Ingram v NILT, Inc.
2007 NY Slip Op 32405(U)
August 1, 2007
Supreme Court, Suffolk County
Docket Number: 0019930/2005
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX # 19930-05
RETURN DATE: 10-10-06
MOT. SEQ. #001,002,003 & 004

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

PRESENT:
Hon. PETER FOX COHALAN

---x
VEARL INGRAM,

Plaintiff,

-against-

NILT, INC., NANCY E. SIMPSON, MICHAEL S. BURKE and SHAUN M. McKAY,

Defendants.
---x

CALENDAR DATE: February 28, 2007
MNEMONIC: MD; XMG; XMG; XMG

PLTF'S/PET'S ATTORNEY:

Ewall & Ewall
946 Park Ave.
Huntington, NY 11743

DEFT'S/RESP ATTORNEY:

Russo & Apoznanski
Attys for Simpson & Nilt
875 Merrick Ave.
Westbury, NY 11590
Robert P. Tusa, Esq.
Atty for Burke
898 Veterans Memorial Highway
Hauppauge, NY 11788
Stockschlaeder, McDonald & Sules
Attys for McKay
161 William St.
New York, NY 10038

Upon the following papers numbered 1 to 38 read on this motion and cross-motions for discovery and summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-9 ; Notice of Cross-Motion and supporting papers 15-21; 22-30; 39-47; ; Answering Affidavits and supporting papers 10-14; 31-34; Replying Affidavits and supporting papers 35-38; ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that the motion (Seq. #001) by the co-defendant, Nancy E. Simpson, to strike the co-defendant Shaun M. McKay's answer for failure to appear for a deposition is denied as moot; the unopposed cross-motion (Seq. #002) by the plaintiff for summary judgment pursuant to CPLR §3212 on the issue of liability only is granted as to the defendant Nancy E. Simpson and NILT, Inc.; the cross-motion (Seq. #003) by the co-defendant Shaun M. McKay for summary judgment and dismissal of the plaintiff's complaint as against him pursuant to CPLR §3212 is granted and the plaintiff's complaint is dismissed; and the unopposed cross-motion (Seq. #004) by the co-defendant Michael S. Burke seeking the same summary judgment relief and dismissal of the plaintiff's complaint pursuant to CPLR §3211 is also granted and the plaintiff's complaint is dismissed as against Michael S. Burke also.

The plaintiff instituted this action for personal injuries allegedly sustained in a motor vehicle accident which occurred on Friday, November 21, 2003 at approximately 10:00 pm at the intersection of Route 110 (New York Avenue) and Lowndes Avenue in Huntington

Station, Suffolk County on Long Island, New York. Plaintiff was a passenger in the defendant Shaun M. McKay's (hereinafter McKay) vehicle which was stopped in the left northbound lane of Route 110 to make a left turn at the intersection with Lowndes Avenue. The co-defendant, Michael S. Burke, (hereinafter Burke), was stopped directly behind the McKay vehicle and this vehicle was struck in the rear by the co-defendant Nancy E. Simpson (hereinafter Simpson), operating a motor vehicle owned by a Chicago corporation, NILT, Inc.. This impact caused the Burke vehicle to hit the McKay vehicle causing injury to McKay's passenger, the plaintiff, Vearl Ingram. This lawsuit thereafter ensued.

The defendant Simpson now moves for an order dismissing the [plaintiff's complaint (sic)] defendant McKay's answer for the failure of defendant McKay to appear for a court ordered deposition. The plaintiff cross-moves for summary judgment pursuant to CPLR §3212 on liability as against the defendant Simpson, arguing that the co-defendant Simpson was responsible for this three (3) vehicle hit in the rear chain reaction accident because she failed to stop her vehicle. The co-defendants McKay and Burke cross-move for summary judgment and dismissal of plaintiff's complaint and all cross-claims asserted pursuant to CPLR §3212 arguing that Simpson was solely responsible for the happening of this accident because she failed to stop her vehicle and caused it to run into the rear of the stopped Burke vehicle which then hit the rear of the stopped McKay vehicle. The defendant Simpson, opposes the requested relief only as to co-defendant McKay arguing that McKay was partial responsible for happening of this accident.

The defendant Simpson's motion to strike (seq. #001) co-defendant McKay's answer is denied as both moot and on the merits. Simpson's papers move for relief in the nature of a dismissal of McKay's complaint which is a misnomer. Simpson's relief seeks to strike McKay's answer for failure to appear for a deposition. The motion is denied. The plaintiff's requested relief in moving for summary judgment (seq. #002) pursuant to CPLR §3212 on her complaint sounding in negligence arising from this rear end chain reaction motor vehicle accident as against the defendant Simpson is granted in its entirety on the issue of liability only. The cross-motion by co-defendants' McKay and Burke for summary judgment and dismissal of the plaintiff's complaint (seq. #003 & 004) as against them pursuant to CPLR §3212 in this multi-vehicle rear end collision motor vehicle accident is hereby granted and the plaintiff's action as well as any cross-claims between and among the defendants is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy 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. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

While summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). Thus, although summary judgment is a rare event in negligence actions, a party is entitled to such relief where the accident occurred, the offending defendant's conduct fell far below any permissible standard of due care and the movants' conduct was not really involved. ***O'Callaghan v. Flitter***, 112 AD2d 1030, 493 NYS2d 28 (2nd Dept. 1985); ***Donadio v. Crouse-Irving Memorial Hospital***, 75 AD2d 715, 427 NYS2d 8 (4th Dept. 1980);but see, ***Kutanovski v. DeCicco***, 122 AD2d 250, 505 NYS2d 175 (2nd Dept. 1986). Rarity notwithstanding, summary judgment will result when a party cannot raise a factual issue for trial. ***Sun Yau Ko et al. v. Lincoln Savings Bank***, 99 AD2d 943, 473 NYS2d 397 (1st Dept. 1984).

In the instant matter, neither the plaintiff's conduct as a passenger in the McKay vehicle nor the conduct of McKay or Burke, whose vehicles were stopped at the time, were involved when their vehicles were both struck in the rear through the actions of the Simpson vehicle. The plaintiff, as a passenger, did not contribute to the happening of this accident. While negligence actions do not generally lend themselves to resolution by motion for summary judgment, such a motion will be granted where the facts clearly point to the

negligence of one party without any culpable conduct by the other. ***Barnes v. Lee***, 158 AD2d 414, 551 NYS2d 247 (1st Dept. 1990). When a driver approaches another vehicle from the rear, she is bound to maintain a reasonably safe rate of speed, to maintain control of her vehicle, and to use reasonable care to avoid colliding with another vehicle. ***Young v. City of New York***, 113 Ad2d 833, 493 NYS2d 585 (2nd Dept. 1985). Absent some excuse, it is negligence as a matter of law if a stopped vehicle is hit from the rear. ***Hatzis v. Belliard***, 13 AD3d 106, 786 NYS2d 40 (1st Dept. 2004); ***McNulty Depetro***, 298 AD2d 566, 750 NYS2d 89 (2nd Dept. 2002); ***Cerda v. Parsley***, 273 AD2d 339, 709 NYS2d 585 (2nd Dept. 2000).

Simpson's attempt to suggest a factual issue that the McKay vehicle caused this accident because the McKay vehicle cut in front of the Burke vehicle to make a left turn and that this action somehow contributed to the happening of this accident is unavailing. The defendant Simpson ignores the fact that notwithstanding the movement of the McKay vehicle in front of the Burke vehicle to thereafter make a left turn, Burke was able to stop his vehicle and avoid striking the McKay vehicle. Simpson's own testimony is equivocal in that she stated she saw a vehicle and "it seems to me almost like he cut Mr. Burke off," yet she observed the Burke vehicle's brake lights come on and the vehicle slowing down. Simpson claims she was unable to stop her vehicle. However, Ingram, the passenger in the McKay vehicle, testified that McKay moved his vehicle to the left in front of the Burke vehicle and gradually brought it to a stop and Burke testified that he brought his vehicle to a stop behind the McKay vehicle and it was then struck by the Simpson vehicle.

In a recent case decided in this Department involving a similar fact pattern, the Appellate Court in ***Tutrani v. County of Suffolk***, AD3d , NYS2d (2nd Dept. 2007) reported in N.Y.L.J., July 23, 2007 p.28, col. 5 found that the police vehicle was not partially responsible for the happening of the accident where the plaintiff was able to stop his vehicle before it was hit in the rear by another vehicle, even though it was alleged the police vehicle made an abrupt stop. The Court stated in its opinion:

> "However, in view of the evidence that the plaintiff was able to come to a complete stop without hitting Officer Weidl's vehicle, Officer Weidl was not the proximate cause of the collision between the plaintiff's vehicle and Darlene Maldonado's vehicle (see ***Hyeon Hee Park v. Hi Taek Kim***, 37 AD3d 416; ***Good v. Atkins***, 17 AD3d 315; ***Leijkowski v. Siedlarz***, 2 AD3d 791; ***McNeil v. Sandiford***, 270 AD2d 467; ***Lehmann v. Sheaves***, 231 AD2d 687; ***Chamberlin v. Suffolk County Labor Dept.***, 221 AD2d 580).

Here, in the case at bar, Burke's vehicle was able to come to a complete stop in back of the McKay vehicle, yet Simpson claims she was unable to stop her vehicle suggesting that Simpson was responsible for this accident either through inattentiveness or because she followed too closely behind the Burke vehicle in front of her vehicle. Under the facts and

circumstances of this case, Burke's ability to stop his vehicle behind the McKay vehicle and Simpson's failure to stop her vehicle establishes Simpson's sole liability for the happening of this accident. See, ***Calabrese v. Kennedy***, 28 AD3d 505, 813 NYS2d 202 (2nd Dept. 2006).

There is no support in the record or under the fact pattern presented to support counsel for the defendant Simpson's claim of a possible factual issue existing for trial that the plaintiff passenger or the co-defendants McKay and/or Burke somehow caused, contributed or were partially responsible for the happening of this accident. In fact, it is clear that McKay proceeded to move in front of the Burke vehicle and then proceeded to stop to make a left turn and that the Burke vehicle stopped behind the McKay vehicle when it was struck in the rear by the Simpson vehicle which did not stop. The failure to oppose Burke's cross-motion or rebut Burke's statements that he came to a complete stop behind McKay lends little support to Simpson's argument that McKay was partially responsible for the happening of this accident and fails to show that the McKay vehicle was the proximate cause of this accident.

A shadowy semblance of an issue, or bald conclusory assertions, expressions of hope or unsubstantiated allegations is insufficient to defeat a motion for summary judgment [***V. Savino Oil & Heating Co. Inc. v. Rana Management***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Mayer v. McBrunigan Construction Corp.***, 105 AD2d 774, 481 NYS2d 719 (2nd Dept. 1984) as is an affirmation of an attorney without first hand knowledge which lacks probative force. ***McDermott v. South Farmingdale Water District***, 167 AD2d 517, 562 NYS2d 191 (2nd Dept. 1990). The defendant, Simpson, has failed to raise a factual issue to warrant denial of either the plaintiff/passenger, Ingram's request for summary disposition on liability as against Simpson or the co-defendants McKay and Burke's request for dismissal of plaintiff's complaint as against them and the cross claims asserted in this rear end collision between the plaintiff's and defendants' vehicles.

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the

> remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, the plaintiff's motion for summary judgment pursuant to CPLR §3212 is hereby granted on the issue of liability only as against the defendant Simpson and the matter will be set down at a time to be determined by the parties pursuant to the rules of this Court for certification for trial on the issue of damages only. See, ***N.Y. Civil Practice***, Weinstein, Korn & Miller §3212.15. The cross-motions by co-defendants McKay and Burke, for summary judgment and dismissal of the plaintiff's complaint as against them as well as all cross-claims asserted pursuant to CPLR §3212 in this three (3) vehicle rear end collision motor vehicle accident are hereby granted and the plaintiff's action and any cross-claims asserted are dismissed as against the moving defendants. The defendant Simpson's motion to strike co-defendant McKay's answer is denied.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: August 1, 2007

J.S.C.