

Gabriel v Whiting

2011 NY Slip Op 31050(U)

April 4, 2011

Supreme Court, Queens County

Docket Number: 30526/2010

Judge: Robert J. McDonald

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intersection with the Grand Central Parkway, Queens County, New York.

The plaintiff commenced this action by the filing of a summons and complaint on December 8, 2010. Issue was joined by service of defendants' answer dated January 13, 2011. Plaintiff now moves, prior to discovery, for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and setting this matter down for assessment of damages.

Plaintiff contends that at the time of the accident her vehicle was stopped in traffic on the Van Wyck Expressway when it was struck in the rear by the vehicle being operated by defendant Whiting. In support of the motion, the plaintiff submits an affirmation from counsel, Scott L. Wiss, Esq. and an affidavit of facts from the plaintiff. The plaintiff's affidavit states as follows:

"On July 26, 2010, I was a driver of a vehicle that was stopped in traffic on the Van Wyck Expressway at or near its intersection with Grand Central Parkway, County of Queens, City and State of New York. At the place of the accident the roadway was straight, dry, flat and without other obstructions. At the time and place indicated, my car was stopped when I felt a heavy impact to the rear of my vehicle. I was stopped for at least (10) seconds before the accident. The vehicle that struck me was owned by defendant PAULINE JOHNSON and operated by defendant EMMANUEL LAROME WHITING. Clearly, the defendants were negligent in the operation of their vehicle in striking my vehicle in the rear."

Counsel contends that plaintiff is entitled to partial summary judgment as to liability because the defendant was solely responsible for causing the accident while the plaintiff was free

from culpable conduct.

In opposition to the motion, defendants' counsel Richard Leahy, Esq., submits only his affirmation in which he contends that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. Counsel did not submit an affidavit from the defendant nor has he proffered any allegations of fact which would contradict the plaintiff's version of the accident.

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" (Macauley 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 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, plaintiff stated in his affidavit that her vehicle was at a complete stop for at least 10 seconds on the Van Wyck Expressway when her vehicle was struck from behind by defendants' motor vehicle. Thus, the plaintiff satisfied her prima facie burden of establishing her entitlement to judgment as a matter of law on the issue of liability by demonstrating that her vehicle was completely stopped when it was struck in the rear by the vehicle operated by defendant Emmanuel Larome Whiting (see Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of her entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff 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 defendant failed to submit any evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v. Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005])[the defendants failed to raise a triable issue of

fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]).

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

ORDERED, that the plaintiff's motion is granted, and the plaintiff, EVELIN LISETH URQUILLA GABRIEL, shall have summary judgment on the issue of liability as against the defendants EMMANUEL LAROME WHITING and PAULINE JOHNSON, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that a copy of this order with notice of entry be served on the Clerk of the Trial Term Office and that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for an assessment of damages.

Dated: April 4, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.