Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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HANSRAJ SUKHU and SANDRA SUKHU,

Plaintiffs,

-against-

MARK MARAJH and ALI SUBHAN,

Defendants.

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Index No.:29136/08
Motion Date: 8/12/09
Motion Cal. No: 25
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by defendants Mark Marajh and Ali Subhan for an order, pursuant to CPLR §3211(a)(5) and CPLR §3212, granting summary judgment to defendants; and on this cross motion by plaintiffs Hansraj Sukhu and Sandra Sukhu for an order striking defendants' ninth affirmative defense, granting summary judgment on the issue of liability in favor of plaintiffs and setting this action down for an assessment of damages.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notice of Cross Motion-Affidavits -Exhibits...	6 - 9
Reply Affirmation-Exhibits.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

This is a personal injury action in which plaintiff Hansraj Sukhu ("plaintiff") seeks to recover damages for injuries sustained by him as a result of a motor vehicle accident that occurred on April 29, 2007, between the vehicle owned by defendant Mark Marajh ("Marajh") and operated by defendant Ali Subhan ("Subhan"), and plaintiff's vehicle at or near the intersection of 93rd Avenue and 210th Street, Queens, New York. At the time of the accident, plaintiff's vehicle was proceeding on 93rd Avenue and defendant was proceeding on 210th Street, which had a stop sign at its intersection with 93rd Avenue; the accident occurred when defendant Subhan failed to stop at the stop sign and proceeded into the intersection, hitting plaintiff's vehicle. On April 20, 2007, the parties allegedly reached a full settlement of all claims arising out of the accident; thereafter, on December 4, 2008, plaintiffs commenced the instant action. Defendants move for an order dismissing all claims, pursuant to CPLR 3211(a)(5), and granting summary judgment in their favor, pursuant to CPLR 3212, both on the ground that plaintiff executed a settlement and release, a copy of which is attached to the

moving papers. Plaintiffs cross move for an order dismissing defendants' ninth affirmative defense that the action is barred by settlement and a binding release, and partial summary judgment in their favor on the issue of liability, contending that the accident occurred solely because of defendant Subhan's negligence.

The threshold inquiry is the efficacy of the purported April 20, 2007 release that was executed by plaintiff, which was signed and notarized, and reads:

> I, Hansraj Sukhu currently residing at 90-15 204 Street, Hollis, hereby depose and say that I agree to accept as full settlement of the sum of $4,500.00 cash from Mark Marajh for the accident that occured [sic] on Sunday 04/29/07. This settlement is for damage for vehicle bearing plate # NY BXV 1687. No party sustained any physical injury.

Defendant Marajh, in his affidavit in support of the motion, alleges that he paid plaintiff the required $4,500.00, and that the "full settlement was intended to release and resolve all claims arising out of the accident; not merely the property damage. By specifying that no physical injuries were sustained, its was made clear that no claims were made or to be made for any compensation arising out of the bodily injuries." Plaintiff, on his cross motion, alleges that the release was intended to apply only to the property damage, not to any claim for personal injury, and further attacks the validity of the release, claiming that "defendant Ali Subhan signed the name of defendant Mark Marajh and that the signature was then falsely notarized as being that of defendant Mark Marajh."

As a general proposition, "'[a] release will not be treated lightly, and will be set aside by a court only for duress, illegality, fraud, or mutual mistake' (citations omitted)." Seff v. Meltzer, Lippe, Goldstein & Schlissel, P.C., 55 A.D.3d 592 (2nd Dept.2008); see, Bodisher v. Hofmann, 50 A.D.3d 720 (2nd Dept. 2008); Haynes v. Garez, 304 A.D.2d 714 (2nd Dept. 2003); see, also, Booth v. 3669 Delaware, Inc., 92 N.Y.2d 934 (1998); Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 616 (1994); Curry v. Episcopal Health Services, Inc., 248 A.D.2d 662 (2nd Dept.1998); DeQuatro v. Yu Li, 211 A.D.2d 609 (2nd Dept. 1995). In order to be entitled to dismissal of an action based upon a release, the movant must show that the release was intended to cover the subject action or claim. Choudhry v. Five Star Contracting Companies, Inc., 52 A.D.3d 763 (2nd Dept. 2008). This defendants failed to do.

The developing law with respect to the enforcement of releases in personal injury actions focuses upon resolving claims of mutual mistake as to injury at the time of release, and establishes that "[a] mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release (citations omitted). If the injury is known, and the mistake, it has been said, is merely as to the consequence, future course, or sequelae of a known injury, then the release will stand (citations omitted)." Mangini v. McClurg, 24 N.Y.2d 556 (1969); DeQuatro v. Yu Li, 211 A.D.2d 609 (2nd Dept. 1995). Here, there are no questions of fact as to whether the release was "fairly and knowingly" made regarding the injuries at issue in this case. See, Cabibi v. Lundrigan, 7 A.D.3d 556 (2nd Dept. 2004); Haynes v. Garez, supra; Mangini v. McClurg, supra. The release was

signed one day after the accident and explicitly covered only property damage, as, at the time of signing, the assumption was that there was no personal injury. See, Best v. Yutaka, 90 N.Y.2d 833 (1997); Curry v. Episcopal Health Services, Inc., 248 A.D.2d 662 (2nd Dept.1998)[trial court's setting aside a release on the ground of mutual mistake affirmed where it "was not until after the release had been signed that the plaintiff was diagnosed as having incurred an 'annular tear' and related injuries to her back, which were more serious than the injuries originally suspected]; compare, Romero v. Khanijou, 212 A.D.2d 769 (2nd Dept. 1995)[application to set aside release on ground of mutual mistake denied where plaintiff was fully aware of the nature of injuries]. Based upon the foregoing, it is clear that the release must be set aside on the ground of mutual mistake. Defendants' motion to dismiss the complaint based upon that release thus must be denied, and plaintiff's cross-motion to dismiss the ninth affirmative defense that the action is barred by release must be granted. Further, although plaintiff's assertion that defendant Marajh never signed the release, although his purported signature was affixed to it, raises a triable issue concerning the validity of the release [(see, Best v. Yutaka, 90 N.Y.2d 833 (1997); Farber v. Breslin, 47 A.D.3d 873, 877 (2nd Dept. 2008)], dismissal on that ground is rendered moot by the setting aside of the release.

Defendants also move for summary judgment dismissing the complaint based upon the release, which is denied as academic, and plaintiffs cross move for summary judgment on the issue of liability. It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The New York Vehicle and Traffic Law §1142(a) requires that any "vehicle approaching a stop sign shall stop [][and] shall yield the right-of-way to any vehicle [] which is approaching so closely on said highway as to constitute an immediate hazard []." See, Goemans v. County of Suffolk, 57 A.D.3d 478 (2nd Dept. 2008); McNamara v. Fishkowitz, 18 A.D.3d 721 (2nd Dept. 2005); Ishak v. Guzman, 12 A.D.3d 409 (2nd Dept. 2004); Rossani v. Rana, 8 A.D.3d 548 (2nd Dept. 2004); Spatola v. Gelco Corp., 5 A.D.3d 469 (2nd Dept. 2004). "A driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law (citations omitted)." Klein v. Crespo, 50 A.D.3d 745 (2nd Dept. 2008); Mei Yan Zhang v. Santana, 52 A.D.3d 484 (2nd Dept. 2008); Batts v. Page, 51 A.D.3d 833 (2nd Dept. 2008). Moreover, a "driver is required to 'see that which through proper use of [his or her] senses [he or she] should have seen'(citations omitted), and a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield (citations omitted)." Gergis v. Miccio, 39 A.D.3d 468 (2nd Dept. 2007); see, Wesh v. Laidlaw, 59 A.D.3d 534 (2nd Dept. 2009); Maliza v. Puerto-Rican Transp. Corp., 50 A.D.3d 650 (2nd Dept. 2008);

see, also, Rosenberg v. Kotsek, 41 A.D.3d 573 (2nd Dept. 2007); Friedberg v. Citiwide Auto Leasing, Inc., 22 A.D.3d 522 (2nd Dept. 2007); Mizrahi v. Lam, 40 A.D.3d 594 (2nd Dept. 2007).

Here, plaintiffs made the requisite prima facie showing of their entitlement to summary judgment both by demonstrating that defendant Subhan, whose course of travel was controlled by a stop sign, entered the intersection when it was unsafe to do so without yielding the right-of-way, and that this was the sole proximate cause of the accident. See, Grossman v. Spector, 48 A.D.3d 750 (2nd Dept. 2008); Odumbo v. Perera, 27 A.D.3d 709 (2nd Dept. 2006); Willis v. Fink, 7 A.D.3d 519 (2nd Dept. 2004); Breslin v. Rudden, 291 A.D.2d 471 (2nd Dept. 2002). Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to defendants to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident. See, Narracci v. Brigati, 57 A.D.3d 632 (2nd Dept. 2008); Virzi v. Fraser, 51 A.D.3d 784, 784 (2nd Dept. 2008); Campbell-Lopez v. Cruz, 31 A.D.3d 475 (2nd Dept. 2006); Bodner v. Greenwald, 296 A.D.2d 564 (2nd Dept. 2002). This they failed to do.

Defendants submit in opposition to the motion the affidavit of defendant Marajh, who addresses only the release; and the affirmation of their attorney, which not being based upon personal knowledge is of no probative or evidentiary significance. Zuckerman v. City of New York, supra.; Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006). In that affirmation, defense counsel asserts that there are "numerous questions of fact which require the denial of the liability aspect of the motion, and argues, in effect, that the motion for summary judgment is premature because plaintiff has not been deposed. "CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated . . . [or] 'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant.'" Juseinoski v. New York Hosp. Medical Center of Queens, 29 A.D.3d 636, 637 (2d Dept. 2006). However, where, as here, "'[a] party . . . claims ignorance of critical facts to defeat a motion for summary judgment. . . [the party] must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue' (Cruz v. Otis El. Co., 238 A.D.2d 540, 656 N.Y.S.2d 688)." Sasson v. Setina Mfg. Co., Inc., 26 A.D.3d 487 (2nd Dept. 2006). What must be offered is "an evidentiary basis to show that discovery may lead to relevant evidence (citations omitted) and that facts essential to justify opposition to the motion were exclusively within the knowledge and control" of the moving opposing party. Gasis v. City of New York, 35 A.D.3d 533 (2nd Dept. 2006). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Id., Sasson v. Setina Mfg. Co., Inc., supra; Associates Commercial Corp. v. Nationwide Mut. Ins. Co., 298 A.D.2d 537 (2nd Dept. 2002). Here, as the record is devoid of an evidentiary basis demonstrating that further discovery would elicit any evidence supporting defendants' position on the issue of liability, there is no basis for denial of the motion on this ground.

Moreover, as neither defendant offered opposition to the cross motion, there are no issues of fact raised to rebut the presumption of negligence, and defeat the motion. Thus, defendant Subhan did not meet his duty to drive at a safe speed and to maintain a safe distance between his vehicle and

the vehicles ahead of him, taking into account the road conditions. See, Ortega v. City of New York, 281 A.D.2d 466 (2nd Dept. 2001); Benyarko v. Avis Rent A Car System, Inc., 162 A.D.2d 572 (2nd Dept.1990). Accordingly, the motion for partial summary judgment is granted. A trial shall be held on the issue of damages, including the threshold issue of serious injury, following the completion of discovery and the filing of a note of issue with statement of readiness, if necessary.

Dated: November 9, 2009

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J.S.C.