

Lewis v Lavoie

2010 NY Slip Op 32886(U)

October 5, 2010

Supreme Court, Nassau County

Docket Number: 22106/08

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

<p>SARAH LEWIS,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>LINDSAY LAVOIE, DEBRA LAVOIE and ANDRE COLLADO,</p> <p style="text-align: right;">Defendants.</p>	<p>TRIAL/IAS PART 32 NASSAU COUNTY</p> <p>Index No.: 22106/08 Motion Seq. No.: 02 Motion Date: 05/27/10</p>
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The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply	3

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

Defendants Lindsay Lavoie (“L. Lavoie”) and Debra Lavoie (“D. Lavoie”) move, pursuant to CPLR § 3212, for an Order granting them summary judgment on the ground that these defendants do not bear liability. Plaintiff opposes the motion.

This action arises from a motor vehicle accident which occurred on October 17, 2008 at approximately 3:50 a.m. at or near the intersection of Route 25 and Lake Avenue, Smithtown, Suffolk County, New York. The accident involved a 2007 Toyota owned by defendant D. Lavoie and operated by the defendant L. Lavoie. On that date, at that time, the aforementioned automobile operated by defendant L. Lavoie collided with a utility pole at the above listed intersection. Plaintiff and defendant Andre Collado (“Collado”) were passengers in the automobile at the time of the accident. As a result of the accident, plaintiff sustained severe

personal injuries including: a compression fracture of the L4 vertebral body with loss and buckling of the anterior cortex; posterior disc bulge at the L4-5 level which is encroaching on the ventral aspect of the thecal sac; restricted range of motion of the lumbar spine; lumbar sprain/strain/derangement/radiculopathy. Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on December 1, 2008 and a Supplemental Summons and Amended Verified Complaint on March 20, 2009. Issue was joined by the service of defendants L. Lavoie and D. Lavoie's Answer on February 24, 2009 and Answer to the Amended Verified Complaint on April 15, 2009.

Briefly, it is defendants L. Lavoie and D. Lavoie's contention that plaintiff cannot show that defendant L. Lavoie acted negligently at the time of the accident at issue. Defendants L. Lavoie and D. Lavoie's argue that defendant Collado was the sole proximate cause of this accident as he was the one who allegedly grabbed the steering wheel while defendant L. Lavoie was driving causing her to lose control of the automobile and crash into a telephone pole. Defendants L. Lavoie and D. Lavoie assert that it is clear from the testimony submitted that defendant L. Lavoie had no time to avoid the collision and no notice that defendant Collado was going to grab the steering wheel. Defendants L. Lavoie and D. Lavoie argue that there is no credible evidence that defendant L Lavoie acted negligently so therefore defendants L. Lavoie and D. Lavoie should not be held liable for the accident at issue.

Defendants L. Lavoie and D. Lavoie also submit that the summary judgment motion was filed timely as set forth in the preliminary conference order which allowed ninety days from the filing of the Note of Issue for dispositive motions. However, the motion is a few weeks late as per the certification order which allowed sixty days from the filing of the Note of Issue for the filing of dispositive motions. Any delay in the filing of the subject motion was due to law office failure as defendants' attorney's file was not properly calendared due to conflicting dates in the P.C. Order, the certification order and the online Court rules of the currently assigned Justice. Defendants L. Lavoie and D. Lavoie contend that the very brief delay, a result of office failure, in no way prejudiced the plaintiff. Defendants L. Lavoie and D. Lavoie argue that the Court of Appeals has held that late but otherwise meritorious motions should be heard when there is good cause shown and no prejudice to the other parties.

In opposition to Defendants L. Lavoie and D. Lavoie's motion, plaintiff first argues that said motion should be denied as it is untimely. Plaintiff submits that the Certification Order of this Court dated January 12, 2010 directed the plaintiff to file a Note of Issue within ninety days of said Order and further required motions for summary judgment to be filed within sixty days of the filing of the Note of Issue (not ninety days as defendants assert). Therefore, in accordance with the Certification Order, all summary judgment motions were required to be made by March 23, 2010 (sixty days from January 22, 2010). Thus, defendants L. Lavoie and D. Lavoie's motion dated April 19, 2010 was untimely filed, as a matter of law, and defendants L. Lavoie and D. Lavoie have not sought leave of the court to make the late motion nor have they shown good cause.

Plaintiff next argues that summary judgment is barred by the culpable conduct of defendant L. Lavoie who was not confronted by an emergency situation, but was affirmatively negligent in causing the subject motor vehicle accident. Plaintiff submits that "[a]lthough LAVOIE claims that she is not liable for the happening of the accident because COLLADO allegedly grabbed the steering wheel just prior to the car veering off the road into the pole, the facts adduced established that COLLADO's actions were not sudden and unexpected (*sic*) but entirely foreseeable under the circumstances where: (a) all of the occupants in the vehicle (including LAVOIE) were consuming alcohol both inside the car and in the club just prior to the accident; (b) COLLADO and another passenger, IVAN ROSA, were both visibly intoxicated and involved in a fight both in and out of the car. In fact, they had gotten out of the car to fight several times before the accident occurred - at one point, they were kicking and damaging cars in a parking lot where they were fighting; (c) COLLADO repeatedly screamed to LAVOIE to stop the car so he could get out; (d) COLLADO was kicking the dashboard and the radio, damaging LAVOIE's car while she was driving; (e) LAVOIE had pulled the car over and stopped at least three times before the incident occurred because COLLADO and ROSA were violently fighting and arguing inside the car; (f) LAVOIE was screaming at COLLADO and ROSA to stop fighting while she was driving; (g) LAVOIE refused to leave without COLLADO and ROSA even though other passengers kept asking her to leave."

The Court first finds that while defendants L. Lavoie and D. Lavoie's motion was

untimely filed, there has been no prejudice to plaintiff in the two week late filing and the Court therefore will decide said motion on its merits.

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).

Defendants L. Lavoie and D. Lavoie, in their motion, have failed to demonstrate *prima*

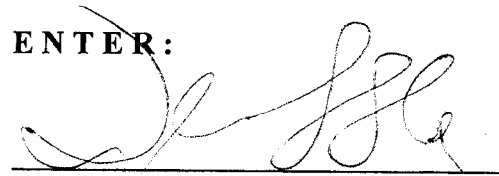
facie entitlement to summary judgment as a matter of law. They have failed to provide sufficient evidence to demonstrate the absence of material issues of fact. While they assert that it is clear from the testimony submitted that defendant L. Lavoie had no time to avoid the collision and no notice that defendant Collado was going to grab the steering wheel, the Court finds that this is not accurate as there exist material issues of fact as to those exact issues.

Based upon the foregoing, defendants L. Lavoie and D. Lavoie's motion for an Order granting summary judgment on the issue of liability is hereby denied.

All parties shall appear for trial of this matter in Nassau County Supreme Court, Central Jury Part at 100 Supreme Court Drive, Mineola, New York, on October 19, 2010, at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:



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

Dated: Mineola, New York
October 5, 2010

ENTERED
OCT 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE