

**Izquierdo v Wexler**

2011 NY Slip Op 30601(U)

March 14, 2011

Supreme Court, Queens County

Docket Number: 8521/2010

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

ANGEL IZQUIERDO, Index No.: 8521/2010  
Plaintiff, Motion Date: 02/17/11  
- against - Motion No.: 27  
Motion Seq.: 2  
ROSE WEXLER and JOSHUA T. WEXLER,

Defendants.

- - - - - x

ROSE WEXLER and JOSHUA T. WEXLER, Index No.: 305257/2010  
Third-Party Plaintiffs,

-against-

ANDREW BERNARD, SYLIANOS BAKALEXIS  
and CAB EAST, LLP,

Third-Party Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on these motions (1) by third-party defendant SYLIANOS BAKALEXIS for an order pursuant to CPLR 3212(b) granting BAKALEXIS summary judgment and dismissing the third-party complaint against him; and (2) by third-party defendant ANDREW BERNARD for an order pursuant to CPLR 3212(b) granting BERNARD summary judgment and dismissing the third-party complaint against him:

Papers  
Numbered

BAKALEXIS Notice of Motion Affidavits-Exhibits.....	1 - 3
BERNARD Cross-Motion-Affidavits-Service-Exhibits.....	4 - 6
CAB EAST, LLC Affirmation in Support.....	7 - 9
WEXLER Affirmation in Opposition.....	10 - 12

In this negligence action, the plaintiff, Angel Izquierdo, seeks to recover damages for personal injuries that he sustained as a result of a motor vehicle accident that occurred at approximately 1:30 p.m. on June 4, 2009. The four-car, chain reaction accident took place on Hoyt Avenue South at its intersection with 29<sup>th</sup> Street, Queens County, New York. Third-party defendants Bakalexis and Bernard each separately move, prior to the completion of depositions, for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the third-party plaintiffs' complaint.

The first vehicle in the chain was operated by third-party defendant, Andrew R. Bernard and owned by third-party defendant Cab East, LLP. Bernard alleges that his vehicle was stopped in traffic when it was hit in the rear by the vehicle owned and operated by third-party defendant Sylianos Bakalexis. Bakalexis, the driver of the second car in the chain, alleges that his vehicle was also stopped when it was hit in the rear by the vehicle owned and operated by plaintiff Angel Izquierdo, who was allegedly injured. Izquierdo, the driver of the third vehicle in

the chain alleges that his vehicle was also stopped when it was rear-ended by the vehicle owned by defendant/third-party plaintiff Rose Wexler and being operated by defendant/third-party plaintiff Joshua Wexler. Joshua, age 20, informed the police officer at the scene that he is diabetic and was not sure what happened.

Plaintiff, Angel Izquierdo, commenced this action against Rose and Joshua Wexler by way of a summons and complaint filed on April 6, 2010. The Wexler's brought a third-party action for indemnification against Bernard, Bakalexis and Cab East LLP, the drivers and owner of the two lead vehicles.

In support of his motion for summary judgment, Bakalexis submits an affidavit from counsel, Bruce A. Cook, J.D., a copy of the pleadings, plaintiff's Bill of Particulars, an affidavit from Sylianos Bakalexis and a copy of the police accident report (MV-104).

In his affidavit, dated January 4, 2011, Bakalexis states:

"I was involved in an auto accident on Hoyt Avenue in Queens on June 4, 2009. At the time of that accident I was struck in the rear while I was stopped in traffic by a vehicle operated by Mr. Izquierdo and did, as a result of being hit in the rear, hit the vehicle which was stopped in front of me, the vehicle operated by Mr. Bernard."

The police report submitted by Bakalexis in support of his motion for summary judgment states as follows:

"At the place of occurrence operator vehicle #1 (BERNARD) states that he was stopped in traffic when vehicle #1 (BERNARD) was suddenly rear-ended by vehicle #2 (BAKALEXIS). Operator of

vehicle #2 (BAKALEXIS) states that while stopped in traffic, vehicle #2 (BAKALEXIS) was suddenly rear-ended by vehicle #3 (IZQUIERDO), impact caused Vehicle #2 (BAKALEXIS) to strike vehicle #1 (BERNARD). Operator of vehicle #3 (IZQUIERDO) states that he was stopped in traffic when vehicle #4 (WEXLER) suddenly rear-ended vehicle #3 (IZQUIERDO) causing vehicle #3 (IZQUIERDO) to strike vehicle #2 (BAKALEXIS). Operator of vehicle #4 (WEXLER) states that he is diabetic and is not really sure what happened. Operator of vehicle #3 (IZQUIERDO) removed to Elmhurst Hospital."

Counsel for Bakalexix contends that the evidence submitted in support of the motion for summary judgment shows that Bakalexix's vehicle was lawfully stopped in traffic in front of the Izquierdo vehicle when his car was rear ended by Izquierdo's vehicle which was propelled into his car by the Wexler vehicle. Counsel contends that summary judgment should be awarded to Bakalexix dismissing the third-party plaintiffs' complaint and all cross-claims against him because the evidence showed that the sole proximate cause of the accident was the negligence of Wexler in rear ending the Izquierdo vehicle and that there is no evidence in the record that Bakalexix, who was stopped in front of the Izquierdo vehicle was negligent in any manner. Counsel contends that the evidence shows that the three lead vehicles in front of the Wexler vehicle were not negligent, and were not the proximate cause of the injuries allegedly sustained by Izquierdo. As Bakalexix was stopped in front of the injured party's vehicle which had been hit in the rear, counsel contends that the proof submitted shows that Bakalexix could not be liable for any of the injuries claimed by Izquierdo (citing Ferguson v Honda, 34 AD3d

356 [1<sup>st</sup> Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 139 [1<sup>st</sup> Dept. 2004]; Cerda v Paisley, 273 AD 2d 339 [2d Dept. 2000]).

In support of his motion for summary judgment, John R. Ferretti, Esq., counsel for third-party defendant BERNARD, submits his affidavit as well as the affidavit of Mr. Bernard, a copy of the pleadings and a copy of the police report.

In an affidavit dated February 4, 2011, defendant Andrew Bernard states that he was involved in four car accident at 11:45 a.m. on June 4, 2009, on Hoyt Avenue South in Queens County. He states that"

"At the time of the accident, I was struck in the rear while at a full stop. The vehicle operated by co-third-party defendant, Sylianos Baralexis, struck my vehicle in the rear, upon information and belief, as a result of being struck in the rear by the plaintiff's vehicle which was struck in the rear by the defendant/third-party plaintiff's vehicle. This information was obtained, upon information and belief, after a review of the police accident report. Notwithstanding the order in which any impacts occurred behind me, I was at a full stop due to traffic conditions in front of me when my vehicle was struck in the rear."

Mr. Bernard's's counsel, John R. Ferretti, Esq., contends in his affidavit in support of the motion for summary judgment dismissing the complaint against Bernard that both Bernard and Bakalexis were completely stopped when Izquierdo's vehicle reared ended Bakalexis's vehicle propelling it into the Bernard vehicle which was the first vehicle stopped in traffic. Counsel contends that there is no dispute that the two vehicles ahead of Izquierdo's were both stopped. Counsel contends that since

Bernard's vehicle was stopped when it was rear ended, he has established a prima facie case of liability with respect to the operator of the moving vehicle, here, Wexler. There is then a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision (citing Johnson v Phillips, 261 AD2d 269[1st Dept. 1999]). Defendant Bernard contends he made a prima facie showing that Wexler was negligent as a matter of law and Wexler has failed to provide a non-negligent reason for hitting Izquierdo's vehicle in the rear.

Counsel for third-party defendant, Cab East, LLP, the owner of the Bernard vehicle submits an affirmation in support of the motion and cross-motion for summary judgment. Counsel contends that the affidavits of Bernard and Bakalexis establish that Bernard, the driver of the front most vehicle, was stopped in traffic as was Bakalexis, the driver of the second car, and therefore neither of them bear any responsibility for the accident. Moreover, the statement made by defendant/third-party plaintiff, Joshua Wexler to the police to the effect that he has no recollection of the events, does not create a question of fact as to the liability of the two front most vehicles. Cab East, LLP requests that if summary judgment is granted in favor of Bernard, that summary judgment should also be granted to third-party defendant Cab East, LLP, the owner of the Bernard vehicle, as liability against it is based solely upon vicarious liability.

In opposition, plaintiff's counsel, Peter Maiorino, Esq., states that the motions for summary judgment by both defendants Baralexis and Bernard are premature as "depositions have not been completed and as such there remains outstanding pertinent information not contained in the self-serving affidavit by Bakalexis such as the number of impacts felt, the manner in which the vehicle was brought to a stop, the traffic and weather conditions, the roadway conditions and the existence of any other such conditions." Counsel contends that the fact that this is a chain style multi-car accident does not automatically excuse the vehicles from negligence. Counsel contends that their actions immediately prior to the accident remain at issue and only depositions of all parties will allow for the discovery of such actions. Counsel also contends that the fact that Wexler, the driver of the allegedly offending vehicle, doesn't know what happened does not mean that the third-party defendants are not negligent.

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]).



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 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, both Balalexis and Bernard stated in their affidavits that their vehicles were at a complete stop when Izquierdo's vehicle was struck from behind by the vehicle driven by Wexler, propelling it into Balalexis' vehicle which was itself propelled into Bernard's vehicle. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1<sup>st</sup> Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199[1<sup>st</sup> Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). Bernard and Balalexis who were both stopped at the time of the impact, both demonstrated that their conduct was not a proximate cause of the rear-end collision between their vehicle and the vehicles behind them (see Abrahamian v. Tak Chan, 33 AD3d

947 [2d Dept. 2006]; Calabrese v. Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]). Thus, the third-party defendants Balalexix and Bernard satisfied their prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that their vehicles were stopped at the time they were struck in the rear in a chain reaction which was commenced by plaintiff Joshua Wexler.

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the third-party plaintiff to raise a triable issue of fact as to whether the third-party defendants were 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]).

The plaintiff, Angel Izquierdo, did not oppose the motion.

The third-party plaintiffs contend that the motions were premature as depositions have not yet been completed. However, contrary to the third party-plaintiffs' contention, the third-party defendants' motion for summary judgment dismissing the complaint was not premature as the Wexlers failed to offer a sufficient evidentiary basis to suggest that further discovery may lead to relevant evidence (see Woodard v Thomas, 77 AD3d 738 [2d Dept. 2010]; Conte v Frelen Assoc., 51 AD3d 620 [2d Dept. 2008]; Lopez v WAS Distrib., Inc., 34 AD3d 759 [2d Dept. 2006]; Ruttura & Sons Constr. Co. v Petrocelli Constr., 257 AD2d 614 [2d

Dept. 1998])). What must be offered is "an evidentiary basis to show that discovery may lead to relevant evidence and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the moving party (see Gasis v. City of New York, 35 AD3d 533 [2nd Dept. 2006])). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion" (see Lopez v WAS Distrib. Inc., 34 AD3d at 760 [2d Dept. 2006]; Conte v Frelen Assoc., 51 AD3d at 621 [2d Dept. 2008]; Min Whan Ock v City of New York, 34 AD3d 542 [2d Dept. 2006])). Here, third-party plaintiffs have failed to provide a sufficient evidentiary basis demonstrating that further discovery would elicit any evidence supporting third-party plaintiffs' position on the issue of liability (see Benedikt v Certified Lbr. Corp., 60 AD3d 798 [2d Dept. 2009]; Lopez v WS Distrib., Inc., 34 AD3d 759 [2d Dept. 2007])).

In addition, this court has searched the record and finds that the third-party complaint should be dismissed as against third-party defendant Cab East, LLP, as the cause of action against Cab East, LLP, the owner of the Bernard vehicle, is based solely upon vicarious liability for the actions of Bernard.

Accordingly, for the reasons set forth above it is hereby ORDERED, the motion by third-party defendant, SYLIANOS

BAKALEXIS, for summary judgment dismissing the third-party complaint and all cross-claims against him is granted, and it is further

ORDERED, the cross-motion by third-party defendant ANDREW BERNARD for summary judgment dismissing the complaint and all cross-claims against him is granted, and it is further,

ORDERED, that the third-party complaint against CAB EAST, LLP is dismissed, and it is further

ORDERED, that the Clerk of the Court is directed to enter summary judgment in favor of third-party dependants CAB EAST, LLP, ANDREW BERNARD, and SYLIANOS BAKALEXIS dismissing the third-party complaint and all claims against them.

Dated: March 14, 2011  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.