

**Salomon v Katos**

2013 NY Slip Op 31931(U)

July 11, 2013

Sup Ct, Queens County

Docket Number: 11836/2011

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

ANNE N. SALOMON, FABIOLA JOSEPH and  
JAMES SALOMON,

Plaintiffs,

- against -

Index No.: 11836/2011  
Motion Date: 06/17/2013  
Motion No.: 105  
Motion Seq.: 3

KASSIANI KATOS,

Defendant.

- - - - - x

The following papers numbered 1 to 9 were read on this motion by plaintiff on the counterclaim, ANNE N. SALOMON, for an order pursuant to CPLR 3212(b) granting summary judgment on the issue of liability and dismissing the defendant's counterclaim:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 5
Defendant's Affirmation in Opposition.....	6 - 9

In this negligence action, the plaintiffs, ANNE N. SALOMON, FABIOLA JOSEPH and JAMES SALOMON, seek to recover damages for personal injuries they each allegedly sustained as a result of a motor vehicle accident that occurred on August 19, 2010, between the plaintiffs' vehicle and the vehicle owned and operated by defendant, KASSIANI KATOS. The accident took place on 23<sup>RD</sup> Avenue at the intersection of 99<sup>th</sup> Street, Queens County, State of New York. Plaintiff driver, Anne Salomon alleges that while her vehicle was stopped while waiting to make a left turn, her vehicle was struck in the rear by the defendant's vehicle. Plaintiffs Fabiola Joseph and James Salomon were passengers in the vehicle operated by plaintiff Anne Salomon. All three plaintiffs allege that they sustained serious injuries as a result of the accident.

The plaintiffs commenced this action by service of a summons and complaint May 16, 2011. Issue was joined by service of defendant's verified answer with counterclaim dated June 20, 2011. In its counterclaim the defendant alleges that the plaintiff, Anne N. Salomon, was at fault for causing the accident and is liable for damages caused to the co-plaintiffs. Plaintiff filed a note of issue on October 2, 2012. The matter is presently on the calendar of the Trial Scheduling Part on August 6, 2013.

Plaintiff on the counterclaim moves for summary judgment dismissing the counterclaim on the ground that plaintiff was not negligent as a matter of law and bears no responsibility for causing the accident. In support of the motion, the plaintiff on the counterclaim submits an affirmation from counsel, Tracy Morgan, Esq., a copy of the pleadings; and copies of the transcripts of plaintiffs Anne N. Salomon and Fabiola Joseph.

Plaintiff, Anne N. Salomon, age 40, testified at an examination before trial on January 22, 2013 regarding the accident of August 19, 2010. She stated that she was coming from her house and traveling to her cousin's house on 99<sup>th</sup> Street and 22<sup>nd</sup> Avenue in Queens County. She was with her sister-in-law, Fabiola Joseph, and her two sons, Jasen and Dante ages 15 and 10. She was proceeding on 23<sup>rd</sup> Avenue intending to make a left turn onto 99<sup>th</sup> Street. She stated that the intersection is controlled by stop signs on 99<sup>th</sup> Street and that there is no traffic control device for cars proceeding on 23<sup>rd</sup> Avenue. When she arrived at the intersection she engaged the left turn signal and stopped her vehicle in the left lane of 23<sup>rd</sup> Avenue waiting until the intersection was clear so she could make a left turn. While she was stopped at the intersection her vehicle was struck on the rear bumper with a hard impact by the vehicle operated by defendant Kassiani Katos.

Fabiola Joseph, age 30, testified at an examination before trial on January 22, 2013, stating that on the date of the accident she was traveling with her sister-in-law, Anne Salomon and going to visit relatives. She was not familiar with the location where the accident occurred but stated that at the time of the accident her sister-in-law's car was stopped. She stated that her sister-in-law intended to make a left turn and that she put on the left turn signal and stopped the vehicle to allow the other vehicles in the intersection to pass. While they were waiting the vehicle was struck in the rear by the defendant's vehicle. She left the scene in an ambulance.

The plaintiff on the counterclaim contends that the defendant driver was negligent in the operation of her 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 his vehicle was traveling too closely in violation of VTL § 1129(a) and that the driver failed to safely stop his vehicle prior to rear-ending the plaintiffs' vehicle. Counsel contends that the evidence indicates that the plaintiffs' vehicle was stopped in the left turn lane with his left turn signal on when it was struck from behind by the defendants' vehicle. Counsel contends, therefore, that the plaintiff on the counterclaim is entitled to summary judgment dismissing defendant's counterclaim because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendant's counsel, Marcella Gerbasi Crewe, Esq., submits an affidavit from the defendant dated March 14, 2013. In her affidavit, defendant, Kassiani Katos, age 60, states that on the date of the accident she was traveling eastbound on 23<sup>rd</sup> Avenue in the left lane when she approached the intersection of 99<sup>th</sup> Street. She intended to continue on 23<sup>rd</sup> Avenue across the intersection. She observed the plaintiffs' vehicle parked on the south side of 23<sup>rd</sup> Avenue just east of the intersection. She states that the plaintiffs' vehicle was not traveling in front of her vehicle and was not preparing to make a left turn to head northbound on 99<sup>th</sup> Street. She states that the plaintiffs' vehicle had already passed through the intersection of 99<sup>th</sup> Street on 23<sup>rd</sup> Avenue. Defendant states that suddenly and without warning or signaling, the plaintiff then turned her vehicle and attempted to make a U-turn to head northbound on 99<sup>th</sup> Street. The defendant stated that plaintiff made this maneuver directly into the path of her vehicle. She did not have enough advance warning to attempt to avoid contact. The front of her vehicle came into contact with the left side rear of the plaintiffs' vehicle. She states that the collision was not a rear-end impact and the front of her vehicle did not come into contact with the rear of the plaintiffs's vehicle.

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" (Macaulley 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, plaintiffs stated that their vehicle was stopped in a left turn lane on Jericho Turnpike when it was struck from behind by defendants' motor vehicle. Thus, the plaintiffs satisfied their prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability by demonstrating that their vehicle was stopped in a left turn lane with its left turn signal on when it was struck in the rear by the vehicle operated by defendant Katos (see Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; 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 defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether his negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

Viewing this evidence in the light most favorable to the non-moving party and affording the defendant the benefit of every favorable inference that can be drawn from the evidence, this court finds that the defendant's version of the accident, to wit, that the plaintiff was not stopped and was not making a left turn in front of her vehicle, but rather, that the plaintiff was parked on the south side of 23<sup>rd</sup> Street, on the east side of the intersection with 99<sup>th</sup> Street and made a U-turn directly in front of defendant's vehicle was sufficient to raise a triable issue of fact as to the proximate cause of the subject accident and was sufficient to provide a non-negligent explanation for the collision (see Scheker v Brown, 85 AD3d 1007 [2d Dept. 2011] [the defendant raised a triable issue of fact as to whether she had a

non-negligent explanation for the collision stating that the plaintiff driver suddenly changed lanes, directly in front of her vehicle, without signaling, and then slowed down]; Ortiz v Hub Truck Rental Corp., 82 AD3d 725 [2d Dept. 2011][evidence that a plaintiff's vehicle made a sudden lane change directly in front of a defendant's vehicle, forcing that defendant to stop suddenly, is sufficient to rebut the inference of negligence]; Reitz v. Seagate Trucking, Inc., 71 AD3d 975 [2d Dept. 2010][the defendants rebutted the inference of negligence by adducing evidence that the plaintiffs' vehicle suddenly changed lanes directly in front of their vehicle, forcing the defendant to stop suddenly]; Oguzturk v General Elec. Co., 65 AD3d 1110 [2d Dept. 2009][defendant's explanation, that the accident occurred after the plaintiff's vehicle suddenly, and without signaling, moved from the center lane into the left lane directly in front of defendant's path and then slowed down, raised a triable issue of fact sufficient to defeat the plaintiffs' motion]; also see Connors v Flaherty, 32 AD3d 891 [2d Dept. 2006]; Briceno v Milbry, 16 AD3d 448 [2d Dept. 2005]). Here, the defendant's affidavit completely contradicted the plaintiff's version of the accident stating that plaintiff's vehicle was not lawfully stopped in front of her vehicle and stating that she did not strike the plaintiffs' vehicle in the rear but instead struck the rear side of the plaintiff's vehicle when the plaintiff, who was making a U-turn, cut directly in front of the defendant's vehicle.

Therefore, this Court finds that the competent evidence in the record demonstrates that there are triable issues of fact as to whether plaintiff on the counterclaim may have borne comparative fault for the causation of the accident (see Allen v Echols, 88 AD3d at 927 [2d Dept. 2011]; Gause v Martinez, 91 AD3d 595[2d Dept. 2011][the issue of comparative fault is generally a question for the trier of fact]; Elefantis v P.O.P. Displays, Inc., 44 AD3d 608 [2d Dept. 2007]).

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

ORDERED, that the motion by plaintiff on the counterclaim for an order granting summary judgment dismissing the defendant's counterclaim is denied.

Dated: July 11, 2013  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.