

Musayev v Musayev

2013 NY Slip Op 32033(U)

August 29, 2013

Sup Ct, Queens County

Docket Number: 3468/2010

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

LEANNA MUSAYEV, infant by her mother
and legal guardian RAISA ARONOVA, and
RAISA ARONOVA, individually,

Index No.: 3468/2010

Motion Date: 07/23/13

Plaintiffs,

Motion No.: 71

- against -

Motion Seq.: 10

ILYA MUSAYEV, YAKOV AMINOV and ARKADIY
AMINOV,

Defendants.

- - - - - x

The following papers numbered 1 to 20 were read on this motion by
defendant ILYA MUSAYEV, for an order pursuant to CPLR 3212(b)
granting summary judgment on the issue of liability and
dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 5
Defendant Aminov's Affirmation in Opposition.....	6 - 9
Plaintiff's Affirmation in Opposition.....	10 - 13
Defendant Musayev's Reply Affirmations(2).....	14 - 20

In this negligence action, plaintiff, RAISA ARONOVA, seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on December 28, 2008, between the vehicle owned and operated by defendant, Ilya Musayev and the vehicle owned by ARKADIY AMINOV and operated by YAKOV AMINOV. Plaintiff Raisa Aronova was a passenger in the Musayev vehicle. The accident took place near the intersection of Booth Street and 65th Road in the County of Queens, New York Defendant Musayev alleges that while his vehicle was stopped

while dropping off his passengers in front of 65-20 Booth Street, his vehicle was struck in the rear by the defendant's vehicle. Plaintiff alleges that she sustained serious injuries as a result of the accident.

The plaintiff commenced this action by service of a summons and complaint on February 11, 2010. Issue was joined by service of moving defendant's verified answer with cross-claims dated July 20, 2010. The Aminov defendants joined issue by service of a verified answer with cross-claims dated June 18, 2010. The complaint of infant plaintiff Leanna Musayev was dismissed by order of this court dated November 14, 2012 for failure to comply with court-ordered discovery including failing to provide a bill of particulars. Plaintiff filed a note of issue on January 4, 2013. The matter is presently on the calendar of the Trial Scheduling Part on November 13, 2013.

Defendant Musayev moves for summary judgment dismissing the plaintiff's complaint on the ground that defendant Musayev was not negligent as a matter of law and bears no responsibility for causing the accident. In support of the motion, Musayev submits an affirmation from counsel, Thomas R. Mazzaro, Esq., a copy of the pleadings; and copies of the transcripts of defendant Ilya Musayev and plaintiff Raisa Aronova. The Aminov defendants have failed to appear for court-ordered examinations before trial and have been conditionally precluded from testifying at the time of trial unless they appear for an examination before trial at least 60 days prior to trial.

Defendant, Ilya Musayev, age 30, testified at an examination before trial on April 4, 2011 regarding the accident of November 28, 2008. Mr. Musayev is also a plaintiff in a separate action which he brought against the Aminov defendants under Index No. 19701/2009. He testified that he is a senior assistant engineer for Web MD. He stated that on the date of the accident he was the owner and operator of a 1999 Lexus RX 300 SUV and his passengers were Raisa Aronova and LeAnna Musayev. Raisa was seated in the rear of the vehicle on the passenger side. He was traveling on Booth Street at approximately 1:30 a.m., coming home from Manhattan. He stated that the accident happened on Booth Street near the intersection of 65th Road, while he was double parked to let LeAnna and Raisa out of the vehicle. His vehicle was in park and he was not operating his hazard or flashing lights although his headlights were on. Ten seconds after stopping his vehicle he looked in the rear view mirror and saw the lights of the defendants' vehicle behind him. He stated that he looked away and then his car was struck from behind by the defendant's vehicle. He and the passengers were still in the car at the time of

impact. He stated that the heavy impact pushed his vehicle 15 - 20 feet passed the intersection. He stated that defendant Aminov approached him after the accident and told him "I am sorry, I didn't see you." he stated that he did not receive medical treatment at the scene but that Raisa and Leanna were transported to the hospital emergency room by ambulance.

Raisa Aronova testified at an examination before trial on April 4, 2011 that at the time of the accident she resides at 65-20 Booth Street in Rego Park, Queens County, New York. At that time she was living with Ilya Musayev who is the father of her daughter LeAnna. She stated that the subject accident occurred on a Sunday at 1:30 a.m. She was seated as a rear seat passenger. Her infant daughter was seated next to her in the rear in an infant car seat. At the time of the accident Leanna was eight months of age. The car was stopped and double parked on Booth Street right before the stop sign at the intersection of 65th Road so that the passengers could be dropped off in front of their residence. In the area where the car stopped there were vehicles parked on both sides on Booth Street. The vehicle was double parked for 10 to 15 seconds prior to impact. As a result of the impact plaintiff Raisa Aronova sustained injuries to her right shoulder, elbow, mid back and low back. Although she stated that the child was rendered unconscious at the scene, she stated that the doctors at the emergency room told her the child was okay.

Defendant Musayev contends that defendant Aminov was negligent in the operation of his vehicle in striking the plaintiffs' vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that the driver failed to maintain a reasonably safe rate of speed and failed to exercise reasonable care and failed to safely stop his vehicle prior to rear-ending the Musayev vehicle. Counsel contends that the evidence indicates that the Musayev vehicle was stopped and double parked in front of Raisa's apartment on Booth Street when it was struck from behind by the Aminov vehicle. Counsel contends, therefore, that Musayev is entitled to summary judgment dismissing plaintiff's complaint against him because the Aminov driver was solely responsible for causing the accident while Musayev was free from culpable conduct. Counsel argues that the Aminov defendants have failed to appear for depositions and as such have failed to provide a non-negligent explanation for striking the movants vehicle in the rear and -there is no testimony contradicting Musayev's testimony that his vehicle was completely stopped when it was struck in the rear. Counsel also argues that the fact that the Musayev vehicle was double parked does not raise a question

of fact because co-defendant's acts were the sole proximate cause of the accident (citing Gerrity v Muthana, 7 NY3d 835 [2006]; Wechter v Kelner, 40 AD3d 747 [2d Dept. 2007]; Fermaglich v Arnone, 36 AD3d 584 [2d Dept. 2007]).

In opposition to the motion, counsel for the Aminov defendants, Peter Maiorino, Esq., contends that summary judgment should be denied because Musayev willingly chose to illegally double park his vehicle in a moving lane of traffic to discharge his passengers. Counsel claims that there is a question of fact for the jury to determine whether or not the discharging of passengers from a double parked location makes Musayev comparatively negligent and partially responsible for the injuries allegedly sustained by the plaintiff. Counsel also claims that Musayev is partially responsible for the accident because although he saw the approaching headlights of the Aminov vehicle in his rear view mirror prior to the impact he still chose to discharge his passengers from the moving lane of traffic.

Counsel for plaintiff, Raisa Aranova, Allen Goldberg, Esq., opposes the motion contending that there is a triable issue of fact as to whether defendant Musayev was negligent in double parking his vehicle to drop off his passengers and whether that negligence was a proximate cause of the accident. As such counsel contends that Musayev failed to meet his prima facie burden establishing that he is entitled to summary judgment as a matter of law by failing to prove his freedom from comparative negligence (citing Roman v Al Limousine, Inc., 76 AD3d 552 [2d Dept. 2010]; Ferguson v Gassman, 229 Ad2d 464 [2d Dept. 1996]; Adams v Lemberg Enterprises, Inc., 44 Ad3d 694 [2d Dept. 2007]).

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" (Maccauley 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 Cajas-Romero v. Ward, 106 AD3d 850 [2d Dept. 2013]; Cupp v McGaffick, 104 AD3d 1283 [2d Dept. 2013]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, Musayev and Aronova testified that the vehicle in which they were seated was briefly stopped in front of their residence to discharge Passengers Aronova and Leanna when their vehicle was suddenly struck from behind by the Aminov vehicle. Thus, the movant 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 co-defendant to raise a triable issue of fact as to whether the Musayev vehicle 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 co-defendants, who have not appeared for depositions and have not submitted affidavits in opposition to the motion, failed to provide evidence as to 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]).

Further, the evidence presented demonstrated that the plaintiff's double-parked vehicle was not a proximate cause of the accident. Even if the Musayev vehicle was double-parked in violation of applicable traffic regulations, neither the plaintiff nor the co-defendant raised a triable issue of fact as to whether the location of the double-parked vehicle was a proximate cause of the accident (see Vazquez v Roldan, 86 AD3d 640 [2d Dept. 2011]; Dauber v Stone, 76 AD3d 699 [2d Dept. 2010]; Wechter v Kelner, 40 AD3d 747 [2d Dept. 2007][liability cannot be imposed upon a party who merely furnished the condition or occasion for the occurrence of the event but was not one of its causes]; Fermaglich v Arnone, 36 AD3d 584 [2d Dept. 2007]; Gerrity v Muthana, 28 AD3d 1063 [4th Dept. 2006]; Mendrykowski v N.Y. Tel. Co., 2 A.D.3d 1410 [4th Dept. 2003]).

Thus, as the evidence in the record demonstrates that there are no triable issues of fact as to whether Musayev may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the motion by ILYA MUSAYEV for summary judgment dismissing the plaintiff's complaint against him as well as all cross-claims by the co-defendants is granted and the Clerk of Court is authorized to enter judgment accordingly.

This matter remains on the calendar in the Trial Scheduling Part on November 13, 2013.

Dated: August 29, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.