

Dattillo v Best Transp. Inc.

2009 NY Slip Op 31717(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 107350/06

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

TONI ANN DATTILLO, as ADMINISRATRIRIX
OF THE ESTATE OF SALVATORE DATTILLO,
Plaintiff,

INDEX NO. 107350/06

- v -

MOTION DATE _____

BEST TRANSPORTATION INCORPORATED
INTERPOOL/TITLEING/ ACQUISITION LLC,
MARGARITA L. ORTEGA-ALVAREZ, TERRELL
SHARAF A WORLEY, and MARGARITA A .
GUAMAN,

MOTION SEQ. NO. 002

MOTION CAL. NO. 27

Defendants.

The following papers, numbered 1 to 4 were read on the motion by defendants Best
Transportation Inc., Terrell Sharafa Worley and Interpol and cross motion by defendants Margarita
L. Ortega Alvarez and Margarita Guaman for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo)	<u>3</u>
Replying Affidavits (Reply Memo)	<u>4</u>

Cross-Motion: Yes No

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

On June 24th, 2004, at approximately 9:30 a.m., Salvatore Dattillo ("plaintiff") was killed
in a multi-vehicle collision while operating a motorcycle on the upper level of the George
Washington Bridge. The collision involved a motor vehicle owned by defendant Margarita A.
Guaman, a passenger in the vehicle, and operated by defendant Magarita L. Ortega-Alvarez
("Guaman defendants"); and a tractor-trailer (hauling a 20 foot container) operated by
defendant Terell Sharafa Worley (a commercial truck driver) and owned by defendants Best
Transportation Incorporated and Interpool/Titleing/ Acquisition, LLC. ("BTI defendants").

On May 26, 2006, Toni Ann Dattillo, the authorized administrator of the estate of
decedent Salvatore Dattillo, commenced this action, to recover damages for alleged personal

injuries suffered as a result of the subject motor vehicle accident. Note of Issue was filed on December 21, 2007. The BTI defendants now move on February 20, 2009 for an order pursuant to CPLR § 3212, granting summary judgment on the issue of liability. Guaman defendants cross moved on March 25, 2009 for the same relief adopting the BTI defendants motion papers. The plaintiff files his answer to all the defendants' motions on or about March 29, 2008 in a single submission. The BTI defendants filed a rely after April 9, 2008.

FACTS

The upper level of the George Washington Bridge ("GWB") is a major four lane highway that spans the Hudson River between New Jersey and New York State. On the subject day, the road conditions were dry and clear and the posted speed limit was 45 miles per hour¹, subject to the post rush hour traffic speed. On the day of the accident, the plaintiff accompanied by his friend, Francis Hohwald (hereafter referred to as "friend"), both on motorcycles, were traveling together northbound on the GWB beyond the pay toll booths on the New Jersey side. Plaintiff and friend were traveling behind the BTI defendants' tractor-trailer², traveling in the far left lane, the roadway barrier to their left and an adjacent traffic lane to the right. Thereafter both motorcycles moved into the adjacent right lane and were passing the BTI tractor-trailer, now to their left. Ahead of them in the same adjacent right lane were the Guaman defendants traveling at approximately 30-35 miles per hour moving with the flow of traffic. The friend moved his motorcycle into an adjacent lane and did not strike the Guaman defendants or the BTI defendants' vehicles. Plaintiff struck the left side rear-end of the Guaman defendants' vehicles and his body and motorcycle was projected into the adjacent left lane where they were struck by the BTI defendants' tractor-trailer. The defendant Worley, operating the BTI defendants'

¹See 21 NYCRR 1202.1; 21 NY ADC 1202.1.

²See Worley Deposition p. 25, line 4.

tractor trailer stated he thought the speed limit was 50 miles per hour³ and was traveling at approximately between 50-55 miles per hour⁴, when he saw the plaintiff's body projected towards him. He further stated he immediately applied his brakes but was unable to prevent the collision with the plaintiff and his motorcycle. Plaintiff was killed by the subject accident collision.

SUMMARY JUDGEMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1st Dept 2002]; *Silverman v. Perlbiner*, 762 NY2d 386 [1st Dept 2003]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York, supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate by admissible evidence the existence of a triable issue of fact, or to tender an acceptable excuse for his or her

³See Worley Deposition p. 24, line 12-15.

⁴See Worley Deposition p. 20, line 10.

failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, 765 NYS2d 326 [1 Dept 2003]).

DISCUSSION

In support of BTI defendants' motion, they submit, *inter alia*, a copy of the pleadings, the uncertified Port Authority Police Accident Investigation report and the deposition testimonies of defendants Terrell Worley, co-defendants Margarita A. Guaman and Magarita L. Ortega-Alvarez, plaintiff Toni Ann Dattillo, as Administratrix of the Estate of Salvatore Dattillo, and non-party witnesses Francis Hohwald. In support of their cross claim, Guaman defendants offer their attorney's affirmation and relies and refers to the BTI defendants exhibits and submissions. BTI defendants also submit in reply, the deposition testimonies of Police Officers Michael Teel and Anthony Fajardo, Certified Accident Investigators for the Port Authority of New York and New Jersey.

In opposition, plaintiff submits their attorney's affirmation and portions of an alleged Port Authority Police document, which indicates that the maximum speed limit on the George Washington bridge is 45 miles per hour and the minimum is 20 miles per hour.

The uncertified Port Authority Police Accident Report has no probative value here to indicate evidence of the parties liability. "A motion for summary judgment will not be granted if it depends on proof that would be inadmissible at trial" (*see* CPLR § 3212; C3212:18; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009] [an uncertified police accident report was held inadmissible at trial]). Moreover, the uncertified Port Authority Police Accident report police is also inadmissible to indicate a parties liability because the police officer who prepared the report was not an eyewitness to the accident, and thus, it constitutes hearsay. (*See Ann Connors v. Duck's Cesspool Services, Ltd.*, 144 AD 2d 329 [1st Dept 1988]; *Figuroa v Luna*, 721 NY2d 635 [1 Dept 2001]; *Murray v Donlan*, 433 NY2d 184 [1st Dept 1980]). This is distinguishable

from a certified copy of a police accident report made in an admissible form pursuant to CPLR § 4520, which can be considered in deciding summary judgment motions, and from a defendant's admission or spontaneous utterances which are exceptions to the hearsay rule (see CPLR § 4520; *Voskin v Lemel*, 52 AD3d 503; 859 NYS2d 489 [2nd Dept 2008]); or a certified copy of a police accident report offered pursuant to CPLR § 4518.

In addition, the defendants' deposition testimonies of police officers Michael Teel and Anthony Fajardo are admissible only as rebuttal evidence or what would be permissible in a reply submission. The defendants cannot proffer *prime facie* evidence in a reply submission. A party may not introduce new arguments for the first time in reply papers as this deprives the non-moving party of the opportunity to respond to the facts or arguments set forth for the first time in a reply affidavit (See *McNair v Lee*, 24 AD3d 159 [1st Dept 2005]; *Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250 [1st Dept 2002]).

The Courts notes that Note of Issue and Certificate of Trial Readiness attesting that discovery was completed was filed on December 21, 2007. Defendants fail to proffer any reason why these police officer depositions could not have been completed before Note of Issue, or the filing BTI defendants' summary judgment motion, or offered in an amended notice of motion. Moreover, the defendants could have requested additional time from the Court or moved to vacate the Note of Issue in order to provide them the opportunity to present the depositions on their *prime facie* case. In addition, Guaman co-defendants could have offered these depositions on their direct case for summary judgment. Nonetheless, BTI defendants' summary judgment motion on liability (filed on February 20, 2009) automatically precluded the two police officers' depositions in the absence of a court order (see CPLR 3214(b)⁵)

⁵ CPLR 3214(b). Stay of disclosure. Service of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise. If the motion is based solely on the defense that the summons and complaint, summons with notice, or notice of petition and petition was not properly served, disclosure shall not be stayed unless the court orders otherwise.

Based upon the defendants' admissible *prime facie* evidence, they have established *prime facie* that the accident was caused by the plaintiff's rear-end collision with the Guaman defendants' vehicle and an emergency situation confronted the BTI defendants which exculpates their liability. A driver traveling behind another vehicle has a duty to maintain a safe distance behind the front vehicle, whether it is moving or stopped, to avoid a rear end collision in the event the front vehicle slows down or stops, or even suddenly stops (see New York Vehicle & Traffic Law (VTL) § 1129(a); *Woodley v. Ramirez*, supra at 452; *Mullen v. Rigor*, 8 AD3d 104; *Malone v. Morillo*, 6 AD3d 324, 325 [1st Dep't 2004]; *Figuroa v. Luna*, 281 A.D.2d 204, 206 [1st Dep't 2001]).

In addition, BTI Defendants have met their initial burden of establishing their entitlement to summary judgment by submitting evidence that defendant Worley, operating the tractor-trailer was confronted with an emergency (see *Coleman v Maclas*, supra at 569, [1st Dept 2009]; *Rivera v New York City Transit. Authority*, 77 NY2d 322, 326-327, 567 NYS2d 629 [1991]). He proffers that he was confronted with an emergency situation when the plaintiff's vehicle rear-end defendants Guaman's vehicle in the adjacent lane and propelled plaintiff's body and motorcycle unexpectedly into his lane and under his vehicle leaving him with no alternative to avoid the collision. Moreover, defendant Worley was hampered in his efforts to avoid striking plaintiff and his motorcycle due to the location of a road barrier to his right and automobile traffic to his left. (see *Zuckerman*, supra at 562).

In opposition, plaintiff argues that defendant Worley's excessive speed in the adjacent lane made it unsafe for plaintiff to change lanes (to the left). Thus, defendant Worley was responsible for plaintiff's rear-end collision with defendants Guaman and Ortega's vehicle. In addition, plaintiff argues, that Guaman and Ortega's slow speed may have contributed to the rear end accident.

Again, it is well settled that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, so as to avoid collisions, and taking into account the weather and road conditions and that a rear-end collision with a traveling or stopped vehicle establishes a *prima facie* case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for such accident (*Woodley v Ramirez*, 25 AD3d 451, 452 [1st Dep't 2006]; *Garcia v Bakemark Ingredients Inc.*, 797 NY2d 467 [1 Dept 2005], quoting *Johnson v Phillips*, 690 NYS2d 545 [1 Dept 1999]); *Grimes-Carrion v Carroll*, 13 AD3d 125, 126 [1st Dep't 2004]. *Malone v Morillo*, 775 NY2d 312 [1 Dept 2004]. In order to rebut the presumption of negligence, the operator and owner of the rear vehicle bears the burden to present a reasonable explanation for the failure to maintain a safe distance behind the front vehicle. *Woodley v Ramirez*, 25 AD3d at 452; *Mullen v Rigor*, 8 AD3d 104 [1st Dep't 2004]; *Jean v Zong Hai Xu*, 288 A.D.2d 62 [1st Dep't 2001]; *Moustapha v Riteway Intl. Removal*, 283 A.D.2 175 [1st Dep't 2001].

The plaintiff offers no such explanation to rebut their presumption of negligence. Accordingly, the plaintiff fails to meet their burden of proof by admissible evidence to raise a triable issue of fact.

For these reasons and upon the foregoing papers, it is,

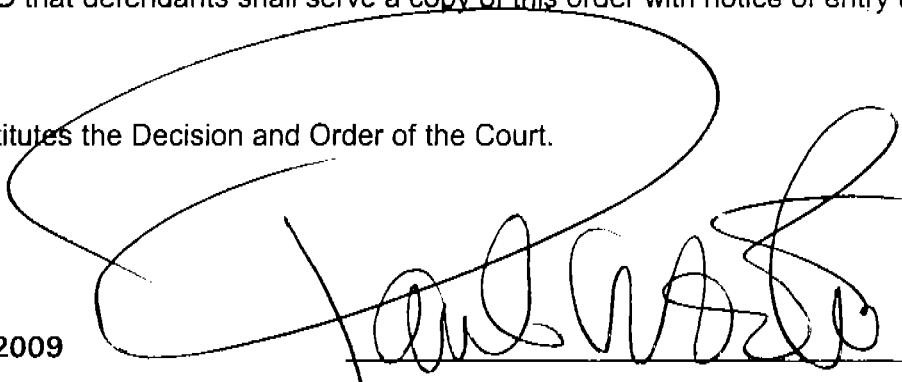
ORDERED that defendants Best Transportation Incorporated, Interpol/Titling/Acquisition, LLC, and Terell Sharafa Worley's motion and for summary judgment on the issue of liability is granted; and it is further,

ORDERED that defendants Margarita A. Guaman and Magarita L. Ortega-Alvarez's cross motion for summary judgment on the issue of liability is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint in its entirety; and it is further,

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.



Dated: July 29, 2009

JUL 29 2009

Paul Wooten U.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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