

Gonzalez v Schlau

2011 NY Slip Op 31048(U)

April 12, 2011

Supreme Court, Queens County

Docket Number: 8960/2009

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

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JULIAN GONZALEZ and LARRY ROSS,, Index No.: 8960/2009
 Plaintiffs, Motion Date: 04/07/2011
 - against - Motion No.: 15

RONA C SCHLAU, JASON H. SCHLAU, ELLIOT Motion Seq.: 02
L. RICHARDS and CANNACEAE L. LEARY,
 Defendants.

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The following papers numbered 1 to 8 were read on this motion by defendants RONA C. SCHLAU and JASON H. SCHLAU for an order pursuant to CPLR 3212 granting the defendant summary judgment on the issue of liability and dismissing the plaintiff's complaint and all cross-claims against them:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....4 - 6
Reply Affirmation.....7 - 8

This is a personal injury action in which plaintiffs, JULIAN GONZALEZ and LARRY ROSS seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred on October 7, 2008, at approximately 6:52 p.m. on Sunrise Highway near the intersection with Randall Avenue in Nassau County, New York.

At the time of the accident, the two plaintiffs were passengers in the vehicle operated by defendant Elliot L. Richards and owned by defendant Cannaceae L. Leary. Ms. Schlau was proceeding eastbound in the middle lane of Sunrise Highway and the vehicle operated by Mr. Richards was proceeding in the left lane. Ms. Schlau contends that the accident occurred as the vehicle operated by Mr. Richards attempted to move into the middle lane striking her vehicle.

The plaintiffs commenced this negligence action by filing a summons and complaint naming the owners and operators of the two vehicles as defendants. Issue was joined by service of an answer by the Schlau's dated April 22, 2009. Defendants Richards and Leary failed to respond to the complaint, and by order dated February 11, 2010, this Court granted a default judgment against Richards and Leary on the issue of liability and set the matter down for an inquest as to damages.

Rona Schlau now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiffs' complaint against her and her husband Jason Schlau. In support of the motion, the defendant submits an affidavit from counsel, Donald M. Munson, Esq., a copy of the pleadings, the transcript of the Rona Schlau's examination before trial and a copy of the police accident report (MV-104).

Ms. Schlau, age 55, appeared for an examination before trial on June 29, 2010. She testified that on the date in question she was traveling from her job in the Bronx to a doctor's office in Rockville Center. She was traveling eastbound in the middle lane on Sunrise Highway for approximately ten minutes when she first observed the Richards vehicle in front of her. Both vehicles were traveling at a rate of 30 miles per hour. Ms. Schlau moved her vehicle into the left lane and she observed the Richards vehicle immediately move into the left lane in front of her. She then moved her vehicle back to the middle lane. After proceeding about 1/4 mile in the middle lane she felt a heavy impact to the rear door of driver's side of her vehicle. The Richards vehicle attempted to move into the middle lane and struck the Schlau vehicle. She did not see the Richards vehicle moving into her lane prior to the impact.

The police accident report states as follows:

"Veh #1 (Richards) eastbound in the left lane of Sunrise Highway and attempting to change lanes to the eastbound middle lane of Sunrise Hwy, collided with Veh #2 (Schlau), eastbound in the middle lane of Sunrise Highway at Randall Avenue."

The movant's counsel contends that the actions of Richards, in striking the Schlau vehicle while attempting to change lanes, was the sole proximate cause of the accident.

In opposition to the motion, plaintiffs' counsel, Mark J. Linder, Esq., submits his affirmation as well as an affidavit from plaintiff Julian Gonzalez who was a passenger in the

Richards' vehicle. In his affidavit, dated February 2, 2011, Mr. Gonzalez states that at the time in question he was a front seat passenger in the vehicle operated by Elliot Richards. He states that:

"I saw the other vehicle, operated by Ms. Schlau, approximately two to three minutes before the collision. At that moment it was traveling in the middle lane on Sunrise Highway behind the vehicle that I was in. Before the impact occurred, Mr. Richards, the operator of the car I was in, said 'what is she trying to do?' referring to Ms. Schlau. After, I felt the impact to the middle portion of the passenger side of the vehicle I was in. The impact was between the passenger side middle portion of the vehicle I was in and the driver's side front/tire area of the other vehicle. After the impact, Mr. Richards was very angry and indicated that Ms. Schlau had been switching back and forth between lanes trying to get in front of him."

As stated above, Richards defaulted in answering the complaint and has not been deposed.

In his affidavit in opposition the motion, Mr. Lander contends that the police report may not be considered by the court because it is not certified and is not in evidentiary form. Counsel also contends that although Ms. Schlau states that it was Richards' attempt to change lanes without yielding that caused the accident, that the evidence raises a triable issue of fact as to whether Ms. Schlau, who had switched lanes more than once prior to the accident, was comparatively negligent in "attempting to change back into the left lane thereby colliding with the Richards vehicle."

In reply, Schlaus' counsel submits a portion of Gonzalez's deposition testimony in which he stated that the contact occurred

in the middle lane as Richards was trying to move into the middle lane.

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]).

Upon review of the defendant's motion, the plaintiffs' opposition and the defendant's reply thereto this court finds as follows:

Vehicle and Traffic Law § 1128 states that "whenever any roadway has been divided into two or more clearly marked lanes for traffic ... (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

It is Ms. Schlau's contention that defendant Richards was negligent as a matter of law in attempting to change lanes on Sunrise Highway when it was unsafe to do so. This Court agrees.

Here, Ms. Schlau established her prima facie entitlement to judgment as a matter of law through the submission of her deposition testimony as well as a portion of Gonzalez's deposition testimony. The testimony establishes that Ms. Schlau

was proceeding safely in the middle lane of Sunrise Highway when the Richards vehicle attempted to move into the middle lane striking her vehicle without first ascertaining that the lane change could be made with safety. The evidence submitted in support of the motion establishes that the unsafe lane was proximate causes of the accident. Thus, the testimony established that Richards was negligent as a matter of law. Ms. Schlau was entitled to anticipate that Richards would obey the traffic law and therefore his violation of Vehicle and Traffic Law § 1128 was the sole proximate cause of the accident.

Further, Ms. Schlau established, prima facie, her entitlement to judgment as a matter of law as the evidence submitted in support of her motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on her part (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition to the defendant's prima facie showing, the plaintiff failed to raise a triable issue of fact, proffering only speculative assertions that the defendant may have been comparatively negligent which are unsupported by the testimony of the parties (see (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Gorelik v Laidlaw Tr. Inc., 50 AD3d 7389 [2d Dept. 2007]; Moreback v Mesquita, 17 AD3d 420, 421 [2d dept. 2005]) Ishak v Guzman, 12 AD3d 409 [2d Dept. 2004]). The affirmation of Gonzalez

and the affirmation of the plaintiffs' attorney containing speculation that the accident was caused by Ms. Schlau as she was attempting to change back into the left lane is without merit and without evidentiary value (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion by the Schlau defendants for summary judgment is granted and the plaintiffs' complaint and all cross-claims are dismissed against them, and it is further,

ORDERED that the Clerk of the Court is directed to enter summary judgment in favor of RONA C. SCHLAU and JASON H. SCHLAU dismissing the plaintiffs' complaint and all cross-claims against them.

Dated: April 12, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.