

Ogletree v Rolle

2013 NY Slip Op 30477(U)

March 4, 2013

Supreme Court, Queens County

Docket Number: 29966/2010

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

LESLIE OGLETREE, Index No.: 29966/2010
Plaintiff, Motion Date: 11/30/12
- against - Motion No.: 109

Motion Seq.: 2

FRANKLIN ROLLE, PENA NORMANDYS,
FRANCISCO PIMENTEL, BRIAN PARTMAN and
ARNOLD SMITH,

Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by
defendants, NORMANDYS PENA i/s/h/a PENA NORMANDYS and FRANCISCO
PIMENTAL for an order pursuant to CPLR 3212(b), granting summary
judgment and dismissing the plaintiff's complaint against said
defendants on the ground that said defendants bear no liability
for causing injuries to the plaintiff:

Table with 2 columns: Document Name and Page Number. Includes Defendant NORMANDYS' Notice of Motion (1-7), Defendant ROLLE's Affirmation in Opposition (8-10), Defendant PARTMAN'S Affirmation in Opposition (11-13), and Plaintiff's Affirmation in Opposition (14-16).

In this action for negligence, plaintiff, Ms. Leslie Ogletree, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on July 9, 2010. The five vehicle, chain reaction accident, took place on Atlantic Avenue near its intersection with Saratoga Avenue, Kings County, New York. Plaintiff commenced the action by filing a summons and complaint on December 1, 2010. Plaintiff served a note of issue and certificate of readiness on June 11, 2012. This matter is presently on the calendar of the Trial Scheduling Part for April 23, 2013.

Defendants, Pena Normandys and Francisco Pimental, now move by notice of motion for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint against them on the ground that their vehicle was the first vehicle in the chain and was coming to a stop when it was hit in the rear. Movants contend that they were not negligent in the operation of their vehicle and that stopping their vehicle in traffic cannot be a proximate cause of the injuries sustained by the plaintiff who was operating the fifth vehicle in the chain.

In support of the motion for summary judgment, defendant Normandys and Pimental submit an affirmation from counsel, Kenneth A. Bernstein, Esq; a copy of the pleadings; and copies of the transcripts of the deposition testimony of plaintiff, Leslie Ogletree and defendants, Francisco Pimental, Brian Partman, Arnold Seth and Franklin Rolle

The deposition testimony of the parties in pertinent part regarding the accident of July 9, 2010 is as follows:

Francisco Pimental testified at an examination before trial on January 24, 2012. He stated that on the date of the accident he was employed at a bodega on Third Avenue in Brooklyn. He was going to work in a Chevrolet Lumina owned by his niece Pena Normandys. He had passed the green traffic signal at the intersection with Saratoga Avenue. He testified that he was proceeding at a rate of 30 miles per hour in the left lane when the vehicle in front of his came to a sudden stop so he applied his brakes suddenly to avoid hitting the car ahead of his car at which point his vehicle was hit in the rear by the vehicle operated by Brian Partman. His vehicle did not make contact with the vehicle in front of his. He stated that he heard two or three additional impacts behind his vehicle that happened almost simultaneously. Based upon what he heard, he believed that the vehicle behind his was also struck in the rear and that the accident involved four vehicles.

Brian Partman, age 57, testified on January 24, 2012. He stated that he is employed by Schacht Electric Supply located on Atlantic Avenue in Brooklyn. He testified that on the date of the accident he was on his way to work, operating a black Acura. He was driving in the left lane of Atlantic Avenue and came to a stop when he saw the vehicle in front of his turn towards the middle lane and then come back into the left lane and stop short. He applied his brakes hard but his vehicle struck the Pimental vehicle in front of his. His vehicle was not hit in the rear by any other vehicles. He did not hear or see any other collisions and was not aware of any other collisions until he learned that

there were other accidents at approximately the same time.

Arnold Seth, age 43, testified at an examination before trial on January 24, 2012. He stated that he is employed as an electrical controls engineer by Trans Canada located on Vernon Boulevard in Long Island City, Queens. On the date of the accident he was driving to work with his wife in a four door silver Honda Accord. He stated that the accident involved five vehicles and occurred on Atlantic Avenue between Saratoga Avenue and Lewis Avenue. He was proceeding at a rate of speed of 25 - 35 miles per hour in the left lane. He states that as he was proceeding he noticed that the vehicle in front of his, Mr. Partman's Acura, struck the Pimental vehicle in the rear. He testified that when he observed the accident in front of him he brought his vehicle to a controlled stop without stopping short. He stated that he was able to stop his vehicle without hitting the car in front of him. He estimated that he stopped ten seconds after the Acura came to a stop. He was ten feet from the Acura when he stopped. However 2 - 3 seconds after he stopped, his vehicle was struck in the rear by a green Mercury minivan operated by Mr. Rolle. He stated that he felt two contacts because the vehicle behind his was also struck in the rear. However, he did not observe any other impacts with the other vehicles. The last vehicle in the chain was a Nissan, operated by Ms. Ogletree. Therefore, Seth's testimony was to the effect that he stopped his vehicle without hitting any other vehicles in front of his vehicle. He was then hit by Rolle's minivan and the impact between the minivan and plaintiff's Nissan came subsequent to the impact between the van and his car. He stated when he exited his vehicle he observed that the Acura in front of his had stopped because it had struck the car in front of it.

Franklin Rolle, age 44, testified on December 14, 2011. He stated that he is employed as a mechanic electrician with CM Ritchey Electric. On the date of the accident he was going to work and operating a green Ford van. He was proceeding on Atlantic Avenue in the left lane. He had just passed the intersection of Saratoga Avenue. He observed a police car in the right lane. He stated that there was a prior two vehicle accident in the left lane between a Jeep and a car. He was traveling 15 feet behind a Honda. He brought his vehicle to a stop 10 feet from the Honda and then after a minute his vehicle was struck on the rear driver's side propelling his car into the Honda in front of him. He stated that the vehicle in front of his came to a slow stop. He stated that he never entered the center lane. Mr. Rolle testified that the vehicle in front of his tried to go to the right but did not enter the center lane. Seth's passenger tire was on the white line and he had his turn signal on. Rolle also

put his right turn signal on. He stated that the vehicle behind his also tried to turn to the right. When he observed the vehicle behind he saw that the front of Rolle's vehicle was partially in the middle lane and the back was in the left lane.

Plaintiff, **Leslie Ogletree, age 49**, testified on December 14, 2011. She testified that at 6:20 a.m. on the date of the accident she was operating her Nissan Rogue westbound on Atlantic Avenue. She was heading to work at Long Island University in Brooklyn and had just picked up her friend, Karen Williams. She testified that there were five vehicles involved in the accident, all proceeding westbound on Atlantic Avenue. Atlantic Avenue consists of three lanes of traffic in each direction. She stated that there is a traffic signal at the intersection of Atlantic Avenue and Saratoga Avenue which was green when she first observed it. She stated that she was proceeding in the middle lane and there was police activity in the right lane. A mini van operated by defendant Rolle passed her vehicle in the left lane tried to come into the middle lane and hit her fender on the drivers side. She stated that her vehicle was moving at the time of the impact. When the police arrived at the scene she told the Officer that there had been a three car accident in the left lane when a green mini van came past her and hit her vehicle. She stated that her foot was on the brake at he time of the impact her vehicle was moving slowly. Ogletree testified that Rolle's vehicle struck the vehicle in front of his in the left lane and then came back towards the middle lane and caught the driver's side of her fender. She stated that she only felt one impact to her vehicle and that as a result of the impact, she hit her right knee on the console. She never made contact with any of the vehicles involved in the three car accident. She did not see any impacts in the left lane but she heard the noise of the impact. Her vehicle was struck 3 - 4 seconds after she heard the impact in the left lane.

Counsel for Pimental, vehicle number 1 in this five vehicle accident, contends that the evidence submitted in support of his motion for summary judgment demonstrates that Pimental brought his vehicle to a stop when the vehicle in front of his stopped short due to traffic on Atlantic Avenue. Pimental's vehicle was then struck in the rear by vehicle number 2, Mr. Partman's vehicle. Partman conceded that he struck Pimental's vehicle in the rear but stated that Pimental's vehicle moved from the left lane into the middle lane and then back again and then stopped in front of his vehicle in the left lane. Mr. Seth, in vehicle number 3, testified that he was not involved in the first accident with Pimental, but rather, was able to bring his vehicle to a complete stop without striking the Partman vehicle in front

of him. His vehicle was, however, struck in the rear by Mr. Rolle in vehicle number 4. Rolle testified that he observed Seth's vehicle stopped on Atlantic Avenue. He claims that his vehicle stopped prior to hitting the Seth vehicle but that his vehicle was hit in the rear by plaintiff, Ms. Ogletree, in vehicle number 5, propelling him into the Seth vehicle. Ms. Ogletree testified that she was in the middle lane when the Rolle vehicle passed her, made contact with the Seth vehicle in front of him and then struck her vehicle which was in the middle lane.

Counsel contends that based upon all of the testimony there is no basis to find that Pimental, who was operating the first vehicle, is liable for the alleged injuries to the plaintiff who claims she was struck by the Rolle vehicle. In fact, counsel claims that the Pimental vehicle was involved in a two vehicle accident which was separate from the three vehicle accident involving plaintiff because Seth, in the third vehicle was able to stop without hitting the car in front of his and he and was not involved in the first accident. Thus, counsel asserts that the complaint should be dismissed against Pimental as his accident, in which he was struck in the rear was actually a separate accident from the subsequent one involving the plaintiff and therefore he cannot be found to have proximately caused plaintiff's injuries.

Counsel for defendant, Partman, opposes the motion and contends that Pimental has not demonstrated, *prima facie*, as a matter of law that his actions were not a proximate cause of the injuries sustained by plaintiff, Leslie Ogletree. Counsel claims that the deposition testimony of the parties is conflicting as to how the accident took place, and in addition, there are questions of fact as to the order of impacts, which vehicles were moving or stopped at the time of the impacts, the cause of the impacts, whether there was more than one accident, and the time period between collisions. Counsel claims that summary judgment for any party is inappropriate where the testimony of each of the five drivers is contradictory.

In opposition, plaintiff's counsel, Joshua I. Fiscus, Esq., states that for the sake of brevity and in the spirit of judicial economy he joins in the arguments set forth in the affirmation in opposition submitted by counsel for defendant Partman. Counsel contends that even if it is determined that there were two separate accidents, that there is a question of fact as to whether the actions of Pimental operating the lead vehicle of the first accident was a substantial factor in producing the accident that the plaintiff was involved in (citing Sohet v Sheehan, 238 AD2d 573 [2d Dept. 1997])[liability

turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence]). Counsel contends that the two vehicle accident in which Partman struck Pimental's vehicle in the rear was a substantial factor in bringing about the second three vehicle accident which involved the plaintiff. Counsel contends that the contact between Rolle and plaintiff's vehicle was due to Rolle attempting to enter the plaintiff's middle lane of travel because traffic was stopped in the left lane due to the prior accident. Counsel also suggests that there is a question of fact as to Pimental's negligence based upon Partman's testimony stating that the vehicle operated by Pimental changed from the left lane to the middle lane, and then shortly before the accident occurred the Pimental vehicle moved back into the left lane directly in front of Partman's vehicle.

Counsel for Partman, Andrea E. Ferrucci, Esq., opposes the motion for summary judgment based upon the multiple disputed issues of fact including the lane each vehicle was in at the time of the impact, the order of impacts, the cause of the various collisions and whether there was one discrete accident or two. Further counsel contends that issues regarding credibility should be left to the trier of fact. Citing Martinez v Martinez, 93 AD3d 767 [2d Dept. 2012] and Camarillo v Sandoval, 90 AD 3d 593 [2d Dept. 2011] counsel contends that Pimental has not established his freedom from comparative negligence as he testified that he suddenly or abruptly applied his brakes when the car in front of his stopped. Counsel also points to Partman's testimony to the effect that Pimental merged out of the left lane into the middle lane and then five to ten seconds later started to merge back into the left lane. Seth, who was able to stop his vehicle without striking Partman's vehicle stated that he had to stop abruptly when he saw Partman stopped due to the accident and Seth's was struck in the rear as a result.

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, this court finds that there was conflicting testimony as to the proximate cause of the accident involving Ms. Ogletree's vehicle. Although Pimental testified that his vehicle was hit in the rear when he stopped his vehicle in traffic on Atlantic Avenue, he also testified that he stopped abruptly when the car in front of his stopped. Further Partman testified that Pimental changed lanes directly into the path of Partman's vehicle prior to being hit in the rear. Thus, in view of the conflicting testimony and Pimental's testimony that he stopped abruptly as well as Partman's testimony that Pimental changed lanes directly in front of his vehicle and stopped abruptly, Pimental has not demonstrated as a matter of law that he was free from comparative negligence (see Martinez v Martinez, 93 AD3d 76 [2d Dept. 2012][in light of the conflicting deposition testimony submitted in support of the motion, the defendant failed to eliminate all triable issues of fact]; Camarillo v Sandoval, 90 AD3d 593 [2d Dept. 2011][any inconsistencies in her testimony raise an issue of credibility that must be resolved by the fact-finder]; Purcell v Axelsen, 286 AD2d 379 [2d Dept, 2001][where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide]; Quezada v Aquino, 38 AD3d 873 [2d Dept. 2007]; Insinga v. F.C. Gen. Contr., 33 AD3d 963 [2d Dept. 2006]).

In addition, although Pimental asserts that the accident with Partman was a separate accident from the accident involving the plaintiff's vehicle, there is a question of fact as to whether the Pimental accident was a substantial factor in the causation of the second accident. Based upon the deposition testimony of the parties there is a question of fact as to whether Seth's vehicle stopped short due to the first accident and was moving towards the middle lane to avoid the accident and a question of fact as to whether the prior accident caused Rolle's vehicle to also stop and try and move towards the middle lane at which time there was contact with plaintiff's vehicle. Thus, there is a question of fact as to whether there is a causal connection between the first accident involving Pimental and the second accident involving the plaintiff's vehicle (see Gomez v Hicks, 33 AD3d 856 [2d Dept. 2006][whether a plaintiff's act is a superseding cause or whether it is a normal consequence of the situation created by the defendant are generally questions for the trier of fact to determine]; Ricchiazzi v. Gray, 5 AD3d 1085 [4th Dept. 2004]; Shohet v. Sheehan, 238 AD2d 573 [2d Dept. 1997]

Accordingly, this court finds that defendant failed to satisfy her prima facie burden of establishing entitlement to summary judgment as there are genuine questions as to the manner in which the accident occurred and whether the operation of the Pimental's vehicle caused or contributed to it,.

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the motion by defendants Pena Normandys and Francisco Pimental for summary judgment dismissing the plaintiff's complaint and any and all cross-claims against them is denied.

Dated: March 4, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.