

Marmorale v All Seasons, Inc.
2010 NY Slip Op 30270(U)
January 26, 2010
Supreme Court, Nassau County
Docket Number: 10693/08
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MICHELLE A. MARMORALE,

Plaintiff,

- against -

ALL SEASONS, INC. and ROBERT MILLER,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.:10693/08

SCOTT SULLIVAN,

Plaintiff,

- against -

ROBERT MILLER, ALL SEASONS, INC., MICHELLE
MAMORALE and ANTHONY MAMORALE,

Defendants.

Index No.: 13603/08
Motion Seq. No.: 02
Motion Date: 12/03/09

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion for Summary Judgment, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibit</u>	<u>2</u>
<u>Affirmation in Opposition</u>	<u>3</u>
<u>Reply Affirmation and Exhibit</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

In a personal injury action stemming from an automobile accident occurring on March 30, 2008 at approximately 12:52 a.m., defendants, Michelle Marmorale and Anthony Marmorale i/s/h/a Michelle Mamorale and Anthony Mamorale, move (under Index No.13603/08) for

summary judgment dismissing plaintiff Scott Sullivan's complaint and any and all cross-claims on the grounds that there is no liability attributable to these defendants. The motion is opposed by plaintiff, Scott Sullivan, and defendants Robert Miller and All Seasons, Inc.

The present action was brought by plaintiff, Scott Sullivan, for damages which occurred as a result of a two-car motor vehicle accident on Broadway near its intersection with Powell Avenue, Bethpage, in the Town of Oyster Bay, County of Nassau, State of New York. Motor Vehicle 1 ("MV1") was a taxi cab owned by defendant All Seasons, Inc. and operated by defendant Robert Miller. Motor Vehicle 2 ("MV2") was owned by defendant Anthony Marmorale and operated by defendant Michelle Marmorale. Plaintiff Scott Sullivan was a passenger in MV1. According to defendants' affirmation in support of the motion for summary judgment, at the time of the motor vehicle accident, MV1 was attempting to make a U-turn on Broadway at or near the intersection with Powell Avenue. MV2 was traveling northbound Broadway proceeding straight ahead when MV1 suddenly pulled from the curb blocking the path of MV2.

Defendants Michelle Marmorale and Anthony Marmorale move for summary judgment on the issue of liability on the grounds that defendant Robert Miller operating the automobile owned by defendant All Seasons, Inc. made an illegal U-turn in violation of New York State Vehicle and Traffic Law § 1160(e), as well as violated New York State Vehicle and Traffic Law § 1162 which states that "[n]o person shall move a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety." Defendants Michelle Marmorale and Anthony Marmorale submit that the Examination Before Trial ("EBT") testimony of plaintiff Scott Sullivan, along with the EBT testimony of defendant Michelle Marmorale and non-party witness Kevin Ray, clearly establish that defendant Robert Miller pulled the car away from the curb intending to make a U-turn without using reasonable care, turning directly into the path of defendant Michelle Marmorale, providing her no opportunity to avoid contact with his vehicle, thereby causing this accident. At his deposition, plaintiff Scott Sullivan testified that one or two seconds after entering the vehicle being driven by defendant Robert Miller, the vehicle "did pull away and there was a crash." At her deposition, defendant Michelle Marmorale testified that the first time that she saw the taxi being operated by

defendant Robert Miller was when it was in front of her car facing “perpendicular” in the roadway. She further testified that the taxi was making a U-turn and consequently the damage done to the taxi was to the driver’s side and back door while the damage done to her automobile was in the front of the vehicle. Non-party witness Kevin Ray, the passenger in defendant Michelle Marmorale’s vehicle, testified at his deposition that “[t]he first time I saw the taxi was when he pulled off the shoulder directly in front of our car.” In response to the question, “[a]nd how long before the impact between the vehicle in which you were a passenger and the taxi? How long a period of time passed, 10 seconds, 5 seconds, 2 seconds, a minute? You tell me,” Mr. Ray responded, “I would say 1 to 2 seconds. The taxi was approximately 3 to 5 feet in front of the vehicle before impact.” In response to the question, “[w]hen you first saw the cab before the impact occurred, was it to the right of your vehicle, to the left of your vehicle or moving in front of your vehicle or any other way you want to describe it,” Mr. Ray responded, “[i]t was pretty much in the middle of the road. My assumption was this guy was on the shoulder and just assumed nobody was coming, hit the gas, turned his wheel to make a U-turn and it was just unavoidable. He was in the middle of the road.” Mr. Ray testified that the taxi was “headed in a westbound direction” on Broadway, a street that runs north-south.

The Court would note that counsel for defendants Robert Miller and All Seasons, Inc. argue that “[c]ounsel is not permitted to use the deposition of a non party witness, Kevin Ray as part of their evidence. This deposition was not taken in conformity with CPLR § 3106(b). This office did not receive notice of this non party deposition....A deposition may not be used in evidence against a party who neither received notice nor participated in the depositions. CPLR § 3117(a)(3).” However, counsel for defendants Michelle Marmorale and Anthony Marmorale, in his reply affirmation stated, “[a]nnexed hereto for the Court’s review as Exhibit A is a copy of the Notice of Examination Before Trial, as well as a copy of the Judicial Subpoena for Non-Party deposition. Counsel for the co-defendants, Sullivan and All Seasons, Inc., in her Affirmation in Opposition is correct in stating that her office was not served with a Notice of Examination Before Trial of the the non-party witness, however, she failed to mention that Baker, McEvoy, Morrissey & Moskovits, P.C. was served with this notice and the accompanying subpoena. A review of the Court’s own website will reveal that it lists Baker,

McEvoy, Morrissey & Moskovits as the attorney for the defendants, Robert Miller and All Seasons, Inc., and to date, our office has received no Consent to Change Attorney or substitution of attorney formally filed with the Court or even served upon our office.” Based upon the aforementioned explanation, the Court will therefore consider the non-party witness deposition in support of defendants Michelle Marmorale and Anthony Marmorale’s motion for summary judgment.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*.

Defendants Michelle Marmorale and Anthony Marmorale having demonstrated *prima facie* entitlement to summary judgment, therefore, the burden shifts to plaintiff to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

In opposition, plaintiff Scott Sullivan and defendants Robert Miller and All Seasons, Inc.

assert that an issue of fact exists as to whether defendant Michelle Marmorale was liable for the accident for her failure to take proper steps to avoid the accident. In support of this, plaintiff Scott Sullivan and defendants Robert Miller and All Seasons, Inc. point to defendant Michelle Marmorale's deposition testimony where she testified that she did not see the taxicab any time before the collision even though she claims that the taxicab pulled off the curb and made a U-turn directly in front of her automobile. It is the position of plaintiff Scott Sullivan and defendants Robert Miller and All Seasons, Inc. that issues of fact exist as to whether defendant Michelle Marmorale failed to take proper steps to avoid the accident and whether she kept a "proper look out under the circumstances then existing;" whether she saw and was "aware of what was in her view;" and whether she used "reasonable care to avoid an accident."

The fact that defendant Michelle Marmorale's vehicle struck the taxi cab being operated by defendant Robert Miller fails to raise an issue of fact as to defendant Michelle Marmorale's potential negligence. Where the evidence here reveals that defendant Robert Miller made an illegal U-turn in violation of New York State Vehicle and Traffic Law § 1160(e) as well as violated New York State Vehicle and Traffic Law § 1162 which states that "[n]o person shall move a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety," defendant Michelle Marmorale is not liable for the occurrence of the accident. *See Rodriguez v. Schwartz*, 257 A.D.2d 655, 684 N.Y.S.2d 579 (2d Dept. 1999). Also unavailing is the assertion by plaintiff Scott Sullivan and defendants Robert Miller and All Seasons, Inc. that an issue of fact exists as to defendant Michelle Marmorale's own negligence on the grounds that she, herself, did not see the taxi cab being driven by defendant Robert Miller in her lane of traffic prior to the accident. At his deposition, non-party witness, Kevin Ray, testified that he saw the taxi in their lane of traffic one to two seconds before impact. Plaintiff Scott Sullivan also testified that it was approximately one or two seconds after the taxi pulled away from the curb that the accident occurred. The Court will not find in the face of this evidence that sufficient time existed for defendant Michelle Marmorale to take evasive action. *See Lupowitz v. Fogarty*, 295 A.D.2d 576, 744 N.Y.S.2d 480 (2d Dept. 2002); *Le Claire v. Pratt*, 270 A.D.2d 612, 704 N.Y.S.2d 354 (3d Dept. 2000).

The Court therefore finds that plaintiff Scott Sullivan and defendants Robert Miller and All Seasons, Inc. have failed to raise a triable issue of fact and grants the summary judgment motion of defendants Michelle Marmorale and Anthony Marmorale and it is hereby directed that

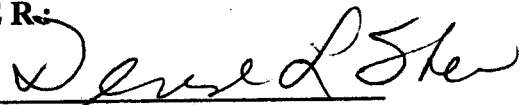
the negligence of defendants Robert Miller and All Season, Inc. was the sole cause of the accident.

Accordingly, it is hereby

ORDERED, that the motion by defendants Michelle Marmorale and Anthony Marmorale pursuant to CPLR § 3212 granting summary judgment to defendants Michelle Marmorale and Anthony Marmorale, dismissing the plaintiff's complaint and all cross-claims in their entirety on the grounds that there is no liability attributable to these defendants is hereby **GRANTED**.

This decision constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

ENTERED

Dated: Mineola, New York
January 26, 2010

FEB 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE