near premises located at 1451 Washington Avenue, near St. Paul's

Place, Bronx, NY. Specifically, plaintiff alleges that while operating his vehicle, he came into contact with a vehicle owned by defendant SP and operated by AP, a vehicle owned by defendant DRIVE ANY CAR R US LLC and operated by defendant EDMUND KWABENA, and a vehicle owned by defendant GESENIA ABREU and operated by defendant HERIBERTO OLMO. Plaintiff alleges that defendants were negligent in the operation of their respective vehicles, said negligence causing the accident and plaintiff's resulting injuries.

AP and SP's motion for for summary judgment is granted insofar as they establish that their actions, in double parking their vehicle - even if evidence of negligence - were not the proximate cause of plaintiff's accident. More specifically, on this record, it is clear that the separate intervening acts of the other vehicles involved in this accident broke the causal connection between any of AP and SP's actions and the instant accidents.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by

pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with

> the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman*

v Twentieth Century Fox Film Corp., 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

It is well settled that owners of improperly parked vehicles may be held liable to one injured plaintiffs injured by negligent drivers of other vehicles (*Ferrer v Harris*, 55 NY2d 285, 293 [1982], *amended*, 56 NY2d 737 [1982] ["We now come to the prima facie case against defendant Javidan. The two elements with which we are concerned on his phase of the case are negligence and proximate cause. The first of these presents no problem since the evidence that this appellant had violated section 81 (subd [c], par 2) of New York City's Traffic Regulations, which interdicted the double- parking of the 'Mister Softee' van."]; *Sieredzinski v McElroy*, 303 AD2d 575, 576 [2d Dept 2003]; *Reuter v Rodgers*, 232 AD2d 619, 620 [2d Dept 1996]; *Boehm v Telfer*, 250 AD2d 975, 976 [3d Dept 1998]). Liability, of course, depends on the resolution of factual issues concerning foreseeability and proximate causation (*Reuter* at 620). Significantly, liability for improperly parked vehicles is not confined to statutory violations but liability can also be imposed under common law principles of ordinary negligence

(*Falker v Ostrander*, 272 AD2d 988, 989 [4th Dept 2000]; *Perry v Pelersi*, 261 AD2d 780, 781 [3d Dept 1999; *Boehm* at 976).

In the City of New York, double parking is generally proscribed by 34 RCNY 4-08(f)(1) which states that

> [n]o person shall stand or park a vehicle in any of the following places, unless otherwise indicated by posted signs, markings or other traffic control devices, or at the direction of a law enforcement officer . . . On the roadway side of a vehicle stopped, standing, or parked at the curb.

Accordingly double parking on a roadway is a violation of the foregoing rule (*Brito v RDJ Express Transp.*, 135 AD3d 651, 651 [1st Dept 2016]; *Pickett v Verizon New York Inc.*, 129 AD3d 641, 641 [1st Dept 2015]). Notably, while a violation of municipal ordinance is neither negligence per se nor warrants the imposition of absolute liability, it is evidence of negligence (*Elliot v City of New York*, 95 NY2d 730, 734 [2001]). Thus an illegally double parked vehicle is only some evidence of negligence.

It is well settled that proximate cause is an essential element to liability, and accordingly, unless both negligence and proximate causation are established, there can be no finding of liability against a defendant (*Sheehan v City of New York*, 40 NY2d 496, 501 [1976]; *Lee v New York City Housing Authority*, 25 AD3d 214, 219 [1st Dept 2005]; *Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept

1995]). Proximate cause means the substantial cause of the events which produced the injury claimed (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 314 [1980]; *Lynn* at 195). While in establishing proximate cause, a party is not required to eliminate every other possible cause of an accident (*Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987]; *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]), proximate cause must nevertheless be conclusively established and cannot be based on speculation (*Bernstein* at 1022; *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478 [2d Dept 2001]; *Smith v Wisch*, 77 AD2d 619, 620 [2d Dept 1980]). Accordingly,

> "[w]here the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury"

(*Ingersoll* at 7; *Bernstein* at 1021; *Lynn* at 195).

Thus, to recover, in addition to establishing defendant's negligence, a plaintiff is required to demonstrate that the defendant's negligence was the proximate cause of the accident and the injuries claimed (*Lynn* at 195). At the very least, a plaintiff is required to establish facts and conditions from which defendant's negligence and an accident's causation may be

reasonably inferred (*Ingersoll* at 7). When a plaintiff fails to establish the cause of an accident and multiple causes can be attributed to the accident claimed, any determination as to said accident's cause would be nothing less than speculation and, thus, plaintiff fails to establish that a defendant's negligence proximately caused the accident (*Teplitskaya* at 478). In *Teplitskaya*, the court granted summary judgment in defendant's favor when the evidence as to what caused plaintiff's fall was nothing short of speculation (*id.* at 478). Specifically, there the defendant established prima facie entitlement to summary judgment by demonstrating that insofar as plaintiff died and could not state what caused his fall, any assertion that his fall was caused by defendant's negligence was speculative (*id.* at 477-478). Moreover, because plaintiff's evidence as to causation came from another person who found plaintiff surrounded by paint chips after his fall, the court ruled that any attempt to attribute the fall to the paint chips, and thus, to defendant's negligence, was speculative since it was just as likely that plaintiff could have fallen for other reasons totally unrelated to the paint chips (*id.* at 478).

While it is true that where varying inferences as to causation are possible, resolution of the issue of proximate causation is a question for the jury (*Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 674 [1999]), it is equally well settled that "[w]here the evidence as to the cause of the accident which injured plaintiff is

undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury" (*Rivera v City of New York*, 11 NY2d 856, 857 [1962]; *Dattilo v Best Transp. Inc.*, 79 AD3d 432, 432 [1st Dept 2010]; *D'Avilar v Folks Elec. Inc.*, 67 AD3d 472, 472 [1st Dept 2009]).

The law draws a distinction between a condition that merely sets the occasion for and facilitates an accident and an act that is the proximate cause of the accident; only the latter and not the former giving rise to liability (*Sheehan* at 503; *Lee* at 219). Stated differently, if a defendant's negligence is not the immediate effective cause of an accident, it cannot be said, that such negligence proximately caused the accident (*Lee* at 219). In *Lee*, for example, plaintiff was injured when, while playing ball, the ball went through a hole in a fence negligently maintained by defendant, the owner of the property and the fence surrounding it (*id.* at 215). Plaintiff went to fetch the ball, not through the hole but after walking around the fence and as he retrieved the ball, plaintiff was hit by a car (*id.* at 215). In granting summary judgment in favor of the defendant/owner of the fence, the court concluded that even though defendant was negligent in maintaining the fence, such that it did not prevent the ball from going through the hole thereat, said negligence was not the proximate cause of the accident (*id.* at 219-220). Specifically, the court found that

the proximate cause of plaintiff's accident was the independent intervening acts of the driver of the vehicle which struck plaintiff, such independent intervening acts breaking the causal connection between a defendant's negligence and an accident (*id.* at 220).

In *Sheehan*, the court came to a similar conclusion. In that case, plaintiff sued after being injured while a passenger on defendants' bus, alleging that the bus stopped in the middle of the street rather than the designated bus stop, that such act constituted negligence, and that such negligence proximately caused the accident which ensued when co-defendant's truck, whose brakes failed, struck the bus in the rear (*id.* 500). In finding that a directed verdict in favor of defendants, the bus owner and operator, was warranted the Court of Appeals noted that the bus' location at the time of the accident, even though not at a bus stop, and which constituted negligence, was not the proximate cause of the accident, and that instead, it was the negligence of the other vehicle - the truck - which caused the accident (*id.* at 502-503). Specifically, the court stated

> [a]Assuming the designated stop was available for the bus's use, if it had in fact stopped there and, having discharged or boarded its passengers, pulled back into the traveling lane before proceeding across the intersection, it would, properly, have been in exactly the same position at which it found itself when it

> was hit. Or, if observing no prospective passengers in the stop and having none who wished to alight at that corner, the bus driver had decided not to go through the proper practice of pulling in and out of the stop, but, preparatory to crossing, had merely stopped in the traveling lane at the corner before doing so, his bus would have been in precisely the same position. In short, the bus at the time of the accident appears merely to have been at one point in the street where it had a right to be (the traveling lane) rather than at another point in the street where it had a right to be (the bus stop). The result of the sanitation truck's brake failure would have been no different, if, perchance, a pedestrian or a vehicle other than the bus had been using the street at that point at that time and had instead become the target of the truck's faulty brakes . . . In addition, it appears quite clear that, if the bus's stop in the traveled lane could, on any view of the circumstances here, be regarded as a proximate cause of the accident, the failure of the truck's brakes might have been an independent, supervening cause. Though, where either of two independent acts of negligence may be found to be concurring, that is, direct causes of an accident, the perpetrator of either or both may be found responsible for the whole harm incurred, when such an intervening cause interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably 836 anticipated, it will prevent a recovery on account of the act or omission of the original wrongdoer

(*id.* at 502-504 [internal citations and quotation marks omitted])

In support of their motion, AP and SP submit plaintiff's deposition transcript wherein he testified, in pertinent part as follows: On July 8, 2011, plaintiff was involved in an accident on Washington Avenue in Bronx County. Plaintiff was a detective with the New York City Police Department and at the time was driving a department issued unmarked vehicle - a blue Honda. Immediately prior to the accident, plaintiff was on his way to the Bronx County District Attorney's Office to drop-off a Sergeant, the only passenger in the vehicle. As plaintiff drove southbound on Washington Avenue, a two lane, one way street, with one parking lane on each side, he approached a double parked vehicle in the right lane of travel. Plaintiff slowed his vehicle and brought it to a stop about 10 feet behind the double parked vehicle. Intending to go around the vehicle, he angled his car towards the left lane, engaged his left turn signal and waited for a break in southbound traffic. 10 seconds thereafter, plaintiff was struck in the rear by another vehicle and propelled into the rear of the double parked vehicle in front of him. He was then impacted in the rear a second time and again propelled into the rear of the doubled parked vehicle.

AP and SP also submit an affidavit from AP wherein he states, in pertinent part, as follows: On July 8, 2011, he was involved in an accident while operating a vehicle owned by SP. Specifically, AP states that while operating SP's 2004 Toyota, he double parked

it in order to wait for a parking spot which he noted was about to be vacated. While double parked, he was impacted in the rear by a vehicle - a Honda. AP then felt a second impact to the back of his vehicle.

Based on the foregoing, AP and SD establish prima facie entitlement to summary judgment insofar as they establish that their negligence was not the proximate cause of the instant accident. It is well settled that owners of improperly parked vehicles may be held liable for injuries to others caused by the improperly parked vehicle (*Ferrer* at 293; *Sieredzinski* at 576; *Reuter* at 620; *Boehm* at 976), and that as per 34 RCNY 4-08(f)(1) double parking on a roadway is a violation (*Brito* at 651; *Pickett* at 641). However, it is equally well settled that proximate cause is an essential element to liability, and accordingly, unless both negligence and proximate causation are established, there can be no finding of liability against a defendant (*Sheehan* at 501; *Lee* at 219; *Lynn* at 195). Thus, the law draws a distinction between a condition that merely sets the occasion for and facilitates an accident and an act that is a proximate cause of the accident; only the latter and not the former giving rise to liability (*Sheehan* at 503; *Lee* at 219). Stated differently, if a defendant's negligence is not the immediate effective cause of an accident, it cannot be said, that such negligence proximately caused the accident (*Lee* at 219). Thus, when, an independent intervening act breaks the chain

of causation between a defendant's negligence and the resulting accident, it cannot be said that said defendant's negligence caused an ensuing accident (*Lee* at 220; *Sheehan* at 502-503).

Here, read together, plaintiff's testimony and AP's affidavit establish that irrespective of any negligence on AP's part in double parking his vehicle, this accident occurred when while at a complete stop, plaintiff's vehicle was impacted in the rear by other vehicles. While AP and SP's vehicle was double parked, which is some evidence of negligence, it is clear that the accident - meanng the first collision - was the result of independent acts of the other vehicles about which plaintiff testified and to which AP refers in his affidavit. These collisions, were independent intervening acts, more so because they occurred after plaintiff had been stopped for several seconds. Accordingly, AP and SP establish that they did not proximately cause plaintiff's accident and are, therefore, entitled to summary judgment.

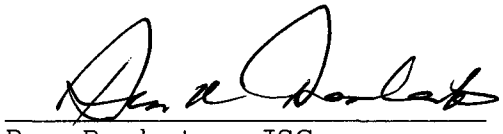
Nothing submitted by plaintiff in opposition raises an issue of fact sufficient to preclude summary judgment. Indeed, plaintiff submits no evidence and merely contends that on this record, AP and SD's action in double parking was a proximate cause of plaintiff's accident because but for double parking, the instant accident would not have occurred. This contention is unavailing. As noted above, while nuanced, the law draws a distinction between a condition that

merely sets the occasion for and facilitated an accident and an act that is a proximate cause of the accident; the latter and not the former giving rise to liability (*Sheehan* at 503; *Lee* at 219). Here, AP and Sd's conduct falls within the ambit of the former. It is hereby

ORDERED that the complaint and all cross-claims as against AP and SP be dismissed with prejudice. It is further

ORDERED that AP and SP serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : April 5, 2017
Bronx, New York



Ben Barbato, JSC