

Van Den Berg v Moss

2008 NY Slip Op 32039(U)

July 11, 2008

Supreme Court, Nassau County

Docket Number: 2971-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**JOSEPHUS A VAN DEN BERG, as Administrator
of the Estate of ANTONIA C. BRANCIA, deceased,
and JOSEF A. VAN DEN BERG, individually,**

Plaintiff,

-against-

JEFF B. MOSS AND LISA C.J. KEYES,

Defendants

-----x
**JULIE TUIFEL, JUDITH TUIFEL, INFANT BY
MOTHER AND NATURAL GUARDIAN, JULIE
TUIFEL AND ALLISON TUIFEL, BY MOTHER
AND NATURAL GUARDIAN, JULIE TUIFEL,**

Plaintiff,

-against-

**LISA C.J. KEYES, JEFF B. MOSS, SJEF A.
VANDENBERG, MARCIA E. SCHUCK, STEVEN
J. DELORENZ, TALISMAN & DELORENZ, P.C.,
DARWIN H. ACOSTA and WALTER ACOSTA,**

Defendants.

-----x

TRIAL TERM PART: 48

Index No. 012971/07

Action No. 2

Action No. 3

INDEX NO.: 22087/07

**MOTION DATE: 4-16-08
SUBMIT DATE: 7-2-08
SEQ. NUMBER - 001**

**MOTION DATE: 5-9-08
SUBMIT DATE: 7-2-08
SEQ. NUMBERS - 002 &
003**

**MOTION DATE: 7-2-08
SUBMIT DATE: 7-2-08
SEQ. NUMBER - 004**

**STEVEN DELORENZ AND KIMBERLY
DELORENZ,**

Plaintiffs,

**Index No. 020253/07
Action No. 4**

-against-

**JEFF MOSS, LISA C.J. KEYES, SJEF
VANDENBERG and MARCIA SCHUCK,**

Defendants.

-----X

The following papers have been read on this motion:

Notice of Motion, dated 3-24-08.....1
Notice of Motion, dated 4-21-08.....2
Notice of Cross Motion, dated 5-5-08.....3
Notice of Cross Motion, dated 5-16-08.....4
Affirmation in Opposition, dated 5-8-08.....5
Reply Affirmation, dated 6-27-08.....6
Reply Affirmation, dated 7-1-08.....7

Action No. 1 Index No. 010091/07, Schuck v. Keyes, et al, has previously been discontinued.

The motions for summary judgment pursuant to CPLR §3212 by defendants (i) DeLorenz and Talisman and Delorenz, P.C., (Seq. 1), (ii) the Acosta’s (Seq. 2), (iii) Schuck (Seq. 3) and (iv) Vandenberg (Seq. 4) are granted, all complaints and cross claims against said defendants are dismissed.

In addition, on a search of the record, the Court grants summary judgment on the issue of fault and liability only and not as to serious injury (*See Zecca v. Riccardelli*, 293 AD2d 31 [2d Dept. 2002]) to the Vandenberg plaintiffs in Action No. 2 against defendants Moss

and Keyes and the Delorenz plaintiffs in Action No. 4 as to defendants Moss and Keyes. Summary judgment has not been granted in favor of the non-moving Tuifel plaintiffs because their attorney has opposed the above motions and has not requested or moved for summary judgment.

Pursuant to CPLR § 3212(b), a court may search the record and award summary judgment to a party other than the moving party, without necessity of a cross motion, provided that the grant of such summary judgment is with respect to a cause of action or issue that is the subject of the motion before the court. *Dunham v. Hilco Construction Company, Inc.*, 89 NY2d 425 (1996), *Geoffrey S. Matherson & Associates, Ltd. v. Siegler*, 305 AD2d 457 (2d Dept. 2003). Pursuant to the foregoing authority, the court has searched the record and grants summary judgment to the Vandenberg and the DeLorenz plaintiffs against the Moss and Keyes defendants on the issue of liability only.

As a result of the foregoing, Action No. 2 and Action No. 4 continue as to the issues of damages, Action No. 3 continues as to defendant Keyes and Moss only, all other defendants in said action having been granted summary judgment, Action No. 4 continues as against defendants Moss and Keyes only with summary judgment granted in favor of defendant Vandenberg. By a previous decision of this Court dated July 7, 2008, summary judgment has been granted in favor of defendant Schuck in Action No. 4.

This is an action arising out of a multivehicle accident that occurred on May 12, 2007 on Glen Cove Road at its intersection with Glen Head Road, Nassau County, New York. The Tuifel plaintiffs were the lead vehicle stopped for a traffic light followed by the Acosta,

DeLorenz, Schuck and Vandenberg vehicles in that order, all stopped for the same light. The Moss/Keyes vehicle struck the Vandenberg vehicle in the rear beginning a chain reaction that culminated with the Acosta vehicle striking the rear of the vehicle of the Tuifel plaintiffs.

On a motion for summary judgement the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgement in its favor as a matter of law (see *Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). “The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material question of fact” (*Frank Corp. v. Federal Ins. Co.*, supra at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, supra at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *Frank Corp. v. Federal Ins. Co.*, supra).

Further, to grant summary judgement, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. See *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept, 1989).

The submissions in support of the motions establish entitlement to the judgements as granted above, thus shifting the burden to those opposing to rebut the motion by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NYS2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers*,

Inc., 46 NY2d 1065 (1979). Here the Tuifel plaintiffs have failed to establish the existence of triable issues of fact.

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision. Under these circumstances, where a stopping vehicle is rear ended and propelled into the vehicle in front of it, such facts provide a non-negligent explanation sufficient to relieve the operator of the stopping vehicle from liability.” *Katz v. Masada II Car & Limoservice, Inc.*, 43 AD3d 876, 877 (2d Dept. 2007).

Based upon the record, the Court finds no material fact issues requiring a trial with respect to the involvement of the parties in the cause of the accident. There are no triable issues of fact regarding the actions of the parties. No one disputes that the accident was caused when the Vandenberg vehicle was struck in the rear by the Moss/Keyes vehicle which in turn struck the vehicle ahead until the Acosta vehicle struck the lead Tuifel car.

In opposition the Tuifel plaintiffs have not submitted any affidavit but have submitted an affirmation of an attorney which fails to rely on any personal knowledge or on any documentation. This affirmation as well as the affirmations of other counsel are lacking in evidentiary value. *Feratovic v. Lun Wah, Inc.*, 284 Ad2d 368 (3rd Dept. 2001). Further, there has been no opposition submitted by defendants Moss and Keyes who are defendants in all three of the above actions.

Counsel for the Tuifel plaintiffs also argues that the motion is premature as depositions have not yet been held. This contention lacks merit. The belief that additional discovery might reveal something helpful to a litigant does not provide a basis for postponing a determination of summary judgement. See, CPLR § 3212 (f), *Morissant v. Raemer Corp.*,

271 AD2d 586 (2d Dept. 2000). The contention that summary judgment should be denied because depositions are incomplete is insufficient to deny these summary judgments. To defeat a motion for summary judgment pursuant to CPLR 3212(f), a party claiming ignorance of critical facts must demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover facts which would give rise to a triable issue, *Lumbsy v. Gershwin Theater*, 282 AD2d 578 (2d Dept. 2001) mere hope is not sufficient *Lightfoot v. City of New York*, 279 AD2d (2d Dept. 2001). The Tuifel plaintiffs have failed to make any evidentiary showing to support the conclusion that there may be facts available that would defeat the motions and speculation or conjecture is insufficient. *Falkowitz v. Peters*, 294 AD2d 330 (2d Dept. 2002); *Firth v. State*, 287 AD2d 771 (3d Dept. 2001). Viewing the evidence in the light most favorable to the opposing party and according the opponent every reasonable inference, the Court finds that a jury could not find negligence in the part of the moving defendants or the non-moving plaintiffs as noted above. The following vehicle is under a duty to maintain safe distances between its vehicle and the vehicles operated ahead. (See Vehicle and Traffic Law § 1129 [a]).

The Court has not considered the police accident report attached to the moving papers because it is hearsay and inadmissible unless a hearsay exception applies. *Liquori v. City of New York*, 250 AD2d 738 (2nd Dept. 1998).

Having found no material of issues of fact, summary judgement is granted as set forth above.

The new caption is as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

**JOSEPHUS A VAN DEN BERG, as Administrator
of the Estate of ANTONIA C. BRANCIA, deceased,
and JOSEF A. VAN DEN BERG, individually,**

Index No. 012971/07

Plaintiff,

Action No. 2

-against-

JEFF B. MOSS AND LISA C.J. KEYES,

Defendants

-----X

**JULIE TUIFEL, JUDITH TUIFEL, INFANT BY
MOTHER AND NATURAL GUARDIAN, JULIE
TUIFEL AND ALLISON TUIFEL, BY MOTHER
AND NATURAL GUARDIAN, JULIE TUIFEL,**

Action No. 3

Plaintiff,

INDEX NO.: 22087/07

-against-

LISA C.J. KEYES, JEFF B. MOSS,

Defendants.

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**STEVEN DELORENZ AND KIMBERLY
DELORENZ,**

Index No. 020253/07

Plaintiffs,

Action No. 4

-against-

JEFF MOSS, LISA C.J. KEYES,

Defendants.

-----X

All parties are reminded of the scheduled conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on July 23, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 11, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

TO: Litman & Litman, P.C.
Attorneys for Plaintiffs Tuifel in Action No. 3
299 Broadway, Ste. 220
New York, NY 10007

Thomas G. Nolan, Esq.
Attorney for Plaintiff Vandenberg in Action No. 2
Union Square, P.O. Box 286
Aquabogue, NY 11931

Hawkins Feretic & Daly, LLC
By: James M. Merlino, Esq.
Attorneys for Defendants Steven J. Delorenz and Talisman &
Delorenz, P.C. Action No. 3
11 Broadway, 3rd Floor
New York, NY 10004

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Quirk & Bakalor, P.C.
Attorneys for Defendants Lisa C.J. Keyes and Jeff B. Moss all actions
845 Third Avenue
New York, NY 10022

Law Office of Robert P. Tusa, Esq.
Attorneys for Defendant Sjeff A. Vandenberg Action No. 3
1225 Franklin Avenue Ste. 500
Garden City, NY 11530

Martyn, Toher & Martyn
Attorneys for Defendant Marcia E. Schuck Action No. 3
330 Old Country Road
Mineola, NY 11501

Rivkin Radler, LLP
Attorneys for Defendants Darwin H. Acosta and Walter Acosta Action No. 3
EAB Plaza
Uniondale, NY 11566

Talisman & Delorenz, P.C.
Attorneys for Plaintiffs in Action No. 4
409 Fulton Street
Brooklyn, NY 11201