

Fruehwirth v Powell

2010 NY Slip Op 31114(U)

May 9, 2010

Sup Ct, Columbia County

Docket Number: 5396-09

Judge: Joseph C. Teresi

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SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

DONALD FRUEHWIRTH and
FLORENCE FUTIA-FRUEHWIRTH,

Plaintiffs,

DECISION and ORDER
INDEX NO. 5396-09
RJI NO. 01-09-098838

-against-

CLIFTON POWELL and LILLY
TRANSPORTATION CORP. d/b/a
RYDER TRUCK RENTAL, INC.

Defendants.

Supreme Court Albany County All Purpose Term, April 1, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs move for summary judgment pursuant to CPLR 3212 on the issue of liability.

The defendants oppose the motion and allege questions of fact preclude summary judgment.

Plaintiff, Donald Fruehwirth commenced this action and seeks to recover for personal injuries he sustained as a result of an automobile accident that occurred on January 18, 2008 in the northbound lane of the Northway ("I-87") in Elizabeth, New York. The plaintiff maintains he was driving north in the middle lane on the Northway when the defendant, Clifton Powell, lost control of the vehicle he was driving as he attempted to merge into a rest area. Plaintiff alleges the defendant's vehicle attempted to re-enter the Northway and jack knifed striking the plaintiff's vehicle. The plaintiff maintains the defendant violated Vehicle and Traffic Law § 1128(a) as he failed to move from one lane to the other in a safe manner. The plaintiff maintains the defendant is the sole cause of the accident as he traveled at a high rate of speed and lost control of his vehicle.

In opposition to the motion for summary judgment, the defendants contend the plaintiffs failed to attach copies of the pleadings to the motion as required by CPLR 3212. The defendant Powell maintains the defendant Lilly Transportation is not the owner of the subject tractor-trailer involved in the accident. The defendant Powell claims Lilly Transportation Corp. does not do business as Ryder Truck Rental, Inc. Mr. Powell alleges the accident occurred during a snowy condition on the roadway which caused the tractor-trailer to jack knife and collide with the plaintiff's vehicle as the plaintiff attempted to pass the defendant.

The defendants also maintain the motion for summary judgment is premature as disclosure is incomplete and depositions of the parties have not been conducted. The defendants contend the plaintiffs have failed to submit sufficient evidence in admissible form which would establish their entitlement to summary judgment on the issue of liability.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 230 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. (Barr v. County of Albany, 49 NY2d 557 [1980]), and all evidence must be viewed in the light most favorable to the opponent of the motion. (Davis v. Klein, 88 NY2d 1008 [1996]).

On a motion for summary judgment, it is mandatory that the movant attach a copy of the pleadings. (see, CPLR 3212(b)). The failure to submit copies of the pleadings to the court in support of a motion for summary judgment renders the moving papers defective requiring the court to deny the motion. (Matsyk v. Konkalipos, 35 AD3d 675 [2nd Dept. 2006]). In support of their motion, the plaintiffs refer to attached exhibits A-F which allegedly include the pleadings, discovery demands and responses and the police report. None of the referenced exhibits were attached to the Notice of Motion for the Court's review.

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. (Amico v. Melville Volunteer Fire Co., Inc., 39 AD3d 784 [2nd Dept. 2007]). Supreme Court is afforded discretion when presented with a request for further disclosure pursuant to CPLR 3212(f) and appellate review is guided by whether the court abused its discretion. (Svoboda v. Our Lady of Lourdes Memorial Hosp., 20 AD3d 805 [3rd Dept. 2005]). A summary judgment motion is properly denied as premature when the non-moving party has not been given a


reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant. (Juseinoksi v. New York Hosp. Medical Center of Queens, 29 AD3d 636 [2nd Dept. 2006]; Metichecchia v. Palmeri, 23 AD3d 894 [3rd Dept. 2005]).

This motion is premature as discovery has not been completed and no depositions of the parties or witnesses have been conducted. “Even assuming the movant made a prima facie showing of its entitlement to judgment as a matter of law, the court providently exercised its discretion in denying the motion as premature, with leave to renew following discovery.” (see, CPLR 3212(f); State Farm Fire & Cas. Ins. Co. v. Meiss, 23 AD3d 372 [2nd Dept. 2005]). Since relevant discovery has not been completed, plaintiffs’ motion for summary judgment is denied but may be renewed once discovery has been concluded.

This Decision and Order is being returned to the attorneys for the defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relived from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
May 9, 2010


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated March 2, 2010;
2. Affidavit of John Criscione, Esq. dated March 2, 2010;
3. Affidavit of Donald Fruehwirth dated February 18, 2010;
4. Affirmation of Judith B. Aumand, Esq. dated March 24, 2020 with exhibits A & B.