

**Doctor-Strand v Yosco**

2007 NY Slip Op 31874(U)

June 20, 2007

Supreme Court, Suffolk County

Docket Number: 0009699/2006

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
SIMONE S. DOCTOR-STRAND,

Plaintiff,

-against-

DOMINICK YOSCO and HAROLD YOSCO,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: NOVEMBER 3, 2006  
FINAL SUBMISSION DATE: FEBRUARY 8, 2007  
MTN. SEQ. #: 002  
CROSS-MOTION: XMD

ORIG. RETURN DATE: DECEMBER 20, 2006  
FINAL SUBMISSION DATE: FEBRUARY 8, 2007  
MTN. SEQ. #: 003  
MOTION: MD

ORIG. RETURN DATE: DECEMBER 20, 2006  
FINAL SUBMISSION DATE: FEBRUARY 8, 2007  
MTN. SEQ. #: 004  
CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:  
GRUENBERG & KELLY, P.C.  
3275 VETERANS MEM HWY - STE B-9  
RONKONKOMA, NEW YORK 11779  
631-737-4110

DEFT'S/RESP ATTORNEY:  
ABAMONT & ASSOCIATES  
200 GARDEN CITY PLAZA - SUITE 400  
P.O. BOX 9250  
GARDEN CITY, NEW YORK 11530-9250  
516-742-8058

Upon the following papers numbered 1 to 12 read on this motion \_\_\_\_\_  
FOR SUMMARY JUDGMENT, SANCTIONS AND TO COMPEL

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Notice of Cross-motion and supporting papers 7-9; Reply Affirmation and supporting papers 10; Reply Affirmation and supporting papers 11, 12; it is,

**ORDERED** that this motion by plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment on the issue of liability in favor of plaintiff and against defendants, is hereby **DENIED** for the reasons set forth herein; and it is further

**ORDERED** that this cross-motion by defendants for an Order, pursuant to CPLR 3124 and 3126, compelling plaintiff to appear for a defense physical examination, or conditionally precluding plaintiff from testifying at trial, or in the alternative, dismissing plaintiff's complaint, is hereby **DENIED** for the reasons set forth herein; and it is further

**ORDERED** that this cross-motion by defendants for an Order, pursuant to 22 NYCRR 130-1.1, granting costs and sanctions in favor of defendants and against plaintiff, is hereby **DENIED**.

This is an action to recover for personal injuries allegedly sustained by plaintiff as the result of a motor vehicle accident that occurred on April 18, 2005 in the parking lot of MacArthur Airport. Plaintiff alleges that she was seriously injured from the accident. Plaintiff now moves for summary judgment on the issue of liability, arguing that it is undisputed that defendant DOMINICK BOSCO failed to yield the right of way to plaintiff, and as such, defendant DOMINICK BOSCO's actions were the proximate cause of the accident. In support of the instant application, plaintiff has submitted, among other things, an affirmation of counsel, plaintiff's verified complaint, and the deposition transcript of plaintiff.

In opposition, defendants argue that questions of fact exist regarding the share of liability attributable to the drivers of the vehicles involved in the subject accident. Defendants allege that the deposition testimony of plaintiff establishes that she was at least partially at fault for the collision. Defendants contend that as plaintiff testified she did not see defendant's vehicle until the moment of impact, plaintiff may be found at least partially liable for failure to observe that which was there to be seen. In addition, defendants submit that the word "STOP" painted on defendant's lane of travel was obstructed with gravel, and therefore defendant was not aware that the intersection was controlled by a stop "sign." As such, defendants argue that questions of fact exist as to whether plaintiff kept a proper lookout; whether defendant's view of the stop "sign" was obstructed; and whether the subject intersection was in essence an uncontrolled intersection governed by Vehicle and Traffic Law § 1140(b).

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35

NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that “the remedy of summary judgment is a drastic one, 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” (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent’s Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). It should be noted that Courts have repeatedly held that negligence claims should not be resolved at the summary judgment stage (see e.g. *Kahane v Marriott Hotel Corp.*, 249 AD2d 164 [1998]; *Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]; *Chahales v Garber*, 195 AD2d 585 [1993]; *In re World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440 [Sup Ct, NY County 2004]).

Here, the Court finds that plaintiff has failed to submit evidence in admissible form to establish entitlement to judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Dempster v Overview Equities, Inc.*, 4 AD3d 495, *supra*). Plaintiff relies upon an affirmation of counsel, and an unsigned, unsworn deposition transcript of plaintiff in support of the motion. Counsel’s affirmation, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to support a motion for summary judgment (see *S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). In addition, plaintiff failed to establish that the unsigned deposition transcript of plaintiff was forwarded to her for her review and signature pursuant to CPLR 3116(a). Hence, the transcript is not admissible evidence (see CPLR 3116[a]; *McDonald v Mauss*, 2007 NY Slip Op 2521 [2d Dept]; *Pina v. Flik Intl. Corp.*, 25 AD3d 772 [2006]; *Santos v Intown*

*Assoc.*, 17 AD3d 564 [2005]; *Lalli v Abe*, 234 AD2d 346 [1996]; *Palumbo v Innovative Communications Concepts*, 175 Misc 2d 156 [Sup Ct, New York County 1997], *affd* 251 AD2d 246 [1998]).

Plaintiff has also submitted a copy of the within verified complaint, which was verified by plaintiff. A verified pleading may be used in lieu of an affidavit of a party, if the verification is made by that party (see CPLR 105[u]; *Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, *supra*; *Goodman v New York City Health & Hospitals Corp.*, 2 AD3d 581 [2003]; *Black Car & Livery Ins., Inc. v H & W Brokerage, Inc.*, 2006 NY Slip Op 50078[U] [Sup Ct, Nassau County]). However, the Court finds that the verified complaint herein does not sufficiently establish, in the first instance, the absence of any material issues of fact that would warrant an award of summary judgment to plaintiff.

The failure of plaintiff to make an initial *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*; *Smith v City of New York*, 288 AD2d 369 [2001]; *Sipourene v County of Nassau*, 266 AD2d 450 [1999]). Accordingly, this motion by plaintiff for summary judgment on the issue of liability is denied.

Defendants have filed a cross-motion seeking an Order, pursuant to CPLR 3124 and 3126, compelling plaintiff to appear for a defense physical examination, or conditionally precluding plaintiff from testifying at trial, or in the alternative, dismissing plaintiff's complaint. Defendants allege that plaintiff was originally scheduled to appear for a defense physical examination on December 12, 2006 at the offices of DR. RICHARD S. GOODMAN, but plaintiff's counsel cancelled the appointment. Defendants allege that the examination was rescheduled for December 28, 2006. Defendants filed the instant application seeking an Order compelling plaintiff to appear on December 28, 2006, or if she fails to appear, precluding plaintiff from offering any evidence at the trial of this action, or in the alternative, dismissing plaintiff's complaint.

In opposition, plaintiff contends that the physical examination was rescheduled for January 15, 2007, and that she is ready, willing and able to attend. However, in reply, defendants allege that plaintiff failed to appear for the physical examination scheduled for January 15, 2007, as she had recently given birth. The examination was then rescheduled for February 5, 2007. As plaintiff

has failed three times to appear for a physical examination, defendants now seek dismissal of plaintiff's complaint.

On this record, it is unclear to the Court whether plaintiff appeared for a physical examination on February 5, 2007. However, the Court notes that a compliance conference of this matter was held on February 8, 2007, in which the parties entered into a compliance conference order of even date indicating that preliminary proceedings were complete and the matter was ready for trial. The Court further notes that a Note of Issue was filed on or about February 20, 2007, and defendants had not moved to vacate the Note of Issue within twenty (20) days of service on the grounds that discovery is not complete (see 22 NYCRR 202.21[e]). As such, this application to compel is denied as moot.

Finally, the instant cross-motion by defendants for an Order, pursuant to 22 NYCRR 130-1.1, granting costs and sanctions in favor of defendants, is denied. Defendants apparently filed this application in response to an application made by plaintiff to strike defendants' answer for failure to attend examinations before trial in violation of the within preliminary conference stipulation and order. In plaintiff's application, plaintiff had also sought an imposition of costs and sanctions against defendants. However, on or about November 6, 2006, plaintiff's application was withdrawn. Accordingly, this application by defendants for an award of costs and sanctions in favor of defendant and against plaintiff is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: June 20, 2007



HON. JOSEPH FARNETI  
Acting Justice Supreme Court