

Gulino v Tebele

2009 NY Slip Op 32216(U)

September 23, 2009

Supreme Court, New York County

Docket Number: 104552/2008

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

ANTHONY GULINO,
Plaintiff,
- v -

EDWARD TEBELE and "JOHN DOE",
name fictitious intended being that of the
operator,
Defendant.

INDEX NO. 104552/2008
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. 51

The following papers, numbered 1 to 3 were read on the motion by plaintiff for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

On November 30, 2007, plaintiff's vehicle was struck in the rear by a vehicle owned by defendant Edward Tebele and operated by an unknown individual. At the time of the subject accident defendant Tebele's vehicle had been stolen. The accident occurred on the Northbound side of the FDR drive, in New York County. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject accident. Plaintiff now moves for an order pursuant to CPLR § 3212, granting summary judgment on the issue of liability. Defendant Tebele crossmoves, for an order pursuant to CPLR 3025(b), granting leave to amend his answer, dated July 29, 2008, to deny the allegations contained in paragraphs 15, 16, and 17 of plaintiff's complaint, and assert the affirmative defense that defendant's vehicle was stolen at the time that the subject accident occurred.

FILED
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUMMARY JUDGMENT 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 [1 Dept 2002]; *Silverman v. Perlbinde*, 762 NY2d 386 [1 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 [1 Dept 1999]).

Where the movant has established a *prima facie* case of negligence, opposing parties are required to submit evidentiary proof in admissible form raising triable issues of material fact in order to defeat the motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 812 NYS2d 12 [1 Dept 2006]; *Perez v Brux Cab Corp.*, 674 NY2d 343 [1 Dept 1998]; *Zuckerman v City of New York, supra*).

DISCUSSION

In support of his motion plaintiff submits, *inter alia*, a copy of the pleadings, and his affidavit, which establish that his vehicle was stopped for several seconds due to traffic, when it was struck in the rear by defendant's vehicle. 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, and that a rear-end collision with a 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" (see *Woodley, v Ramirez*, 810 NYS2d 125 [1 Dept 2006]; *Garcia v Bakemark Ingredients Inc.*, 797 NY2d 467 [1 Dept 2005], quoting *Johnson v Phillips*, 690 NYS2d 545 [1 Dept 1999]; *Mullen v Rigor*, 778 NYS2d 168 [2004]; *Agramonte v City of New York*, 732 NYS2d 414 [2001]). In addition, a "driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles taking into account the weather and road conditions" (*Malone v Morillo*, 775 NY2d 312 [1 Dept 2004], quoting *Mitchell v Gonzalez*, 703 NY2d 124 [1 Dept 2000]). Plaintiff has established *prima facie* entitlement to summary judgment, as his vehicle was a stationary vehicle involved in a rear-end collision (see *Sandra Mariano v New York City Transit Authority*, 831 NYS2d 155 [1 Dept 2007]; *Woodley, v. Ramirez, supra*; *Garcia v Bakemark Ingredients, supra*).

The burden now shifts to defendant to rebut the inference of negligence by offering a non-negligent explanation for the contact (*Ferguson v Honda Lease Trust*, 826 NYS2d 10 [1 Dept 2006]), and thereby, raise triable issues of material fact in order to defeat plaintiff's motion for summary judgment (*Mazurek v Metropolitan Museum of Art, supra*; *Perez v Brux Cab Corporation, supra*; *Zuckerman v City of New York, supra*).

In opposition, defendant submits, *inter alia*, his affidavit and the affidavits of

Moshe Haber, defendant Tebele's son-in-law, and nonparty witnesses Lucy Amaro and Cynthe Venturini, employees of Allstate Insurance Company, defendant Tebele's insurance company. Defendant Tebele also submits the transcripts of a telephone conference interview, held on December 3, 2007, between Cynthe Venturini and Moshe Haber and his wife Alice Haber, and a telephone conference interview, held on February 8, 2008 between Lucy Amaro and Moshe Haber.

Defendant Tebele claims that he had given his son-in-law, Moshe Haber, permission to operate his vehicle and while the vehicle was in Moshe possession, the vehicle was stolen from the front of his home, on November 29, 2008. Such claim was confirmed by Moshe Haber's affidavit and the transcripts of the telephone conferences, submitted by defendant Tebele.

Accordingly, defendant Tebele has met his burden to raise a triable issue of material fact regarding liability for the subject accident.

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

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied; and it is further,

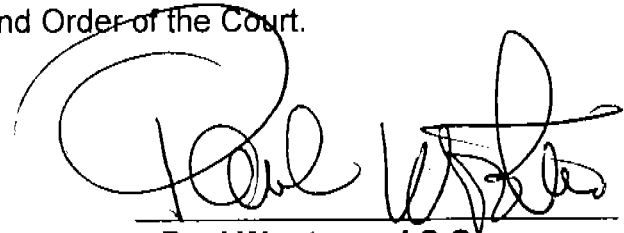
ORDERED that the defendant Tebele's cross-motion is granted, and leave shall be granted to amend his answer, dated July 29, 2008, to deny the allegations contained in paragraphs 15, 16, and 17 of plaintiff's complaint, and assert the affirmative defense that his vehicle was stolen at the time that the subject accident occurred; and it is further,

ORDERED that the amended answer in the form proposed, as annexed to defendant Tebele's cross-motion, shall be deemed served upon service of a copy of

this order with notice of entry; and it is further,jn

ORDERED that all parties are directed to appear for a compliance conference in DCM, ~~on~~ October 9, 2009, at 9:30 a.m. (80 Centre Street, Room 103).

This constitutes the Decision and Order of the Court.



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

Dated: 9-23-09
SEP 23 2009

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

FILED
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK