

Nunu v Maylor-Harris

2007 NY Slip Op 32333(U)

July 9, 2007

Supreme Court, Queens County

Docket Number: 0009784/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

DOMINIC NUNU,

Plaintiff,

- against -

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

-----X

Index
Number: 9784/05

Motion
Date: JUNE 12, 2007

Motion
Cal. Number: 20
Motion Seq. No. 2

The following papers numbered 1 to 16 read on this motion by defendants M.S. Maylor-Harris and Clifford A. Harris ("the Harrises") for summary judgment dismissing the complaint and all cross-claims against said defendants 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 into a third-party action.

Papers
Numbered

- Notice of Motion-Affirmation-Memo of Law-Exhibits.. 1-5
- Affirmation in Opposition to Motion..... 6-8
- Reply..... 9-10
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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the Harrises for summary judgment as to the issue of liability is granted and the complaint and all cross-claims as against them are dismissed.

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

In his deposition, plaintiff 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. Plaintiff 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.

Matthews, who was a front-seat passenger in plaintiff'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 207th Street governing the movement of plaintiff'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 plaintiff'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 plaintiff and Matthews indicates that at the time of the accident, the vehicle operated by plaintiff 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 plaintiff's movement was supposed to have been governed by a traffic control device and that Harris was struck by plaintiff'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 plaintiff 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 failed to meet his burden. Plaintiff fails 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).

The affirmation in opposition of plaintiff's counsel fails to raise a question of fact. Counsel's contention that there are triable issues of fact as to Harris' negligence because there was no attempt to avoid the accident, see what there was to be seen, what Harris' visibility was, the familiarity of Harris with the accident site and what the speed was of Harris' vehicle and whether it contributed to the accident, are mere speculation insufficient to defeat the granting of summary judgment (see Klein v. Byalik, 1 AD 3d 399 [2nd Dept 2003]). Counsel's contention that the motion must be denied since Harris' deposition has not yet been taken and, therefore, her version of the event has not yet been ascertained, is without merit. Counsel's mere expression of hope that further discovery might reveal something helpful to plaintiff's case is not a basis for denying the motion for summary judgment (see Jorbel v. Kopko, 31 AD 3d 612 [2nd Dept 2006]). In addition, counsel's contention that the motion must be denied since it is neither supported by an affidavit of the Harrises nor by their deposition transcript (as their deposition has not been taken), is without merit. The fact that the Harrises' supporting proof consisted of the deposition testimony of plaintiff, Matthews and Stempel rather than the Harrises' affidavits or deposition testimony does not defeat the Harrises' right to summary judgment (see Olan v. Farrell Lines Incorporated, 64 NY 2d 1092 1985)).

It is uncontroverted that the subject intersection was controlled by a stop sign governing the movement of vehicles traveling on 207th Street and that 113th Avenue was not governed by any traffic control devices. The fact that the stop sign governing plaintiff's movement was missing at the time of the accident may bear upon and mitigate plaintiff's culpability toward Harris, but it does not affect Harris' duty of care, or lack thereof, to

plaintiff. 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 plaintiff'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 plaintiff's movement on 207th Street was missing merely raises an issue of fact as to the degree of negligence, if any, of plaintiff and the City toward the Harrises and of the City toward plaintiff. It does not raise any question of fact as to whether the Harrises were negligent toward plaintiff.

Plaintiff's own deposition testimony and that of Matthews establishes that plaintiff's movement on 207th Street was controlled by a stop sign while Harris' movement on 113th Avenue was not limited by any traffic control devices. Plaintiff failed to stop at the corner, entered the intersection and broadsided Harris' vehicle.

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.

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

Dated: July 9, 2007

KEVIN J. KERRIGAN, J.S.C.