

Carlino v Shaprio

2021 NY Slip Op 32662(U)

December 13, 2021

Supreme Court, Kings County

Docket Number: Index No. 514322/15

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 514322/15
Motion Date: 9-20-21
Mot. Seq. No.: 8-9

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ROBERT CARLINO and ZINA HOWELL,

Plaintiff,

-against-

DECISION/ORDER

JOAN SHAPRIO, 246 MORGAN AVENUE CORP.,
d/b/a 246 MORGAN AVENUE CO., 1515 BEDFORD
AVENUE REALTY, LLC, MJR CONSTRUCTION
SERVICES CORP., d/b/a MJR CONSTRUCTION
SERVICES and MICHAEL RUSSELL,

Defendants.

-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 173-255, the motions are decided as follows:

In this action to recover damages for personal injuries arising out of a rear-end collision, defendant MJR CONSTRUCTION SERVICES CORP. d/b/a MJR CONSTRUCTION SERVICES ("MJR") moves for an Order: (1) pursuant to CPLR §3025(b), granting MJR leave to amend its answer to include the affirmative defense of Release; (2) pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(5), dismissing plaintiff's complaint pursuant to MJR's affirmative defense of release; or alternatively (3) pursuant to CPLR 3212 granting summary judgment, dismissing plaintiffs' complaint and all claims against MJR; and (4) for such other and further relief as this court may deem just and proper (Mot. Seq. # 8). Plaintiff opposes the motion.

By separate motion, Defendant, MICHAEL RUSSELL ("Mr. Russell") moves for an order granting him summary judgment dismissing plaintiff's Complaint and all cross-claims against him (Mot. Seq. # 8) The two motions are consolidated for this decision.

Background:

This action arises out of a motor vehicle accident that occurred when plaintiff's vehicle was rear-ended by a truck driven by non-party Karl Biermann ("Mr. Biermann") and owned by 246 MORGAN AVENUE CORP. d/b/a 246 MORGAN AVENUE CO. ("246 Morgan"). Plaintiff commenced a previous personal injury action against Mr. Biermann and 246 Morgan,

stemming from the accident which Plaintiff settled for nearly \$500,000. (See *Robert Carlino v. Karl Biermann et al.*, Supreme Court, Kings Co. Index No. 7326/2014). In furtherance of the settlement, the plaintiff executed a General Release, that in relevant part, provides:

This release and settlement constitutes payment for all damages and injuries allegedly sustained on or about March 11, 2013 **and is specifically intended to release, whether presently known or unknown, all other tortfeasors liable or claimed to be liable jointly with the RELEASEES; and, whether presently known or unknown, all other potential or possible tortfeasors liable or claimed to be liable jointly with the RELEASEES in relation to the action** captioned Robert Carlino and Zina Howell v. Karl Bierman and 246 Morgan Avenue Corp., Index No. 7326/2014 and venued in the Supreme Court, Kings County.

In the prior action, Mr. Biermann conceded that he rear-ended Plaintiff's vehicle and testified that the collision occurred because the gears on his truck became "stuck" and that such prevented him from stopping before colliding into the rear of plaintiff's vehicle. The allegations against MJR and defendant Michael Russell in this action is that their negligence in directing traffic in the area of the accident or their failure to direct traffic contributed to the happening of the accident.

The Accident:

At the time of the accident, the plaintiff was traveling northbound on Bedford Avenue in Brooklyn. (Ex E¹, p.34, 59; H² p 25). Because there was a truck stopped in the right lane, plaintiff pulled around the truck (Ex E .. 60; Ex H., pp 31-32), then returned to the right lane and stopped at a red light on Bedford Avenue near its intersection with St. John's Place. (Ex. E. p. 74; H p 33 lines 22-24). Plaintiff was stopped at the red light for ten seconds before his vehicle was struck in the rear by the truck owned by 246 Morgan and operated by Mr. Biermann (Ex H p 38 lines 2-4, p 33 lines 5-7, Ex E, p. 76; Ex E, p. 76; Ex H pp. 38-39, 41).

At the time of the accident Mr. Biermann was driving a truck with a container (dumpster) he was bringing the construction site on Bedford Avenue. The contractors working at the site were going to load the container with debris at which point Mr. Biermann would cart it away.

¹ Deposition of Plaintiff taken on January 14, 2020.

² Deposition of Plaintiff taken on July 19, 2016.

(Ex I³, p. 7-8). Mr. Biermann explained that the foreman from the jobsite removed cones that had been used to keep a lane open and directed him where to park the truck. As Mr. Biermann was pulling in, plaintiff pulled in front of him. (Ex. I pp. 14-15; 17). Mr. Biermann explained "as I was pulling into the stop, my truck got jammed in gear, I couldn't take it out of first gear" and struck Plaintiff's truck. (Ex. I, p. 15, lines 19- 22). Mr. Biermann reiterated that he had seen Plaintiff's vehicle, tried to stop, but "it got stuck in gear." (Id., p. 29, lines 2-6).

Steven Russell of MJR both witnessed the accident and spoke with Mr. Biermann and corroborated that the accident occurred when Plaintiff swung around Mr. Biermann's truck. Mr. Russell testified:

He said the driver of the black pickup went around the flagmen, crossed the double line 4 and swung right in front of him to get behind the 5 car. There was a car length between the truck and the car that was stopped. He swung out across the double line and then swung right back in. And at that time the guy was pulling the truck up and before he could stop he tapped, tapped the passenger side of the black pickup truck driven by [Plaintiff]

[Mr. Biermann] couldn't get it -- he couldn't get the gear in stop, but it was too late. (Ex F⁴ p 61 lines 2-17)

Because I knew what the driver told me. I knew what I saw. And it was part of his statements and everything what happened (Id. p. 62 lines 2-4)

Michael Russell's Connection to the Accident.

MJR was run by Steve Russell. (Ex. F. p95 lines 1-2). Michael Russell was "not involved at all." (Ex. F, p, 94 lines 23-25). Steven Russell worked a supervisor of demolition for MJR on the date of the accident (Ex F. pp, 11-12). Steven Russell explained that his son, Michael

³ Deposition of Karl Bierman taken on 8-29-16.

⁴ Deposition of Steve Russel taken on October 21, 2020.

Russell, did not engage in any construction or demolition or any other activities on behalf of MJR at the time of the accident. (Ex. F, p. 85 lines 2-9). Michael's sole connection with MJR was that his name was used to incorporate it. (id. p. 90, lines 16-17).

In March 2013 MJR was retained by Marge Contracting to perform demolition work at 1515 Bedford Avenue in Brooklyn. (Ex F. p. 16,. 18). Michael did not supervise any MJR employees. (Ex. F, p. 86, lines 21-22), nor did hie instruct any workers at the 1515 Bedford Avenue jobsite. (Ex F p. 87 lines 1- 4). MJR ordered containers (from Morgan) to dispose of debris and used two trained flagmen to direct the entry and exit of the container trucks. (Ex F. p. 42 lines 3-5; lines 20-23). MJR would also place orange traffic cones or barrels to protect the flagmen while they were working. (id., p. 43 lines 6-12).

Discussion:

The moving defendants established, prima facie, that the sole proximate cause of the accident was the actions of the Mr. Biermann in failing to stop his vehicle before colliding into the rear of the vehicle operated by the plaintiff. (*see Stone v. Williams*, 64 N.Y.2d 639, 642, 485 N.Y.S.2d 42, 474 N.E.2d 250; *Margolin v. Friedman*, 43 N.Y.2d 982, 983, 404 N.Y.S.2d 553, 375 N.E.2d 734; *Sheehan v. City of New York*, 40 N.Y.2d 496, 503, 387 N.Y.S.2d 92, 354 N.E.2d 832; *Castillo v. Amjack Leasing Corp.*, 84 A.D.3d 1298, 924 N.Y.S.2d 156). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff failed to demonstrate a triable issue of fact as to whether any act or omission of the moving defendants, including their alleged failure to properly direct traffic, was a substantial factor in causing the accident (see *Sciafla v. Roman Cath. Church of Our Lady of Hope*, 116 A.D.3d 690, 691, 983 N.Y.S.2d 282, 283; *Clarke v. Hirt*, 48 Misc. 3d 1205(A), 17 N.Y.S.3d 381).

In light of this determination, that branch of MJR motion pursuant to CPLR §3025(b) for leave to amend its answer to include the affirmative defense of Release, and for summary judgment on this defense is moot.

Accordingly, it is hereby

ORDERED that those branches of the motions of defendants MJR and MICHAEL RUSSELL for summary judgment dismissing plaintiff's complaint, and all cross-claims, are **GRANTED**; and it is further

ORDRED that the motions are in all other respects **DENIED** as moot.

This constitutes the decision and order of the Court.

Dated: December 13, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020