

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

RACQUEL PROFITT and FITZGERALD EARLE,

Plaintiffs,

-against-

GARY BOSWELL, KRYSTAL McGIRR,
WALSH LIMOUSINE SERVICE and
JASON DUBIN,

Defendants.

ORIGINAL RETURN DATE:01/23/08
SUBMISSION DATE: 03/14/08
INDEX NO. 19798/06

MOTION SEQUENCE #1

The following papers read on this motion:

Notices of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmations.....	3, 4

Defendant, Krystal McGirr (“McGirr”) moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff’s complaint as against her on the grounds that plaintiffs cannot prove a prima facie case of negligence against her. It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this initial burden is not met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*).

This action was brought by plaintiffs to recover damages for personal injuries allegedly sustained by plaintiff, Racquel Profitt (“Profitt”), and property damage allegedly sustained by plaintiff, Fitzgerald Earle, as a result of an accident which occurred on or about April 18, 2006. In support of her motion, McGirr submits copies of the transcripts of the depositions of plaintiff, Profitt, and defendants, Gary Boswell, Jason Dubin and McGirr.

Plaintiff Profitt testified that the accident occurred around 8 a.m. on the Belt Parkway eastbound (Ex. C, p. 17) near the Springfield Boulevard exit (*Id.*, p. 22). She was traveling in the right lane (*Id.*) when she was hit in the back bumper (*Id.*, p. 26). Upon looking in her rearview mirror Profitt saw a white car coming towards her (*Id.*, p. 27). Defendant Boswell testified that his

vehicle was white (Ex. D., p. 21). Boswell was traveling in the left lane when he was hit from behind on the corner of the rear bumper by a black limousine (Id., pp. 22, 23 and 24). After the impact his car hit the wall dividing the eastbound and westbound traffic and then hit a car in front of him in the left lane (Id., pp. 29, 31 and 32). Thereafter there was an impact with another vehicle in the middle lane, and Boswell's vehicle ultimately stopped in the right lane (Id., pp. 36, 37 and 38).

Defendant Dubin testified that he was driving the limousine (Ex. E, p. 6). Mr. Dubin further testified that he "saw a green car cut across the highway from the right lane to the left lane and slam on the brakes causing the white car which Mr. Boswell was driving to slam on his brakes and leaving me no other choice than to slam on my brakes to try to get around the stopped car" (Id., p 16). Mr. Dubin was told that the make and model of the vehicle was an Acura (Id.) Plaintiff had testified that she was driving a "1996 3.2 Acura TL" (Ex. C, p. 15). Mr. Dubin testified that he never made contact with the green car and that the green car "proceeded to go to the side of the road on the right side of the road" after the impact (Ex. E., p. 25). It was further testified by Mr. Dubin that the limousine was thereafter sideswiped by another vehicle (Id., p. 26) driven by McGirr (Id., p. 28). Mr. Dubin testified that "[a]t no time was she in contact with the green car" in that the green car had already been pulled over to the side of the road long before the impact with the McGirr vehicle (Id., p. 30) and that there was no contact between the white car and the McGirr vehicle (Id. P. 44).

Ms. McGirr testified that she was driving a blue Dodge Neon 2002 (Ex. F, p. 10). Ms. McGirr's version of the accident, according to her testimony, was that: "I was driving in the middle lane and the limo on the left-hand side of me came into my side, my driver's side, and pushed me into a wall. Into the right lane, into the wall underneath the overpass" (Id., pp. 14 and 15). She also testified that there was no contact between her vehicle and any vehicle other than the limousine (Id. p. 37).

It is clear from the testimony elicited at the depositions that McGirr's vehicle did not come into contact with the plaintiff's vehicle nor did she cause plaintiff's accident (see, *Cardy v. Garretson*, 277 AD2d 1039 [4th Dept. 2000]). Movant has made a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once this initial burden has been met by defendant, McGirr, the burden then shifts to the plaintiffs to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). This the plaintiffs have failed to do. In opposition, plaintiffs merely submit an affirmation of their counsel. Counsel's arguments are insufficient to defeat Ms. McGirr's motion for summary judgment (*Id.*). Likewise, the co-defendant, Boswell, only submits an affirmation of counsel which does not raise any triable issues of fact.

Accordingly, Ms. McGirr's motion is granted.

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This decision constitutes the order of the court.

Dated: 4-22-08

HON THOMAS P. PHELAN

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ENTERED

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