Castro v Liz
2016 NY Slip Op 31958(U)
July 12, 2016
Supreme Court, Bronx County
Docket Number: 20116/2013
Judge: Betty Owen Stinson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

ROSSI CASTRO AND KATHERINE RODRIGUEZ,

Plaintiff(s),

- against -

JOSE LIZ, KJM TRASS INC., KLEBER ALVAREZ, AND MERCHANT FUNDING SERVICES CORP.,

Defendant(s).
----------x

DECISION AND ORDER

Index No: 20116/2013 E

Stinson, J.

In this action for personal injuries arising from an automobile accident, defendants KEBLER ALVAREZ (Alvarez) and MERCHANT FUNDING SERVICES CORP. (Merchant) move seeking an order granting them summary judgment and dismissal of the complaint and all cross-claims asserted against them. Movants contend that because they neither collided with plaintiffs' vehicle nor caused the collision between plaintiffs' vehicle and the vehicle owned by defendant KJM TRANS INC. (KJM) and operated by defendant JOSE LIZ (Liz), they cannot be liable as a matter of law. KJM and Liz oppose the instant motion asserting that questions of fact as to what caused their vehicle to collide with plaintiffs' vehicle preclude summary judgment. Plaintiffs cross-move seeking an order pursuant to CPLR § 3126 striking Liz and KJM's answer for their alleged failure to provide court-ordered discovery. Liz and KJM oppose plaintiffs' cross-motion asserting, *inter alia*, that

plaintiffs' failure to provide an affirmation of good faith as required by 22 NYCRR 202.7(a)(2) mandates denial of the cross-motion.

For the reasons that follow hereinafter, Alvarez and Merchant's motion is granted and plaintiffs' cross-motion is denied.

The complaint alleges the following. On February 6, 2011, on Broadway near its intersection with West 168th Street, New York, NY plaintiffs were involved in a motor vehicle accident. Specifically, it is alleged that the vehicle operated by plaintiff ROSSI CASTRO (Castro) and in which plaintiff KATHERINE RODRIGUEZ (Rodriguez) was a passenger, came into contact - while parked - with two other vehicles. One of the vehicles was owned by KJM and operated by Liz, the other was owned by Merchant and operated by Alvarez. Plaintiffs alleges that defendants were negligent in the operation and ownership of their vehicles and that said negligence caused them to sustain injuries.

Merchant and Alvarez' Motion for Summary Judgment

Merchant and Alvarez' motion is granted insofar as they have establish that they were not negligent in the operation of their vehicle and that, in fact, their vehicle never came into contact with plaintiffs' vehicle. To the extent that Liz and KJM oppose

the instant motion, not only is the basis for their opposition not relevant to Merchant and Alvarez' negligence, but the evidence they submit is in inadmissible form.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently

> to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

In the absence of evidence to the contrary, a defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham v Wagner*, 48 AD3d 349, 350 [1st Dept 2008 [Court held that defendant established prima facie entitlement to summary judgment when she tendered evidence evincing that she was not at fault for the accident therein and could not have avoided the same.]; *Cerda v Parsley*, 273 AD2d 339, 339 [2d Dept 2000] [Defendants were entitled to summary judgment because the evidence presented established that defendant operator was not negligent in the operation of his vehicle.]). Alternatively, a defendant can establish prima facie entitlement to summary judgment by demonstrating that the plaintiff or a co-defendant was negligent in the operation of his/her vehicle and that said negligence was the sole proximate cause of the accident (*Espinoza v Loor*, 299 AD2d 167, 168 [2d Dept 2002] [Defendant "made out a prima facie case that the accident resulted solely from (plaintiff's) negligence."]); *Borges v Zukowski*, 22 AD3d 439, 439 [2d Dept 2005]).

In support of the instant motion, Merchant and Alvarez submit Alvarez' deposition transcript wherein he testified, in pertinent part, as follows: On February 6, 2011, at approximately 5PM, he

was involved in a motor vehicle accident. At that time Alvarez was a taxi driver, operating a Lincoln owned by Merchant (vehicle 1). He had just picked up a male passenger on West 185th Street and was headed to 14th Street. As he drove south on Broadway, a two-way road with two travel lanes on each side, a different Lincoln (vehicle 2) made a u-turn and collided with Alvarez' vehicle. Immediately prior to the collision, Alvarez was driving on the right lane of southbound traffic on Broadway and the other vehicle was traveling northbound on Broadway in the lane closest to the yellow line which divided the opposing lanes of traffic. Alvarez' vehicle was impacted by vehicle 1 while still traveling in the right lane of southbound traffic. Alvarez' vehicle the came to a stop and did not collide with any other vehicles. Vehicle 2, however, kept moving and impacted plaintiff's vehicle (vehicle 3), which was parked on Broadway. At no time, did Alvarez' speed exceed 30 miles per hour.

Alvarez and Merchant also submit Castro's deposition transcript wherein she testified, in pertinent part, as follows: On February 6, 2011 at approximately 5PM, she was involved in a motor vehicle accident on Broadway near West 168th Street. At the time of the accident, Castro was seated in vehicle 3 - a Toyota Highlander - while it was parked on the southbound side of Broadway near West 168th Street. Suddenly, Castro felt an impact to her vehicle and realized that she had just been hit vehicle 2.

Specifically, vehicle 2 hit the driver's side front door of vehicle 3. Thereafter, vehicle 2 kept going; forcing Castro to chase after it. Although Castro did not see it, she testified that vehicle 2 struck her car as it made a u-turn and after colliding with vehicle 1. Castro testified that vehicle 1 did not collide with her vehicle.

Alvarez and Merchant also submit Rodriguez' deposition transcript wherein she testified, in pertinent part, as follows: On February 6, 2011 at approximately 5PM, she was involved in a motor vehicle accident on Broadway. At the time of the accident, Rodriguez was seated in vehicle 3, her mother's vehicle, while it was parked on the southbound side of Broadway near West 168th Street. Suddenly, she felt an impact to vehicle 3 from the left side and realized that vehicle 3 had just been hit by vehicle 2. Vehicle 2 collided with the driver's side of vehicle 3. Thereafter, vehicle 2 did not stop and sped away. Vehicle 1 then approached vehicle 3 indicating that he too had been hit vehicle 2. Thereafter, Castro and vehicle 1 chased the offending vehicle. Rodriguez testified that vehicle 1 was not involved her accident with vehicle 2.

Based on the foregoing, since a defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham* at 350; *Cerda* at 339), Alvarez

and Merchant establish *prima facie* entitlement to summary judgment. Significantly, Alvarez testified that he was involved in an accident when while operating vehicle 1, vehicle 2 made a u-turn in front of him, thereby, colliding with his vehicle. He further testified that he was merely driving straight at no more than 30 miles per hour. Accordingly, based on the foregoing because "[t]he driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws which require him or her to yield" (*Adobea v Junel*, 114 AD3d 818, 820 [2d Dept 2014]; *Williams v Hayes*, 103 AD3d 713, 714 [2d Dept 2013]; *Figueroa v Diaz*, 107 AD3d 754, 755 [2d Dept 2013]), and "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Socci v Levy*, 90 AD3d 1020, 1021 [2d Dept 2011] [internal quotation marks omitted]; see also *Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]), Alvarez and Merchant establish the absence of negligence, which alone entitles them to summary judgment.

Additionally, because a defendant can also establish *prima facie* entitlement to summary judgment by demonstrating that the plaintiff or a co-defendant was negligent in the operation of his/her vehicle and that said negligence was the sole proximate cause of the accident (*Espinoza* at 168; *Borges* at 439), summary judgment is further warranted because all the evidence submitted

indicates that vehicle 2 was negligent and the sole proximate cause of the collision with vehicle 3 - plaintiffs parked vehicle. To be sure, a vehicle that crosses into the lanes of oncoming traffic violates VTL § 1126(a) and absent a justifiable emergency constitutes negligence as a matter of law (*Barbaruolo v Difede*, 73 AD3d 957, 957 [2d Dept 2010]; *Foster v Sanchez*, 17 AD3d 312, 313 [2d Dept 2005]). Insofar as Alvarez testified that the collision between plaintiffs' parked vehicle and vehicle 2 was the result of the u-turn made by vehicle 2 whereby it crossed over into the lanes of oncoming traffic on Broadway, Alvarez and Merchant establish that plaintiffs' accident was proximately caused by vehicle 2's negligence.

Nothing submitted by Liz and KJM raises an issue of fact sufficient to preclude summary judgment. First, Liz and KJM solely oppose the instant motion by asserting that in rear-end collisions a legally cognizable excuse will rebut the presumption of negligence accorded to the rear-ending vehicle. However, none of the evidence submitted indicates that the accidents herein were rear-end collisions so as to make the foregoing opposition relevant. Second, assuming, *arguendo*, that the foregoing had any applicability, it is hard to understand how negating Liz and KJM's negligence precludes summary judgment in favor of Alvarez and Merchant. Indeed, the fact that Liz and KJM were not negligent does not mean - as implied - that Alvarez and merchant were.

Lastly, the only evidence submitted by Liz and KJM, an unsworn accident report, is inadmissible and there is no excuse given for failing to provide it in admissible form. As such it cannot be considered by the Court (Bates v Yasin, 13 AD3d 474, 474 [2d Dept 2004] ["The only other evidence submitted by the plaintiff was the MV-104 police accident report. The unsworn, self-serving statement in the MV-104 by the plaintiff's decedent that the defendants' vehicle hit his vehicle was insufficient as a matter of law to raise a triable issue of fact."]; *Johnson* at 270-271; v Phillips, 261 AD2d 269, 270 [1st Dept 1999]; *Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]).

Plaintiffs' Cross-Motion to Strike Liz and KJM's Answer

Plaintiffs' cross-motion seeking to strike Liz and KJM's answer is denied insofar as they seek relief by way of cross-motion against a nonmoving party and because their affirmation of good faith fails to comply with 22 NYCRR 202.7(a)(2).

It is well settled that a cross-motion is an improper vehicle for seeking relief from a nonmoving party (Civil Practice Law and Rules Rule 2215 ["a party may serve upon *the moving party* a notice of cross-motion demanding relief" (emphasis added).]; *Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003]; *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]).

The Uniform Rules for the New York Trial Courts state that

"with respect to a motion relating to disclosure" (22 NYCRR 202.7), it shall not be filed absent "an affirmation that [moving] counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (*id*). It is well settled that the failure to file the aforementioned affirmation warrants denial of any motion seeking disclosure or sanctions related thereto (*Hernandez v City of New York*, 100 AD3d 433, 434 [1st Dept 2012]; *Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]; *Vasquez v G.A.P.L.W. Realty, Inc.*, 236 AD2d 311, 312 [1st Dept 1997]). Moreover, denial of a motion seeking disclosure is also warranted when the affirmation of good faith submitted nevertheless fails to indicate that the proponent of disclosure actually conferred with counsel for the party from whom discovery is sought (*Gonzalez v Intl. Bus. Machines Corp.*, 236 AD2d 363 [2d Dept 1997] ["Furthermore, the court did not err in summarily denying the appellant's motion to strike the complaint since counsel for the appellant failed to confer with counsel for the plaintiffs in a good faith effort to resolve the issues raised by the motion."]; *Koelbl v Harvey*, 176 AD2d 1040, 1040 [3d Dept 1991] ["Contrary to the position taken by defendants that it was not their obligation to make a further request for a bill of particulars or to serve reminders upon plaintiffs, they were required to communicate with plaintiffs in a good-faith effort to obtain the requested particulars without filing a motion with

Supreme Court." (internal quotation marks omitted)]).

Here, insofar as Liz and KJM do not seek any relief, the relief sought by plaintiffs' against them by way of cross-motion must be denied. Moreover, the affirmation of good faith submitted by plaintiff is not compliant with 22 NYCRR §202.7(a)(2). To be sure, here, the affirmation of good faith dated April 27, 2016, merely states that counsel "has unsuccessfully attempted to communicate, in good faith, to resolve by agreement the discovery issues raised by the attached motion." Patently, movants have failed to confer with opposing counsel to resolve the discovery issues on which the motion is premised and the cross-motion must be denied. Insofar as the requisites of 22 NYCRR 202.7(a) are met where a party details his efforts to resolve discovery disputes without resort to motion practice in something short of an formal affirmation (*Burton v Matteliano*, 98 AD3d 1248, 1249 [4th Dept 2012] ["Defendant's attorney outlined his good faith efforts to resolve the discovery dispute, which included contacting plaintiff's attorney numerous times to request compliance with the demands and affording plaintiff's attorney an additional two weeks to comply with the demands. It was only after plaintiff's attorney failed to comply with the demands during that two-week period that defendant's attorney made the motion for preclusion."]), here, the letter annexed to plaintiffs' motion does not avail them. Significantly, the letter dated April 25, 2016 suffers from the

same affliction as the affirmation of good faith, namely, that it does not indicate that there was any actual conferral with opposing counsel with respect to the discovery sought. It is hereby

ORDERED that the complaint and all cross-claims as against Alvarez and Merchant are hereby dismissed. It is further

ORDERED that Alvarez and Merchant serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : July 12, 2016
Bronx, New York

Betty Owen Stinson, JSC