

Reeves v AAA Am. Auto Glass, Inc.

2007 NY Slip Op 30509(U)

March 29, 2007

Supreme Court, Suffolk County

Docket Number: 0019617/2003

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
MARY REEVES,

Plaintiff,

-against-

AAA AMERICAN AUTO GLASS, INC., "JUAN PEREZ"
and BROOKLYN RESOURCE RECOVERY, INC.,

Defendants.
-----x

CALENDAR DATE: December 6, 2006
MNEMONIC: MD; XMOT D.

PLTF'S/PET'S ATTORNEY:

Farley & Kessler
410 Jericho Turnpike
Jericho, NY 11753

DEFT'S/RESP ATTORNEY:

DeSena & Sweeney
1383 Veterans Memorial Highway
Hauppauge, NY 11788

Upon the following papers numbered 1 to 45 read on this motion for summary judgment and cross motion to strike Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross-Motion and supporting papers 15-32; Answering Affidavits and supporting papers 33-38; Replying Affidavits and supporting papers 39-42; 43-45; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants, AAA American Auto Glass, Inc. and Brooklyn Resource Recovery, Inc., for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 arguing they are not liable for the plaintiff's accident is denied and the cross-motion by plaintiff seeking denial of the defendants' motion for summary judgment and to strike the defendants' answer is also denied.

Plaintiff instituted this action for personal injuries allegedly sustained as a result of a motor vehicle accident with the defendants occurring on January 22, 2003 at approximately 2:00 pm on Montauk Highway (Rte 27A) at or near its intersection with Amsterdam Avenue in East Patchogue, Suffolk County on Long Island, New York. Plaintiff, an 83 year old woman, claims that she was proceeding eastbound on Montauk Highway when her vehicle struck an illegally parked truck on the side of the road resulting in fractures to both her legs and knees, a fractured rib, and sternum and a fracture in her right hand. Plaintiff claims that the defendants' tractor trailer was stopped and parked on the side of Montauk Highway where there is a minimum shoulder and that it was sticking out in the travel portion of the roadway. Defendants do not dispute that the tractor trailer was parked on the eastbound side of the roadway with its right side wheels up against the curb and its hazard lights on and acknowledge that a portion of the truck was over the solid white demarcation line. The defendants' vehicle was cited for being illegally double parked on the roadway.

Defendants now move for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 arguing that it was plaintiff-driver's inattentiveness to a tractor trailer

parked on the side of the roadway in daylight with its hazard lights on that was the cause of this accident and not any conduct on the part of the defendants. Plaintiff opposes the requested relief arguing that there are issues of fact involving the defendants' vehicle being half in the travel portion of the roadway and being illegally parked on the side of a roadway with a minimal shoulder which could not accommodate the tractor trailer. Plaintiff also cross-moves for denial of the defendants' motion and to strike the defendants' answer for failing to produce the driver of the tractor trailer for deposition. Defendants argue that the driver "Juan Perez" cannot be produced and is missing and unavailable to be deposed.

For the following reasons, the defendants' motion for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 is hereby denied in its entirety and the plaintiff's cross-motion is granted only to the extent of denying the defendants' motion and precluding the defendant driver "Juan Perez" from testifying at the trial of this action for failing to make himself available for deposition prior to trial. In all other respects the cross-motion is denied.

Summary judgment is the procedural equivalent of a trial. The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, there are numerous factual issues raised by the parties which preclude summary disposition. The defendants allege that the tractor trailer was on the side of the road with its hazard lights on, during daylight hours, when the elderly plaintiff/driver's vehicle ran into the back of the defendants' truck. Defendants therefore claim, as a matter of law, that they are not responsible for the happening of this accident and that the fault lies entirely with the plaintiff. However, the driver of the tractor trailer is not available to explain why he was stopped at that area of the highway that had a limited shoulder area, whether the hazard lights were on at the time of the accident and whether the truck was out in the travel portion of the roadway. In fact, the defendants concede that the driver is unidentifiable raising issues of fact and questions as to his abilities to operate a tractor trailer and his judgment in parking a tractor trailer on the side of the roadway in an area not suitable for parking a tractor trailer. Plaintiff, in opposition, points out that the tractor trailer was parked on the side of the road with a portion of the trailer sticking out into the travel portion of the roadway. Plaintiff notes that she did not see the tractor trailer's hazard lights and the defendants were ticketed by the Suffolk County Police for illegally being parked on the side of the roadway. A review of the photographs shows that there is minimal or no shoulder to speak of at the location where the accident occurred and the tractor trailer was stopped. A jury might properly infer that the causation of the accident lies with fault on both sides and failure to exercise due discretion and good judgment in the operation of their respective vehicles. Further, the defendants engage in mere speculation in light of the fact that the driver of the tractor trailer is not available to explain the purpose of his stopping his tractor trailer at a location where a stopped tractor trailer could be inherently dangerous to motorists using the roadway. These are all issues which test the credibility of the parties involved since there were no other witnesses to the accident. Summary judgment is seldom appropriate in negligence actions for this very reason.

Furthermore, summary judgment is an extremely rare event when dealing with issues in a personal injury negligence action with its potential of possible contributory negligence, since the granting of such relief is possible only in the most clear cut of cases. *O'Callaghan v. Flitter*, 112 AD2d 1030, 493 NYS2d 28 (2nd Dept. 1985). As the court noted in *Johannsdottir v. Dohn*, 90 AD2d 842, 456 NYS2d 86 (2nd dept. 1982), the drastic remedy of summary judgment relief is rarely granted in negligence cases since the very question of whether a party's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious of situation. Thus, even in cases where the facts are conceded, there is often a question of whether the plaintiff herself or the defendant himself acted reasonably under the circumstances of the accident. On that issue, there are also questions raised about plaintiff's contributory negligence in not seeing or realizing there was a tractor trailer stopped in the roadway and her statement she was unable to stop.

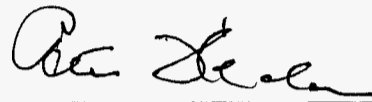
In light of all these issues of fact which appear before the Court and the Court being mindful of the fact that negligence cases do not lend themselves to resolution of these issues as a matter of law, the defendants' motion must necessarily fail. Summary judgment,

being such a drastic remedy so as to deprive a litigant of her day in court, should only be employed when there is no doubt as to the absence of triable issues. **VanNoy v. Corinth Central School District**, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, the defendants' motion for summary judgment and dismissal of the plaintiff's complaint as a matter of law pursuant to CPLR §3212 in this motor vehicle negligence action is denied.

Plaintiff's cross-motion seeking to strike the defendants' answer is denied, except to the extent that the Court hereby grants a preclusion order and precludes the unidentified driver of the tractor trailer from testifying in this incident. The issue with regard to charging the jury on negative inferences to flow from the failure to produce the driver or identify him further is a matter best left to the direction of the trial judge at the time of trial.

The foregoing constitutes the decision of the Court.

Dated: March 29, 2007



J.S.C.