| **Boucher-Valot v Valot** |
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| 2013 NY Slip Op 32607(U) |
| October 18, 2013 |
| Supreme Court, Queens County |
| Docket Number: 16503/2012 |
| 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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DEBRA BOUCHER-VALOT,

Plaintiff,

- against -

BRIAN VALOT,

Defendant.

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Index No.: 16503/2012

Motion Date: 10/08/13

Motion No.: 21

Motion Seq.: 2

The following papers numbered 1 to 14 were read on this motion by defendant, BRIAN VALOT, for an order pursuant to CPLR 3212(b) granting defendant summary judgment and dismissing the plaintiff's complaint on the issue of liability:

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits | 1 - 7 |
| Affirmation in Opposition-Affidavits-Exhibits | 8 - 11 |
| Reply Affirmation | 12 - 14 |

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In this negligence action, plaintiff, DEBRA BOUCHER-VALOT, seeks to recover damages for personal injuries she sustained as a result of a one vehicle accident that occurred on March 19, 2012, at approximately 6:00 a.m. in the driveway of her home located at 158-49 97th Street, Howard Beach, New York. The accident occurred when the plaintiff exited the driver's seat of her 2011 Dodge Challenger to close an unlatched trunk which she had inadvertently unlatched when she entered the vehicle. After the plaintiff closed the trunk the vehicle rolled backwards knocking her to the ground causing serious physical injuries including a rotator cuff tear of the left shoulder requiring arthroscopic surgery, rib fractures, a large symptomatic pneumothorax, a scalp laceration, multiple disc herniations and multiple disc bulges.

Plaintiff commenced an action against her husband by filing a summons and complaint on August 7, 2012. In her complaint she

alleges that defendant, Brian Valot, was the registered owner of the subject vehicle and that the vehicle was operated in a careless and negligent manner by the defendant immediately prior to the vehicle coming into contact with the plaintiff, a pedestrian. Issue was joined by service of the defendant's answer dated November 19, 2012.

In her verified bill of particulars the plaintiff alleges that "The defendant failed to secure his vehicle in park thereby causing the car to roll backwards striking the person of the plaintiff. She states that the defendant was negligent in the ownership, operation, management, maintenance and control of his vehicle in failing to apply the emergency brake and in failing to put the vehicle in the park position.

Defendant now moves for an order granting summary judgment on the issue of liability asserting that he could not be liable for the injures sustained by the plaintiff since he had not operated the vehicle the day of the accident and had not operated the vehicle since he parked it in the driveway the night prior to the accident. Defendant contends that the plaintiff was in fact the last person to enter the vehicle prior to its rolling backwards in the driveway.

In support of the motion, the defendant submits an affirmation from counsel, Andrea E. Ferruci, Esq; a copy of the pleadings; and copies of the examinations before trial of the plaintiff, Debra Boucher-Valot and defendant Brian Valot.

At her examination before trial, taken on March 15, 2013, the plaintiff, Debra Boucher-Valot, age 50, testified that she has been married to the defendant, Brian Valot, for 26 years. She stated that she was involved in a motor vehicle accident involving the 2011 Dodge Challenger equipped with a manual transmission, owned by her husband. Plaintiff testified that the accident took place in the driveway of her home in Howard Beach at approximately 6:30 a.m. Her driveway, which is approximately 100 feet long, is on a slight, gradual decline from the garage towards the street. On the day of the accident there were two vehicles in the driveway. Her husband's work vehicle, a truck, was pulled up closest to the garage facing the street. The Dodge was pulled up facing the truck. She testified that the morning of the accident at approximately 6:30 a.m. she went out to move the Challenger so that her husband could leave for work in the truck. It was her intention to back the Challenger out of the driveway, let her husband leave in the truck, and then drive the Challenger back onto the driveway. Her husband was waiting in the truck with the ignition on when plaintiff first entered the Challenger. She

stated that:

"I opened the door. I sat in the car, closed the door and the light was on. So, I pushed the button to turn the light off. Instead of the light button I hit the trunk release. So, I got out of the car and I walked around to the back of the car to close the trunk and after I closed the trunk the car ran me over."

She stated that she had not put the key in the ignition. She testified that no one else had been in the car that day. The last time the vehicle was used, prior to the accident, was the night before when she and her husband drove back from the City and her husband parked the vehicle in the driveway. She did not observe the position of the gears after he parked the vehicle. When asked if the manual transmission was in park, drive or neutral when she entered the car in the morning she stated that she didn't know what gear the car was in because she didn't look. She assumed it was in neutral. The Challenger did not move when she first got in the vehicle. She states that she assumes the parking brake was on but she did not know that for a fact. She stated that the internal lights were on in the vehicle and she pressed a button on the left of the steering wheel to try to shut off the lights. However, she heard the trunk pop open and realized she pressed the wrong button. When she heard the trunk pop she immediately got out of the vehicle still holding the keys in her hand. She walked around to the back of the car and closed the trunk. She was standing stationary, inches behind the center of the rear of vehicle when it immediately began to move. The rear bumper came into contact with the front of both of her legs.

She states that the contact was heavy and knocked her over, She fell backwards onto her left side. She made contact with the ground with the back of her head, left shoulder, tailbone, back and left side ribs. She stated that as she was on the ground the car rolled over on top of her and crushed her. None of the wheels rolled over her but she was struck by the chassis on her ribcage and shoulder. When the Challenger stopped moving, while still in the driveway, it was covering her entire body. She states that she lost consciousness. When she regained consciousness she was out from under the Challenger and her husband was helping her. She was bleeding from a laceration to the back of her head. She did not call an ambulance. Rather, she took a shower and two hours later her husband drove her to the emergency room at North Shore Hospital. She states that she was told she had a collapsed lung and several fractured ribs. She was hospitalized for five days. Following the accident she was treated with physical therapy for pain to her head, shoulder, ribs, knee, neck and back. She eventually had arthroscopic surgery to her left

shoulder as a result of a torn rotator cuff.

The defendant, Brian Valot, age 49, was also deposed on March 15, 2013. He stated that he is a foreman for Network Infrastructure, a construction company. He is the owner of the subject vehicle, a green 2011 Dodge Challenger with manual transmission. He states that with a manual transmission when he parks the vehicle he puts on the emergency brake before he exits the vehicle. The evening before the accident he drove the Challenger to the City and when he returned he parked it in the driveway behind his work truck. At the time of the accident he was sitting in his vehicle waiting for his wife to move the Challenger out of the way so he could leave for work. While sitting in his vehicle he observed his wife enter the Challenger, exit a few seconds later, and go to the rear of the vehicle. He observed her close the trunk and then he observed the vehicle roll backwards over her. When asked if he remembered engaging the emergency brake when he parked the Challenger the night before, he replied that he did not remember. He also did not remember what gear the vehicle was in when he parked it. When he saw the Challenger moving,` he jumped out of his vehicle and engaged the emergency brake of the Challenger and then he went to attend to his wife. When he got to the back of the vehicle she was covered by the Challenger and unconscious. He pulled her out from under the vehicle. He did not call the police or an ambulance to the scene. He took the plaintiff to the emergency room at North Shore Hospital. He stated that some time after the accident he apologized to her for the accident. He never filled out an MV-104 motor vehicle accident report.

Defendant contends that based upon the testimony of the parties it is clear that his actions in parking the Challenger the night before the accident were not negligent nor were they a proximate cause of the accident. Defendant’s counsel relies on the testimony of both parties to the effect that the defendant operated the vehicle the night before the accident, that he parked in the driveway, that the vehicle remained stationary all night, and only rolled backwards after the plaintiff entered the vehicle the following morning, sat in the driver’s seat, manipulated some of the controls, opened the trunk, got out and slammed the trunk closed immediately prior to the accident. Both the plaintiff and her husband neither knew or remembered what gear the vehicle was in when it was parked the night before and neither party remembered if the emergency brake was engaged at the time the vehicle was parked the night before or in the morning. The husband did testify, however, that he engaged the emergency brake after he observed the vehicle roll backwards over his wife. Defendant’s counsel contends that the fact that the

vehicle did not move all night and did not move when the plaintiff first entered the vehicle indicates that the defendant did in fact engage the parking brake when he parked the vehicle. Counsel argues that plaintiff entered the vehicle prior to the accident and that as she was the last person to have operated the vehicle before the accident her actions may have been a proximate cause of the accident. Counsel also surmises that the fact that the defendant engaged the parking brake after it rolled over the plaintiff, indicates that the parking brake must have been disengaged by the plaintiff when she first entered the vehicle.

Thus, defendant's counsel argues that the testimony establishes prima facie that the defendant was not the operator of the vehicle prior to the accident, and that he was not negligent in the operation of the vehicle when he parked it the night before. Counsel argues that it was the plaintiff's own negligence when she entered the vehicle, operated certain controls in the vehicle, engaged the trunk release, exited the vehicle, stood behind the vehicle and slammed the trunk closed in the operation of the vehicle that morning that was the sole proximate cause of the vehicle rolling down the driveway. Further counsel argues that it was the plaintiff's actions in unlatching the hood that caused her to stand behind the vehicle. Counsel argues that the actions of the plaintiff including plaintiff's entrance into the vehicle in the morning and her actions in operating the vehicle controls immediately prior to the accident is an intervening event that caused the accident notwithstanding what the defendant may or may not have done the night before the accident with respect to parking the vehicle. He argues that the amount of time that elapsed between the defendant's last operation of the vehicle prior to plaintiff's entrance and exit of the vehicle breaks any causal connection between the defendant's prior operation and the subject accident.

Defendant contends, therefore, that he is entitled to summary judgment dismissing the plaintiff's complaint because the plaintiff was solely responsible for causing the accident while the defendant who did not enter the vehicle in question prior to the accident was free from culpable conduct.

In opposition to the motion, plaintiff's counsel, Stacey Haskel Esq., contends that summary judgment in favor of the defendant is not warranted because the testimony of the parties raises several triable issues of fact concerning whether the defendant was negligent in parking the vehicle the night before the accident and whether that negligence was a proximate cause of the accident. Plaintiff argues that the deposition testimony of the parties does not establish the defendant's freedom from

culpable conduct as a matter of law.

Plaintiff contends that the defendant failed to establish, prima facie, that he was not negligent for causing the accident. Counsel states that because the defendant testified that he had no recollection of engaging the emergency parking brake and no recollection of what gear the vehicle was in when he left it parked over night that he is not able to meet his burden of proving that he was not negligent in the operation of the vehicle (citing DeVito v Tepper, 40 AD3d 805 [2d Dept. 2007] in which the court denied summary judgment to a defendant whose golf cart struck a pedestrian because he could not recall if he turned the key to the off position prior to parking the vehicle]). In DeVito, supra. the court held that the defendant had a duty to exercise reasonable care in parking the golf cart. The court also held as the defendant could not demonstrate as a matter of law that he fulfilled that duty, he failed to meet his burden of establishing his entitlement to judgment as a matter of law. Plaintiff contends that it may be inferred that the emergency brake was not engaged by the defendant when he parked the vehicle as he was able to press the brake pedal all the way down after the vehicle rolled backwards. Plaintiff argues that the only way the car could have rolled was because the brake had been disengaged. Counsel claims that because the plaintiff did not testify that she disengaged the brake that morning, the clear assumption is that the defendant failed to put the brake on. Therefore, plaintiff contends that the sole proximate cause of the accident was the negligent manner in which the defendant parked the car the night before, failing to engage the emergency brake and failing to place the vehicle in the proper gear.

Upon review of the defendant's motion for summary judgment, the plaintiff's opposition and the defendant's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2nd Dept 2005]). 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]).

In Malin v Malin, 124 Misc. 2d 1078 [Sup Ct. Erie Co. 1984]aff'd 113 AD2d 1024 [4th Dept. 1985], the court held that there is a duty to park carefully which is owed to the world at large. In Bouchard v Canadian Pac. Ltd., 267 AD2d 899 [3d Dept. 1999], the court held that owner-operators may be held liable for injuries proximately caused by their negligently parked motor

vehicles pursuant to VTL § 388 which provides that the owner of an automobile can be held "liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle (also see Schiffer v Sunrise Removal, Inc., 62 AD3d 776 [2d Dept. 2009][the operator of the vehicle, had a duty to park and secure the unattended truck so that it would not start up except by the intervention of some external cause not to be anticipated or guarded against]; Noriega v Sauerhaft, 5 AD3d 121 [1st Dept. 2004][plaintiff, injured when defendant's parked car rolled down an incline and hit him, was properly granted summary judgment on the issue of fault, based on the affidavit of a responding police officer stating that he found defendant's car in neutral]).

Here, this court finds that there are several questions of fact raised by the evidence submitted as to whether defendant exercised reasonable care in parking and securing his vehicle when he parked it in his driveway the night before the accident. As the defendant could not remember if his vehicle was left in gear and could not remember if he engaged the emergency brake he failed to demonstrate, prima facie, that he was not negligent as a matter of law in the manner in which he parked the vehicle and failed to show, prima facie, that his actions were not a proximate cause of the accident (see VTL § 388).

Further, this court finds that the defendant has not shown that the plaintiff's action were the sole proximate cause of the accident. Although the plaintiff was the last one to enter and exit the vehicle and the last one to manipulate the controls inside the car before the accident, there remain questions as to the actions of the plaintiff in operating the vehicle such as whether any of the actions she took inside the vehicle may have caused the vehicle to move, whether if the emergency parking brake was in fact disengaged it was the plaintiff who may have inadvertently disengaged the brake or inadvertently put the car in neutral, or otherwise by any of her actions caused the vehicle to roll backwards down the driveway on the morning of the accident. It is highly likely that the brake was disengaged when the vehicle rolled down the driveway, the question for the trier of fact is when that disengagement occurred. Based on the deposition testimony of the parties, it would be sheer speculation to conclude at this point that the emergency brake was engaged or disengaged the night before the accident and it would be speculative to find that the plaintiff was or was not negligent in her operation of the vehicle the morning of the accident.

Thus, the defendant's evidentiary submissions did not prove his freedom from negligence as a matter of law, and as such, were insufficient to establish, prima facie, that the plaintiff's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926[2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Accordingly, as triable questions exist as to whether both operators exercised due care with respect to parking and operating the vehicle and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, the motion by defendant, Brian Valot for summary judgment dismissing the complaint of Debra Boucher-Valot is denied

Dated: October 18, 2013
Long Island City, N.Y.

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**ROBERT J. MCDONALD**
**J.S.C.**