

Craig v Odesanya

2009 NY Slip Op 33285(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 110609/08

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

VALENTINA CRAIG and JACKSON BOSWORTH,
Plaintiff,

INDEX NO. 110609/08

MOTION DATE _____

v -

MOTION SEQ. NO. 001

VICTOR ODESANYA and GENESIS OPERATING CORP.,
Defendants.

MOTION CAL. NO. 37

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

Notice of Motion/ Order to Show Cause — Affidavit — Exhibits ...	<u>1 6 2009</u>	<u>1</u>	<u>1</u>
Answering Affidavits — Exhibits (Memo)	_____	_____	_____
Replying Affidavits (Reply Memo)	_____	_____	_____

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Cross-Motion: Yes No

On May 8, 2008, plaintiffs Valentina Craig and Jackson Bosworth, were involved in a collision, while passengers in a taxi cab owned by defendant Genesis Operating Corp. and operated by defendant Victor Odesanya. The accident occurred on Seventh Avenue near its intersection with West 18th Street. The plaintiffs commenced this action to recover damages for alleged personal injuries suffered as a result of the subject accident. The plaintiffs now move for an order pursuant to CPLR § 3212, granting summary judgment on the issue of liability.

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. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NYS2d 433, 434 [1 Dept 2002]). 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, supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1 Dept 1999]).

Where the plaintiff has established a *prima facie* case of negligence, defendants 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 their motion, the plaintiffs have submitted, *inter alia*, a copy of the pleadings and their affidavits. The plaintiffs claim that while they were passengers in defendant Odesanya's taxicab, he lost control of his vehicle and collided with a parked vehicle. At the time of the subject accident, plaintiff Craig was seated in the back of the taxicab and plaintiff Bosworth was seated in the right front seat of the vehicle. Plaintiff Craig, stated in her affidavit, that she did not hear any screeching of brakes or sounding of a horn, at the time of the subject accident and that the road was in good condition. Plaintiff Bosworth stated, in his affidavit, that he specifically observed

defendant Odesanya take his eyes off of the road, thus causing the subject accident.

In opposition the defendants have submitted defendant Oseyana's affidavit. Defendant Oseyana alleges that the plaintiffs were intoxicated when they entered his taxicab. Defendant Odesanya claims that he asked the plaintiffs to exit his vehicle and when they would not comply, he proceeded to drive them to their destination. Defendant Odesanya claims that as he was driving, the passengers in the back seat began arguing and one passenger, in the rear seat, became extremely loud and began using obscene and abusive language toward him. Defendant Odesanya, a man of West African decent, claims that when a passenger, in the rear seat, referred to him as a "nigger", he was so shocked that he turned around while he was driving, thus, colliding with a parked vehicle. Defendant Oseyana argues the "intoxicated and verbally abusive" plaintiffs were the proximate cause of the subject accident.

It is well settled that the standard of conduct for the driver of a motor vehicle, is that of reasonable care. A *prima facie* case of negligence is established when the driver of a car loses control through no fault of another, which results in an injury to a passenger (*Felberbaum v Weinberger*, 2007 NY Slip Op 4257, 1 [2007]; *Dudley v Ford Credit Titling Trust*, 307 AD2d 911 [2003]). However, in deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment (See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 [1957]). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party (See *Kesselman v Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302, [1 Dept

2006]; *Goldman v Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004]).

In light of the two different versions of events presented by the parties regarding the circumstances of the subject accident, there remains issues of fact as to the cause of the subject accident, thus, requiring resolution by a trial. Accordingly, the plaintiffs have failed to meet their burden to establish the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, *supra* ; *Alvarez v Prospect Hospital*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, *supra*; *Thomas v Holzberg*, *supra*).

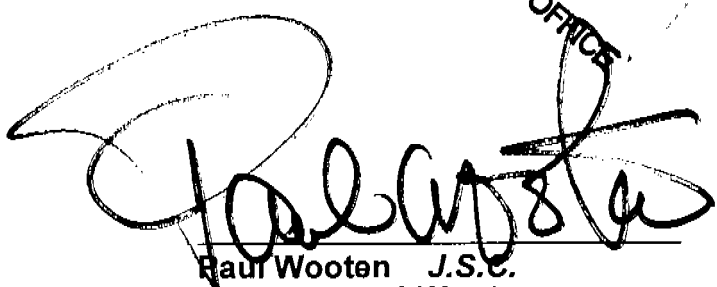
For these reasons and upon the foregoing papers, it is,

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

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE



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

Dated: September 30, 2009

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