Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

LAWRENCE J. TRIOLO,

Plaintiff,

-against-

SEAFORD BRUSHLESS CAR WASH and FREDDIE GUANCIN,

Defendant.

Index No. 15022/05

Motion Seq. No.: 003, 004
Motion Submitted: 9/26/07

The following papers read upon this Motion:

Notice of Motion.....X
Notice of Cross Motion.....X
Answering Papers.....X
Reply.....X

Under motion sequence number three the defendant moves this court for an order vacating the note of issue and striking this case from the trial calendar due to the fact that there is outstanding discovery that needs to be completed. Under motion sequence four the plaintiff moves this court for an order granting summary judgement in its favor on the issue of liability.

The action before the court is an action for personal injuries allegedly sustained by the plaintiff on May 4, 2004, when he was struck by his own motor vehicle which was being

driven by the defendant Freddie Guancin (hereinafter "Guancin"), an employee of defendant, Seaford Brushless Car Wash (hereinafter "Seaford Brushless").

The action was commenced by the filing of a Summons and Verified Complaint on or about September 21, 2005. The action was joined by the service of an Answer on behalf of both defendants on November 29, 2005. A preliminary conference was held in this matter on March 1, 2006, and an Order was issued directing all parties appear for depositions on April 12, 2006 at the Nassau County Supreme Courthouse. Defendants failed to produce the defendant, Guancin on that date. On May 12, 2006 all sides appeared for a compliance conference before the court (Jaeger, J.) and a second Order was issued directing the defendants produce their witness for deposition on May 16, 2006. Defendants failed to produce their witness on May 16, 2006. Subsequently, the parties agreed among themselves for Guancin to be deposed on June 28, 2006. Defendants again were unable to produce Guancin or any other witness to the alleged accident. The parties appeared before this court (Murphy, J.) on October 6, 2006 for a certification conference. At that time the court certified the case as ready for trial and directed the plaintiff to file his Note of Issue within 90 days of the Order. Plaintiff complied with the court's directive and filed the Note of Issue and Certificate of Readiness on or about October 18, 2006.

The plaintiff points to the fact that defendants have been unable to offer any testimony in this matter and they conclude that the court should grant summary judgment in their favor because, according to plaintiff, his uncontradicted testimony establishes his entitlement to summary judgment on the issue of liability and that there is no genuine triable issue of fact

to be resolved at trial regarding liability. Defendant opposes plaintiff's position on summary judgment and in fact wants this court to vacate the Note of Issue and Certificate of Readiness because "discovery remains outstanding, and the filing of the Note of Issue was premature in this matter". Defendants insist that because the plaintiff has yet to appear for physical examinations which, according to defendants, were designated by defendants' prior to the filing of the Note of Issue that "all necessary and proper preliminary proceedings" referred to in the certificate of readiness have not actually been completed. They argue that because the statement in the certificate of readiness is not accurate, that the Note of Issue should be vacated and the action should be struck from the trial calendar.

The court agrees that the uncontradicted testimony of the plaintiff establishes his entitlement to summary judgment as a matter of law on the issue of liability. Plaintiff has previously testified that he was involved in an accident on May 4, 2004, when he was struck by his own vehicle which at the time was being driven by defendant Guancin, an employee of the defendant Seaford Brushless. Plaintiff also testified he turned his car over to the employees of the car wash, went inside the car wash office to pay, and exited through the front of the car wash office. He further testified that he made a right when he exited the car wash office and proceeded on the sidewalk towards the area where the cars were being dried. The accident occurred when the vehicle was being driven out of the wash tunnel and into the drying area by the defendant Guancin.

Summary judgment is a drastic remedy and should be reserved for situations where there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361). Once the movant

has made a showing of an entitlement to summary judgment, the burden then shifts to the party opposing summary judgment to demonstrate the existence of a triable issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320; *Winegrad v. New York University Medical Center*, 64 NY2d 851). In the present matter, the plaintiff has established that he turned his car over to be washed and that somehow he was run over by his car while on the sidewalk in front of Seaford Brushless by an employee of Seaford Brushless who was driving his car from the wash portion of the car wash to the drying area. The defendants have thus far been unable to produce any witness to the event which would be able to advance an alternative theory or version of events.

Now, more than two years after the event their lawyer is advancing arguments regarding pictures and what they show. "As can be seen from the photographs, the plaintiff clearly passed the chains erected by the exit and walked directly in front of the mouth or exit of the car wash, knowing that at least his own vehicle should be exiting. Plaintiff should not have passed the chains without observing the exit of the car wash." "As he did not see his vehicle prior to being struck by it, he clearly did not look even though he knowingly was passing in front of an exit to the car wash and past the chains which are clearly erected for a warning". All of that may be clear to the attorney for the defendant, but it is not clear to the court. Her speculation and assertions of what the plaintiff "clearly passed"; "clearly did not look at "; and that "the chains are clearly erected for a warning" (Malone Affirmation in Opp. Pages 4-5) are a transparent attempt to present the court with a fact witness which the defense obviously lacks in this case. There has been no witness produced for the defendants

in three attempts and clearly if the defendants had one they would have presented this person at this point. Unfortunately, counsel for the defendants' is not that witness and her affirmation has no evidentiary value (*see Bahlkow v. Greenberg*, 185 AD2d 829; *Grosvenor v. Niemand Brothers*, 149 AD2d 459). The pictures she refers to, which appear to be part of a response to a demand for discovery are not useful to the court because defense counsel was not present on the date of the accident and cannot lay the proper foundation regarding the pictures and whether they are a fair and accurate representation of the Seaford Brushless Car Wash on the date of the accident.

In addition, defense counsel's attempt to argue the plaintiff did not make a prima facie showing regarding the fact that defendant, Guancin was the operator of the vehicle fails by defendants own admissions. "Defendants deny each and every allegation set forth in paragraph designated "28" of the complaint herein, except defendants admit that on May 4, 2004, Freddie Guancin was driving a motor vehicle bearing New York State registration number CVJ4863" (Defendants' Answer ¶ 15). "Defendants deny each and every allegation set forth in paragraph designated "31" of the complaint herein, except defendants admit that on May 4, 2004, Freddie Guancin operated the aforementioned motor vehicle with (sic) the scope of his employment" (Defendants' Answer ¶ 18).

Ultimately, the court must accept the uncontradicted testimony presented by the plaintiff. It is undisputed that the defendant, Guancin, while driving the plaintiff's vehicle out of the car wash tunnel, stuck the plaintiff as he was proceeding from the office to the drying area to retrieve his car. Under these circumstances the court has no alternative but

to grant summary judgement on the issue of liability against defendants.

As for defendants' motion to vacate the Note of Issue, that motion is granted. It appears to the court that the plaintiff served an amended Bill of Particulars merely days before the filing of the Note of Issue and Certificate of Readiness. It is clear to the court that this case was certified ready for trial on May 12, 2006 over the objection of at least one counsel and that counsel for plaintiff had no choice but to comply with the court's order and file the Note of Issue. It is also clear to the court that there is no valid reason to deny the defendant's the IME's they are entitled to and that the defendants properly designated both an orthopedic and neurologist prior to the plaintiff filing the Note of Issue. Plaintiff is directed to turn over the outstanding medical reports of his treating physicians pursuant to 22 NYCRR 202.17(b) within thirty days of this order. Thereafter, plaintiff is directed to appear for physical examinations with the designated neurologist and orthopedic within forty five days of this order.

All parties are directed to appear for a discovery conference before this court on March 1, 2008.

Dated: December 29, 2007
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.