

Wertman v Goldschmidt

2010 NY Slip Op 32649(U)

September 16, 2010

Supreme Court, Nassau County

Docket Number: 5497/10

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

CHARLES WERTMAN and ADINA WERTMAN,
as Guardians of the Person and Property of
EPHRAIM WERTMAN,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiffs,

- against -

Index No.:5497/10
Motion Seq. No.: 01
Motion Date: 07/29/10

JASON GOLDSCHMIDT and JANET L. GOLDSCHMIDT,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

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

Plaintiffs move, pursuant to CPLR § 3212, for an Order granting them partial summary judgment on the issue of liability upon the ground that defendants have no defense to the action as a matter of law, and additionally move, pursuant to CPLR § 3212(c) for an Order setting the matter down for an immediate trial on the issue of damages. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on March 16, 2009 at approximately 7:40 a.m. at or near the intersection of Spruce Street and Broadway, Cedarhurst, Nassau County, New York. The accident involved a 2007 Lexus SUV owned by defendant Janet Goldschmidt and operated by the defendant Jason Goldschmidt. On that date, at that time,

plaintiffs' son, Ephraim Wertman ("Ephraim"), was walking on Spruce Street when he came to the corner of Broadway. Ephraim states that he stopped and waited for the traffic light to turn to green so that he could cross Broadway. When the light changed to green, Ephraim started to cross from north to south in the crosswalk, but before he reached the middle of Broadway, defendant Jason Goldschmidt made a left turn onto Broadway and hit Ephraim. Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on March 18, 2010 and an Amended Verified Complaint on April 27, 2010. Issue was joined on May 3, 2010.

Briefly, it is plaintiffs' contention that Ephraim carefully crossed the street within the crosswalk with the green light in his favor. Accordingly, Ephraim had the right to anticipate that a motorist intending to turn left onto the street he was crossing would obey the New York State Vehicle and Traffic Law ("VTL") and grant Ephraim the right of way to which he was legally entitled. Plaintiffs contend that defendant Jason Goldschmidt violated VTL § 1111(a)(1) when he failed to yield the right-of-way to a pedestrian lawfully within a crosswalk. Plaintiffs further contend that a violation of a standard of care imposed by the VTL constitutes negligence *per se*. Plaintiffs also offer as evidence a certified copy of the Police Accident Report pertaining to the accident. *See* Affirmation in Support Exhibit C. Plaintiffs argue that, in said report, defendant Jason Goldschmidt admitted to the responding police office that plaintiff was crossing in the intersection but that defendant Jason Goldschmidt did not see him because defendant Jason Goldschmidt looked in the opposite direction before turning his vehicle into the plaintiff.

In opposition to plaintiffs' motion, defendants argue that said motion should be denied as it is both premature and because there are facts which preclude a summary judgment finding of liability against the defendants. Defendants first argue that the motion should be denied since it is based upon the affidavit of someone who may not be competent to swear since Ephraim is

identified as a “mentally retarded person.” Defendants next argue that plaintiffs’ motion should be denied as premature since there has been no discovery. Defendants submit that no depositions have taken place nor have plaintiffs even served the Bill of Particulars upon defendants. Defendants argue that the certified Police Accident Report submitted by plaintiffs as an Exhibit in their moving papers is “inadmissible hearsay and that there are no exceptions to the hearsay rule present, which would allow it into evidence.” Defendants additionally argue that “just because the police officer reported statements allegedly made by Mr. Goldschmidt does not necessarily mean that Mr. Goldschmidt said them or that he intended to convey the information in that manner to the officer.”

In response to defendants’ opposition, plaintiffs reply that “[c]ontrary to Defendant’s contention, the fact that depositions have not been held is not a valid reason to deny summary judgment. Summary judgment should not be denied so as to allow discovery to go forward unless the facts essential to oppose the motion are exclusively within the movant’s knowledge.” Plaintiffs submit that defendant Jason Goldschmidt has full and complete knowledge as to how or why the accident occurred. “He requires no discovery to enable him to present his version to the Court in opposition to the motion. Indeed, Defendant has, in fact, set forth his version of the accident in an Affidavit submitted in opposition to this motion.” Plaintiffs further contend that it is simply not the existence of an issue of fact that must be demonstrated by the party opposing the summary judgment, but that a material issue of fact exists. Plaintiffs argue that the only difference between defendant Jason Goldschmidt’s statement to the police on the date of the accident and what he sets forth in his Affidavit in Opposition is that “[p]laintiff now claims that, contrary to his statement to the police that he did not see the Plaintiff before he turned his vehicle into him, he actually saw him a ‘split second’ before ‘but it was too late to avoid the accident.’”

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*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not

its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985).

Plaintiffs, in their motion, have demonstrated *prima facie* entitlement to summary judgment as a matter of law, by demonstrating that defendant Jason Goldschmidt was negligent in failing to yield the right of way to Ephraim while he was crossing a street within the crosswalk with the light in his favor. *See Cavitch v. Mateo*, 58 A.D.3d 592, 871 N.Y.S.2d 372 (2d Dept. 2009) (holding pedestrian established her *prima facie* entitlement to summary judgment on the issue of liability by submitting evidence that the driver failed to yield the right of way to her as she proceeded across a roadway in a crosswalk); *Voskin v. Lemel*, 52 A.D.3d 503, 859 N.Y.S.2d 489 (2d Dept. 2008); *Sulaiman v. Thomas*, 54 A.D.3d 751, 863 N.Y.S.2d 723 (2d Dept. 2008). The Court notes that the certified Police Accident Report submitted by plaintiffs as an Exhibit in their moving papers qualifies as an exception to the hearsay rule since it was an admissions of a party/an admission against interest. *See Vaden v. Rose*, 4 A.D.3d 468, 771 N.Y.S.2d 670 (2d Dept. 2004); *Kemenyash v. McGoey*, 306 A.D.2d 516, 762 N.Y.S.2d 629 (2d Dept. 2003); *Guevara v. Zaharakis*, 303 A.D.2d 555, 756 N.Y.S.2d 465 (2d Dept. 2003).

As stated previously, the burden now shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra*.

After applying the law to the facts in this case, the Court finds that defendants failed to meet their burden to demonstrate a material issue of fact which precludes summary judgment.

Moreover, the motion for summary judgment was not premature, since defendants failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Defendants' "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *See Ortiz v. Fage USA Corp.*, 69 A.D.3d 914, 893 N.Y.S.2d 270 (2d Dept. 2010); *Sanabria v. Paduc*, 61 A.D.3d 839, 876 N.Y.S.2d 874 (2d Dept. 2009); *Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 873 N.Y.S.2d 199 (2d Dept. 2009). *See also Conte v. Frelen Associates, LLC*, 51

A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006). The cases cited by defendants in support of their argument that the motion for summary judgment should be denied as premature all specifically deal with the issue of summary judgment in a Labor Law scaffold dispute and therefore are not directly on point in this matter.

Based upon the foregoing, plaintiffs' motion for an Order granting partial summary judgment on the issue of liability is hereby granted.

It is further ordered that the parties shall appear for a Preliminary Conference on October 18, 2010, at 9:30 a.m. in the Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings with respect to the remaining issue of damages. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the decision and order of this Court.

ENTER:


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

Dated: Mineola, New York
September 16, 2010

ENTERED

SEP 22 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**