Palaquibay v Lowman
2007 NY Slip Op 32163(U)
July 6, 2007
Supreme Court, New York County
Docket Number: 0115752/2006
Judge: Deborah A. Kaplan
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SCANNED ON 7/19/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

MARIA PALAQUIBAY

- v -

DEBRA F. LOWMAN

INDEX NO. 115752/06

MOTION DATE 4-25-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 81

The following papers, numbered 1 to 2 were read on this motion by the plaintiff for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	None

Cross-Motion: ▲ Yes ■ No

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As she was crossing the street at the intersection of Amsterdam Avenue and West 141st Street in Manhattan on September 26, 2006, the plaintiff, Maria Palaquibay, was struck by a vehicle owned and operated by the defendant, Debra Lowman. A police report indicates that the defendant stated to an officer at the scene that, while executing a left turn, she was blinded by the sun and did not see the plaintiff crossing the street. The plaintiff commenced the instant action seeking damages for personal injuries she allegedly sustained in the accident. She now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability.

It is well settled that 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 demonstrate the absence of any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). The moving party must demonstrate his or her entitlement to judgment as a matter of law by tendering proof in admissible form. See Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065(1979). If moving party meets that burden, the opposing party, in order to defeat the motion, must come forward with evidentiary proof in admissible form

that would raise a triable issue of fact. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of her motion, the plaintiff proffers the pleadings in this action, her attorney's affirmation, her own affidavit, and the police report which contains the statement attributed to the defendant. In her affidavit, the plaintiff maintains that at the time of impact, she was within the pedestrian crosswalk and the traffic light was in her favor. She alleges that the defendant's vehicle "entered the intersection so suddenly, unexpectedly and without warning that I was unable to avoid being struck." The plaintiff argues that the defendant's statement is admissible on this motion as an admission of a party or admission against interest.

In opposition to the motion, the defendant submits her attorney's affirmation, pleadings and her own affidavit. In her affidavit, the defendant does not deny telling the police she was blinded by the sun and recalls that it was, in fact, a sunny day. She alleges that she had stopped at the intersection and was the first vehicle at the light. After the light turned green, she waited five seconds and looked to her left before turning but did not see any pedestrians. She states that the plaintiff "came from my right" but claims that she did not see her crossing Amsterdam Avenue at any time.

In her affirmation, the defendant's attorney restates the factual assertions contained in the defendant's affidavit and argues that the statement contained in the police report constitutes inadmissible hearsay. Since the attorney claims no personal knowledge of the accident, her affirmation is without probative value on the factual issues presented by this motion. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority, 12 AD3d 316 (1st Dept. 2004). However, she properly asserts legal arguments regarding the admissibility of the defendant's statement.

It is not disputed that the defendant's statement contained in the police report, as an out-of-court statement offered for the truth of the fact asserted therein, constitutes hearsay and must, therefore, fall within one of the exceptions to the hearsay rule in order to be admissible. See generally Prince, Richardson on Evidence, § 8-101et seq. [Farrell 11th ed.]

In the First Department, police reports are admissible as business records

(CPLR 4518[a]) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d392 (1st Dept. 2003); Yeargans v Yeargans, 24 AD2d 280 (1st Dept. 1965). If the information contained in the report came from witnesses not engaged in the police business in the course of which the report was made, or it came from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., supra; Yeargans v Yeargans, supra; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Conners v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). While the driver of an offending vehicle is required to provide the responding police officer with proof of registration of the vehicle (see Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]), he or she has no duty to report the circumstances or the causes of the accident. See Cover v Cohen, 61 NY2d 261 (1984); Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); see also Mooney v Osowiecky, 235 AD2d 603 (3rd Dept. 1997). Indeed, the First Department has consistently held that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980).

The decisional authority relied upon by the plaintiff in arguing that the statement is admissible as an admission (see, Prince, Richardson on Evidence, § 8-2011et seq. [Farrell 11th ed.]), is from the Second Department. See Niyazov v Bradford, 13 AD3d 501 (2nd Dept, 2004);Vaden v Rose, 4 AD3d 468 (2nd Dept. 2004); Kemenyash v McGoey, 306 AD2d 516 (2nd Dept. 2003); Guevara v Zaharakis, 303 AD2d 555 (2nd Dept. 2003); see also Matter of Merchants Insurance Group v Haskins, 11 AD3d 694 (2nd Dept. 2004). As discussed above, the First Department views the issue differently. Accordingly, the defendant's hearsay statement is inadmissible on this motion.

However, even without the defendant's hearsay statement, the plaintiff's proof establishes negligence on the part of the defendant and prima facie

entitlement to judgment as a matter of law. As a pedestrian in a cross-walk who is crossing with a traffic light in her favor, the plaintiff had the right of way. See Vehicle and Traffic Law § 1111. In her own affidavit, the defendant does not dispute the facts asserted by the plaintiff but simply alleges that she never saw her. This submission does not raise any triable issues as to the defendant's liability or the plaintiff's comparative negligence. See Kirchgaessner v Hernandez, 40 AD3d 437 (1st Dept. 2007); Zabusky v Cochran, 2334 AD2d 542 (2nd Dept. 1996).

The defendant argues that the plaintiff's motion is premature since discovery has not been completed. However, in order to succeed on such a claim, the defendant must show that "facts essential to justify opposition [to the motion] may exist but cannot then be stated" without further discovery. CPLR 3212(f). See Downey v Local 46 2nd Holding Company, 34 AD3d 318 (1st Dept. 2006); Denby v Pace University, 294 AD2d 156 (1st Dept. 2002); Schachat v Bell Atlantic Corp., 282 AD2d 329 (1st Dept. 2001). "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." Bailey v New York city Transit Authority, 270 AD2d 156, 157 (1st Dept. 2000); see Auerbach v Bennett, 47 NY2d 619 (1979); Cioe v Petrocelli Electric Co., Inc., 33 AD3d 377 (1st Dept. 2006); Artigas v Renewal Arts Realty Corp., 22 AD2d 327 (1st Dept. 2005). Her conclusory hearsay assertion that an unidentified person at the scene told her that the plaintiff got off a bus and ran across Amsterdam Avenue just before the accident cannot constitute the requisite showing under CPLR 3212(f). Nor does the fact that the parties have not yet been deposed render the motion premature. By failing to raise any triable issues in her opposition papers, the defendant has also failed to show that "facts essential to justify opposition to the motion may emerge upon further discovery." Bailey v NYCTA, supra at 157.

For these reasons, it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED that the parties are to proceed with discovery in regard to the issue of damages and appear for a discovery compliance conference on October 8, 2007, at DCM, 80 Centre Street, N.Y., N.Y. Room 103, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: July 6, 2007

Deborah Kaplan

Deborah A. Kaplan ***J.S.C.***

DEBORAH A. KAPLAN

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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