

Garced v Rodriguez

2007 NY Slip Op 31880(U)

July 1, 2007

Supreme Court, Suffolk County

Docket Number: 0021987/2004

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

ANDRE GARCED, an infant by his parent and
natural guardian, ANGEL GARCED, and
ANGEL GARCED, individually,

Plaintiffs,

-against-

RAQUEL RODRIGUEZ and NASTASSJA
RODRIGUEZ,

Defendants.

ORIG. RETURN DATE: FEBRUARY 22, 2007
FINAL SUBMISSION DATE: APRIL 5, 2007
MTN. SEQ. #: 002
MOTION: MD

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Upon the following papers numbered 1 to 6 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers
4, 5; Replying Affidavits and supporting papers 6; it is,

ORDERED that this motion by defendants for an Order, pursuant to
CPLR 3212, granting summary judgment dismissing plaintiffs' verified complaint,
is hereby **DENIED** for the reasons set forth herein.

This action arises from an incident that occurred on March 16, 2003
in front of the residence known as 134 McNair Street, in the Town of Islip, State
of New York, involving an automobile owned by defendant RAQUEL
RODRIGUEZ and operated by defendant NASTASSJA RODRIGUEZ. The infant

plaintiff, who was twelve years old at the time, rode a bicycle into the street and collided with the driver's side of defendants' automobile while she was proceeding westbound. In support of the instant application, defendants have submitted, among other things, affirmations of counsel and the deposition transcript of defendant NASTASSJA RODRIGUEZ.

Defendants submit that a review of the pleadings and the deposition testimony herein reveal that the record is completely devoid of any evidence indicating that defendant/operator NASTASSJA RODRIGUEZ was responsible for the happening of the accident. Defendants argue that the deposition testimony establishes that the proximate cause of the accident was the infant plaintiff's disregard of defendant's vehicle, and that there is no evidence that defendant/operator NASTASSJA RODRIGUEZ was negligent with respect to the operation of the automobile.

In opposition, plaintiffs argue that defendants have not met their initial burden to establish entitlement to judgment as a matter of law, as defendants failed to submit an affidavit of someone with personal knowledge of the facts. Further, plaintiffs contend that numerous questions of fact exist with respect to the subject accident. Namely, plaintiffs submit that questions of fact exist as to which lane of traffic the collision occurred; whether the infant plaintiff was on a bicycle or a motorbike; whether defendant/operator failed to properly observe the infant plaintiff and operate her vehicle reasonably and prudently given the presence of children in the area; and whether defendant/operator failed to reduce her speed or take reasonable action to avoid the collision.

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]; *Comms. 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 defendants have 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*). Defendants rely upon affirmations of counsel, and an unsigned, unsworn deposition transcript of defendant NASTASSJA RODRIGUEZ in support of the motion. Counsel's affirmations, made without personal knowledge of the facts, are without any evidentiary value and are 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, defendants failed to establish that the unsigned deposition transcript of defendant 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]), and despite counsel's assertion to the contrary, cannot be used to support a summary judgment motion.

The failure of defendants 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*

GARCED v. RODRIGUEZ
INDEX NO. 21987/2004

FARNETI, J.
PAGE 4

City of New York, 288 AD2d 369 [2001]; *Sipourene v County of Nassau*, 266 AD2d 450 [1999]). Accordingly, this motion by defendants for summary judgment is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: June 19, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court