

Hayward v Berk

2007 NY Slip Op 31056(U)

April 17, 2007

Supreme Court, Suffolk County

Docket Number: 0024898/2005

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

<p>LISA HAYWARD,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>MICHAEL BERK, JOAN BERK, LUIS MAZARA, JUANA TORRES and JAMES GRIFFIN, JR,</p> <p style="text-align: right;">Defendants.</p>	
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INDEX NO.:	2005-24898
MOTION SEQ. NO.:	001 - MG
ORIG. MOTION DATE:	08/10/07
MOTION SEQ. NO.:	002 - MD
ORIG. MOTION DATE:	09/14/07
MOTION SEQ. NO.:	003 - MG
ORIG. MOTION DATE:	01/05/07
FINAL SUBMIT DATE:	02/28/07

UPON the following papers numbered 1 to 51 read on these Motions:

- Defendant GRIFFIN’s Motion & Supporting Papers (Pages 1-8 & Exhibits A-G);
- Plaintiff’s Opposition (Pages 9-16);
- Defendant GRIFFIN’s Reply (Pages 17-21 & Exhibit A);
- Defendants BERKs’ Cross-Motion & Supporting Papers (Pages 22-29 & Exhibits A-C);
- Plaintiff’s Opposition (Pages 30-37);
- Defendants BERKs’ Reply (Pages 38-44);
- Non-Party AUTO ONE’s Motion and Supporting Papers (Pages 45-51 & Exhibits A-D);

it is,

ORDERED, that the application of Defendant GRIFFIN is hereby granted in all respects; the application of Defendants BERK is hereby denied to the extent set forth herein below; and the unopposed application of Non-Party AUTO ONE is hereby granted to the extent set forth herein below.

Defendant GRIFFIN moves this Court for an Order, pursuant to CPLR 3212, granting Summary Judgment to said Defendant and dismissing Plaintiff’s Complaint against said Defendant.

Defendants BERK move this Court for an Order, pursuant to CPLR 3212, granting said Defendants Summary Judgment dismissing Plaintiff’s Complaint and Co-Defendant’s Cross-Claims against them, on the grounds that there are no triable issues of fact.

Non-Party AUTO ONE moves this Court for an Order, pursuant to CPLR 2201, staying all proceedings pending resolution of a Declaratory Judgment action commenced by Plaintiff against AUTO ONE, not a party to the within action, to declare whether AUTO ONE is obliged to defend and indemnify Defendant TORRES herein.

As to the issue of summary judgment, it is well settled that, in order for the Court to grant such relief, it must clearly appear that there are no material issues of fact (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp, supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*Zuckerman v City of New York, supra*).

After a thorough review of all the submissions made herein, the Court notes, and is quite compelled by that which Counsel for Defendant GRIFFIN rather adroitly points out, and which this Court cannot imagine a clearer manner of stating, in that “There is simply no requirement that a stopped car must sprout wings and fly up into the air in order to avoid being hit”. There is nothing, nor does this Court believe there could be, in the Complaint nor the rebuttal to Defendant GRIFFIN’s Motion, that Plaintiff has offered that comes close to overcoming the stark logic of this statement, and therefore the Complaint, as to Defendant GRIFFIN must be dismissed.

The same cannot be said of the application proffered by Defendants BERK, where there are clearly issues of fact that presently require a trial to determine them. Defendant MICHAEL BERK submits an affidavit in support of his Motion for Summary Judgment wherein he claims, at Paragraph 6 thereof, that “After the vehicle came out in front of me and contact occurred with that vehicle, that vehicle then proceeded to make contact with a vehicle which appears to have been driven by Defendant, James Griffin, Jr.”, the vehicle in which Plaintiff, the Court notes, was a passenger. In an affidavit she submits in opposition to the Motion by Defendants BERK, Plaintiff claims, at Paragraph 4 thereof, that what later came to be known as the vehicle owned by Defendant TORRES and operated by Defendant MAZARA “...traveling on 1st Avenue, entered the intersection of Pulaski Road striking a 1996 Ford motor vehicle owned by defendant, JOAN BERK and operated by defendant MICHAEL BERK. Once struck, defendant BERK then collided with defendant GRIFFIN’s motor vehicle”, which the Court again notes was the vehicle in which Plaintiff was a passenger. It is immediately apparent that there is a substantial dispute as to which vehicle struck the vehicle in which Plaintiff was a passenger. At this point, there remains at least this issue to be resolved. Perhaps after discovery is completed, this matter may, or may not, be ripe for a Motion for Summary Judgment, and the Court will permit leave to file same if there comes a point where no issues of fact remain to be resolved, but currently this matter does not meet the well settled standard set forth herein above, and Defendants BERKs’ Motion must be denied.

As to the application of AUTO ONE to stay all proceedings herein until Plaintiff’s Declaratory Judgment action against it is resolved, determining whether it is obliged to defend and indemnify Defendant TORRES herein, this Court concurs with the citations presented by movant in support of said Motion (*See, Westchester Fire Ins Co v Lipsky*, 9 Misc2d 390, 170 NYS2d 566; *Ganas v Terry*, 16 AD2d 826 228 NYS2d 999), and therefore determines that, after the relief granted herein and in the companion matter (said Declaratory Judgment action, under Suffolk County Index No. 2005-24897) joining same with a matter pending in Nassau County Supreme Court, under Nassau County Index No. 2005-11030), this matter shall

be stayed pending resolution of the issues raised therein as to obligation to defend and indemnify.

ORDERED, that the application of Defendant GRIFFIN for an Order granting Summary Judgment to said Defendant, same is hereby granted in all respects, that portion of Plaintiff's Complaint against him is therefore dismissed, and the caption of this matter is hereby amended to read as follows:

LISA HAYWARD, - against - MICHAEL BERK, JOAN BERK, LUIS MAZARA and JUANA TORRES,	Plaintiff, Defendants.
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and it is further

ORDERED, that the application of Defendant BERK for Summary Judgment dismissing Plaintiff's Complaint and Co-Defendant's Cross-Claims against them, is hereby denied in all respects, with leave to renew should discovery and inspection resolve outstanding issues of fact; and it is further

ORDERED, that the application of AUTO ONE for an Order staying all proceedings herein pending resolution of a Declaratory Judgment action commenced by Plaintiff against it is granted from this point forward, until the issue of AUTO ONE's obligation to defend and indemnify Defendant TORRES herein is resolved by the Court; and it is further

ORDERED, that Counsel for Defendant GRIFFIN is hereby directed to serve a copy of this order, with Notice of Entry, upon all parties, upon the Calendar Clerk of this Court and upon the Suffolk County Clerk within twenty (20) days of the date of the entry of this Order by the County Clerk.

Dated: Riverhead, New York
April 17, 2007



HON. JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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