Marks v Robb

2011 NY Slip Op 30608(U)

March 1, 2011

Supreme Court, Nassau County

Docket Number: 10095/09

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ONEKA MARKS, Plaintiff, - against - JOHN J. ROBB, JOSE O. ORELLANA-DIAZ, ESTHER G. URQUILLA and KEVIN J. GODING, Defendants.	TRIAL / IAS PART 30 NASSAU COUNTY Index No. 10095/09 Motion Sequence No. 001, 002, 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1, 2, 3
Answering Affidavits	4
Replying Affidavits	5
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendant Kevin J. Goding moves, under motion sequence number 1, pursuant to CPLR 3212 for summary judgment on this personal injury action involving a June 15, 2007 four motor vehicle accident at the intersection of Sunrise Highway and Rocklyn Avenue, Lynbrook, New York. The defense attorney points, in a September 10, 2010 affirmation with other supporting papers, to the April 16, 2010 and May 25, 2010 depositions of Oneka Marks, the plaintiff, the defendant John J. Robb, the defendant Esther Urquilla and Goding, respectively. The defense attorney contends New York law

does not impose any liability on a vehicle operator struck by a vehicle that suddenly and without warning crossed over the roadway and into Goding's lane of traffic. The defense attorney asserts, in a September 10, 2010 legal memorandum, Goding was not negligent, and he did not breach any duty owed to the plaintiff. The defense attorney argues none of the parties' testimony attributed any negligence to Goding. The plaintiff testified she headed westbound on Sunrise Highway to the green traffic signal at the intersection. The plaintiff also testified she was within the intersection when Urquilla's vehicle first struck the plaintiff's vehicle in the front followed by Goding's vehicle striking her. The defense attorney notes Goding traveled in the Sunrise Highway center eastbound lane within the speed limit with a green traffic signal at the intersection, and the plaintiff came southwest across the intersection. The defense attorney maintains Goding moved his vehicle to the right to avoid impact, but the front end of the plaintiff's vehicle struck Goding's driver side fender. The defense attorney avers Goding faced an emergency, and he acted reasonably under those circumstances.

The plaintiff's attorney states, in an October 12, 2010 affirmation with other opposition papers, Goding failed to submit the plaintiff's bill of particulars and the pleadings of the other three defendants in the underlying personal injury action. The plaintiff's attorney also points to the depositions of the parties for support of the opposition to this motion. The plaintiff's attorney maintains Goding moved after the completion of discovery, and filing of the note of issue. The plaintiff's attorney adds the

motion for summary judgment is based upon the emergency doctrine, but the defense argues erroneously the plaintiff suddenly crossed over into opposing traffic. The plaintiff's attorney asserts the emergency doctrine is inapplicable under the circumstances of this matter. The plaintiff's attorney submits that deficiency requires this motion for summary judgment to be denied by the Court.

Goding's attorney reiterates, in a November 23, 2010 reply affirmation, legal authority with respect to the plaintiff's assertions. Goding's attorney argues the failure to incorporate all of the pleadings in support of this motion is a procedural defect which may be overlooked by the Court should there be a complete record. Goding's attorney asserts the record is complete, and points to the parties' examinations before trial. Goding's attorney avers the plaintiff failed to raise a triable issue of fact, and adds Goding showed he drove properly, and he was not required to anticipate a vehicle traveling in the opposite direction would cross over into oncoming traffic. Goding's attorney contends the Court should not consider the plaintiff's November 8, 2010 affidavit because that sworn statement expressly contradicts the plaintiff's deposition, so it is a feigned issue designed to avoid the consequences of an earlier sworn statement.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to motion sequence number 1. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question

for jury determination" (***Ugarriza v. Schmieder***, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc***., 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case

should be summarily decided (*see, **Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***). The Court determines Goding has not established a *prima facie* entitlement to summary judgment as a matter of law. In opposition, the plaintiff shows there are material issues of fact regarding negligence and causation which require resolution by a trier of fact.

Robb moves, under motion sequence number 2, to strike Marks' complaint from the trial calendar because the action is not ready for trial, and to direct the completion of disclosure by Marks. Robb's attorney states, in a September 21, 2010 affirmation, the plaintiff's statement of readiness is incorrect because Urquilla has not disclosed certain information demanded on June 10, 2010 for discovery and inspection. Robb's attorney contends that disclosure is vital to determine who is liable for the June 15, 2007 accident, and Robb would be severely prejudiced should this matter be placed on the trial calendar without this discovery.

The plaintiff's attorney states, in an October 12, 2010 affirmation in opposition to motion sequence number 2 with opposition paper, there is no claim of outstanding evidence regarding the plaintiff and Robb only as to Robb and Urquilla. The plaintiff's attorney points to the June 17, 2010 certification order which required a note of issue and certificate of readiness within 90 days. The plaintiff's attorney notes the parties agreed that discovery was complete. The plaintiff's attorney asserts the discovery relief sought could be allowed while the matter stays on the trial calendar.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to motion sequence number 2. This Court denies the defense motion to strike the complaint from the trial calendar, and directs the defendant Urquilla to disclosed certain information demanded on June 10, 2010 for discovery and inspection.

Robb also moves without opposition, under motion sequence number 3, pursuant to CPLR 602 (a) to consolidate or join action number 1 and action number 2, entitled Urquilla against Robb index number 10938/10 because both actions arise from the June 15, 2007 accident. Robb requests a court order scheduling a joint preliminary conference in the near future for all parties to agree upon a joint discovery schedule, so all parties can conduct the necessary pre-trial discovery proceedings prior to trial. Robb's counsel points, in an October 8, 2010 affirmation, to specific exhibits attached to this motion, and adds Action number one commenced on or about May 26, 2009 while Action number two started on or about June 7, 2010 with Robb interposing verified answers to both actions. Robb's counsel asserts both actions arise from the same motor vehicle accident, and common questions of law or fact are involved, so consolidation or joinder under CPLR 602 will serve time and costs preventing the possibility of inconsistent verdicts. Robb's counsel notes no Judge has yet been assigned to Action number two.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to motion sequence number 3. The Court determines the defendant has met the CPLR 602 burden, so the matters will be jointly tried. The Court directs joint

[* 7]

discovery and a joint trial in the interest of judicial economy. Each action shall maintain its separate index number and separate caption. Upon payment of the appropriate calender fees in each of the above actions and upon service of a copy of this order with notice of entry on the Clerk of the Preliminary Conference Part, the Clerk shall place both actions on the Preliminary Conference calendar for a joint conference.

Accordingly, motion sequence number 1 is denied, motion sequence number 2 is denied, and motion sequence number 3 is granted in accord with this order and decision of the Court.

So ordered.

Dated: **March 1, 2011**

ENTER:

J. S.C.

ENTERED
MAR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

FINAL DISPOSITION   NON FINAL DISPOSITION XXX