Matthews v Nunu

2007 NY Slip Op 32332(U)

July 9, 2007

Supreme Court, Queens County

Docket Number: 0009018/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice | Part **10**

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FITZROY MATTHEWS,

Plaintiff,

- against -

DOMINIC NUNU, M.S. MAYLOR-HARRIS, CLIFFORD A. HARRIS, THE CITY OF NEW YORK, AND NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendants.

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Index Number: 9018/05

Motion Date: JUNE 12, 2007

Motion Cal. Number: 18
Motion Seq. No. 2

The following papers numbered 1 to 17 read on this motion by defendants M.S. Maylor-Harris and Clifford A. Harris ("the Harrises") for leave to file a late motion for summary judgment and for summary judgment dismissing the complaint and all cross-claims against said defendants, cross-motion by defendant Dominic Nunu for leave to file a late motion for summary judgment and for summary judgment dismissing the complaint and any cross-claims as against said defendant and cross-motion by defendants City of New York and New York City Department of Transportation ("the City") for an order converting the cross-claims by the City against the Harrises and Nunu into a third-party action.

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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the Harrises for leave to file a late motion for

summary judgment is granted, there appearing no opposition to this branch of the motion. Movants have demonstrated good cause for filing a late motion for summary judgment (see CPLR 3212(a); Brill v. City of New York, 2 NY 3d 648 [2004]).

Plaintiff commenced the underlying action on April 22, 2005. The Harrises interposed an answer on June 15, 2006. Plaintiff filed a note of issue on October 19, 2006. At the time plaintiff filed the note of issue discovery was not complete, as an Independent Medical Examination (IME) of plaintiff remained outstanding. On October 25, 2005, the parties entered into a stipulation, so-ordered by Justice Martin E. Ritholtz, whereby it was agreed that in lieu of defendants making a motion to strike the note of issue, the parties agreed that the matter would remain on the trial calendar pending completion of discovery and that plaintiff would appear for an IME by December 7, 2006. It was further stipulated that summary judgment motions were to be returnable no later than March 17, 2007.

The instant motion was served on March 21, 2007 and initially made returnable on April 12, 2007, rendering it late even pursuant to the stipulation. It is uncontroverted that plaintiff failed to appear for several scheduled IMEs and finally did appear for IMEs on February 5 and 6, 2007. Counsel for the Harrises represents that he promptly prepared the instant motion upon receipt of the IME reports. Although the moving papers fail to include a copy of the IMEs and counsel fails to specify when he received the IME reports, since the Harrises had initially and timely sought to move to vacate the note of issue shortly after same had been filed and since they were induced to refrain from doing and to allow the matter to remain on the trial calendar notwithstanding that there was still outstanding discovery by the promise that plaintiff would comply with their demands for IMEs, and considering the fact that plaintiff was dilatory in complying with the stipulation and that the instant motion was made within a reasonable time after the IMEs were conducted, movants have shown good cause for their delay in making the instant motion. Moreover, there is no opposition to movants' request for leave to file a late motion. Accordingly, the branch of the motion seeking leave to file a late summary judgment motion, pursuant to CPLR 3212(a), is granted.

That branch of the motion for summary judgment as to the issue of liability is granted and the complaint and all cross-claims as against the Harrises is dismissed.

Plaintiff allegedly sustained injuries in an automobile accident on January 27, 2004 when the motor vehicle operated by Nunu and in which plaintiff was a passenger collided with the motor vehicle operated by M.S. Maylor-Harris (hereinafer "Harris") and owned by Clifford Harris at the intersection of 113th Avenue and 207th Street in Queens County.

In his deposition, Nunu testified that he was driving on 207th Street and intended to proceed straight through the intersection with 113th Avenue when the collision occurred. He stated that the first time he saw Harris' vehicle was "two seconds" before the impact and that "by the time I saw her she was hitting me." About 75% of his vehicle had entered the intersection and the front of his vehicle on the driver's side came into contact with the passenger-side middle of Harris' vehicle. Nunu testified that there were no traffic control devices at the intersection. He also testified that there was supposed to be a stop sign governing his travel on 207th Street but that it was missing and that there was only a pole. He did not stop because there was no stop sign, although he subsequently found out that there was supposed to be a stop sign.

Plaintiff, who was a front-seat passenger in Nunu's vehicle, testified in his deposition that he did not recall seeing any traffic control devices governing traffic on 113th Avenue. He did not see Harris' vehicle at any time before the impact. He did not see any traffic control devices on 207 th Street governing the movement of Nunu's vehicle, but opines that there should have been because there was a stop sign on 207th Street on the opposite side of the intersection. He stated that Nunu's vehicle was about half-way into the intersection when the front part of the vehicle came into contact with the passenger side of the other vehicle.

Herbert Stempel, record searcher employed by the City, testified in his deposition that there are no traffic control devices for 113th Avenue at the intersection of 207th Street. He also testified that there was a stop sign installed on 207th Street and that on January 30, 2004, three days after the accident, the City was notified that the stop sign was down. A work crew restored the stop sign on February 4, 2004.

It is undisputed that 113th Avenue had no traffic control devices or signs governing traffic traveling on that thoroughfare at the intersection with 207th Street and that 207th Street has a stop sign governing traffic traveling on that thoroughfare at said intersection (or was supposed to have one). The uncontroverted deposition testimony of Nunu and plaintiff indicates that at the time of the accident, the vehicle operated by Nunu proceeded on 207th Street into the intersection with 113th Avenue without stopping at the stop sign (since said sign was missing) and broadsided the vehicle operated by Harris, which was traveling on 113th Avenue.

As such, movants have made out a prima facie showing that the accident did not result from their negligence(see Jenkins v. Alexander, 9 AD 3d 286 [1st Dept 2004]; Vehicle and Traffic Law §1142 [b]). Movants have thus established their entitlement to summary judgment as a matter of law by proffering uncontested

testimony that the Nunu's movement was supposed to have been governed by a traffic control device and that Harris was struck by Nunu's vehicle after she had entered the intersection (see, Diasparra v. Smith, 253 AD 2d 840 [2nd Dept 1998]; Salenius v. Lisbon, 217 AD 2d 692 [2nd Dept 1995]).

The burden thereupon shifted to the opposing parties to establish any issues of fact so as to preclude the granting of summary judgment (see, Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Plaintiff has not appeared to oppose the instant motion and the remaining defendants have failed to meet their burden. They fail to raise a triable issue of fact as to whether Harris had been comparatively negligent (see, Balanta v. Stanlaine Taxi Corp., 307 AD 2d 1017 [2nd Dept 2003]); Carpio v. Leahy Mechanical Corp., 30 AD 3d 554 [2nd Dept 2006]); Diasparra v. Smith, supra). They neither dispute any of the deposition testimony nor proffer any evidence so as to raise any triable issue of fact as to whether Harris was comparatively negligent.

The affirmation in opposition of Nunu's counsel fails to raise a question of fact. The intersection is not, as counsel characterizes it, an uncontrolled intersection. Rather, it was controlled by a traffic device governing the movement of vehicles traveling on 207th Street. The fact that the stop sign governing Nunu's movement was missing at the time of the accident may bear upon and mitigate Nunu's culpability toward Harris, but it does not affect Harris' duty of care, or lack thereof, to Nunu and his passenger. Since 113th Avenue had no traffic control devices governing Harris' travel while 207th Street was governed by such a device, Harris had the right of way and was not obligated to stop or slow down or anticipate that Nunu's vehicle traveling on 207th Street would not stop.

A driver who has the right of way at an intersection is entitled to rely upon another vehicle to obey traffic signals requiring it to yield and has no duty to watch out for and execute evasive action to avoid being struck by the other vehicle that might fail to stop at the stop sign (see Jenkins v Alexander supra; Cenovski v. Lee, 266 AD 2d 424 [2nd Dept 1999]). That the stop sign governing Nunu's movement on 207th Street was missing merely raises an issue of fact as to the degree of negligence, if any, of Nunu and the City toward plaintiff and the Harrises. It does not raise any question of fact as to whether the Harrises were negligent toward Nunu and plaintiff.

Accordingly, the Harrises are entitled to summary judgment on the issue of liability and the complaint and all cross-claims are dismissed as against them.

Even if there were a question of fact precluding the granting of summary judgment on the issue of liability, the record on this motion demonstrates that plaintiff did not suffer a serious injury as defined by Insurance Law §5102. Therefore, that branch of the motion seeking summary judgment on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is, likewise, granted.

In order to obtain summary judgment, the movant must make a prima facie showing that he is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The Harrises have met their burden. He has submitted evidence, in admissible form, to establish prima facie that plaintiff did not sustain a serious injury (see Insurance Law §5102[a]; Gaddy v. Eyler 79 NY2d 995 [1992]).

Neither movants nor cross-movant annex plaintiff's bill of particulars to their papers. However, plaintiff, in his deposition, testified that he injured his right shoulder and lower back in the accident. He treated with a physical therapist for three months immediately following the accident. When asked why he stopped treating after three months, he stated, "Coverage ran out or whatever, I don't know." He did not receive a letter or any communication apprising him that he would not be covered by insurance any longer. He said that he did not remember. He stated that he went one time for an MRI of his shoulder and lower back and was informed by the doctor, "There was nothing broken, you know, it wasn't a major thing. But I did have some bruising here and there." He was confined to his home for a period of one week, after which, he returned to work full time. When asked whether there was anything he could not do anymore that he used to do before the accident, he stated that he can't play basketball with his son and that he feels his love life has suffered. He stated that he suffered no psychological injuries.

Movants submit an affirmed report of their examining orthopedist, Dr. Israel, dated February 6, 2007, relating full ranges of motion of plaintiff's lumbar spine and shoulders by stating the ranges of motion in degrees and comparing these findings to the normal ranges of motion in degrees. There were no muscle spasms and straight leg raising was negative. The orthopedist's impression was that plaintiff had a resolved sprain of the lumbar spine and left shoulder and opines that plaintiff suffered no disability.

Plaintiff has failed to appear and come forward with any

evidence to demonstrate that he did sustain a serious injury (see Gaddy v. Eyler, supra). No medical proof was proffered that was contemporaneous with the accident showing any initial range of motion restrictions that he sustained in his spine or his shoulder (see Nemchyonok v. Ying, 2AD3d 421 [2nd Dept]; Ifrach v Neiman, 306 AD2d 380 [2nd Dept]; Pajda v Pedone, 303 AD2d 729 [2nd Dept]). Indeed, plaintiff does not oppose the motion and offers no medical proof of injury whatsoever.

Plaintiff's subjective statements in his deposition that he could no longer play basketball and that he "feels" that his love life has suffered fails to raise a question of fact. Although evidence may be considered demonstrating limitations of a qualitative nature, such must be supported by objective medical findings (see Toure v. Avis Rent A Car Systems, 98 NY 2d 345 [2002]).

Cross-motion by Nunu for leave to file a late motion for summary judgment and for summary judgment dismissing the complaint and cross-claims as against him on the ground that plaintiff failed to sustain a serious injury pursuant to Insurance Law §5102 is also granted, there appearing no opposition, for the reasons heretofore stated with respect to the Harrises' motion for the same relief.

Accordingly, the motion and cross-motion for summary judgment are granted and the action and cross-claims as asserted against the Harrises and Nunu are dismissed.

Cross-motion by the City for an order "converting" its cross-claims asserted in its answer against the Harrises and Nunu into a counterclaim is denied.

Dated: July 9, 2007

KEVIN J. KERRIGAN, J.S.C.