

ULNA Bisnathsing v Kwan

2012 NY Slip Op 30152(U)

January 6, 2012

Supreme Court, Nassau County

Docket Number: 5707/09

Judge: Denise L. Sher

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 OF THE STATE OF NEW YORK

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

ULNA BISNATHSING,

Plaintiff,

- against -

KEVIN KWAN, METROPOLITAN SUBURBAN BUS
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY, MTA LONG ISLAND BUS,
DAWN TRUCKING INC. and HARRILAL BRIDGELOL,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 5707/09
Motion Seq. Nos: 03, 04
Motion Dates: 09/19/11
10/19/11

SERGE LAMBERT,

Plaintiff,

- against -

KEVIN M.L. KWAN, MTA LONG ISLAND BUS a/k/a
METROPOLITAN SUBURBAN BUS AUTHORITY,
HARRILAL BRIDGELOL and DAWN TRUCKING INC.,

Defendants.

Index No.: 11359/10

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 04), Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Motion (Seq. No. 03) and Exhibits</u>	<u>3</u>
<u>Affirmation in Opposition to Motion (Seq. No. 03) and Exhibits</u>	<u>4</u>
<u>Reply Affirmation (Seq. No. 03) and Exhibits</u>	<u>5</u>
<u>Reply Affirmation (Seq. No. 04)</u>	<u>6</u>

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

Defendants Kevin Kwan (“Kwan”), Metropolitan Suburban Bus Authority, Metropolitan Transportation Authority and MTA Long Island Bus (collectively the “MTA Long Island Bus defendants”) move (Seq. No. 03), pursuant to CPLR § 3212, for an order granting them summary judgment on the issue of liability to all claims asserted against them and all cross-claims asserted by them; and move, pursuant to CPLR § 3126, for an order striking the Answer of defendants Dawn Trucking, Inc. (“Dawn Trucking”) and Harrilal Bridgelol (“Bridgelol”) for failing to produce defendant Bridgelol (defendant Dawn Trucking’s driver) for a deposition; and move, pursuant to 22 NYCRR 202.21(e) and/or the Civil Court Practice Act, for an order vacating the Note of Issue and Certificate of Readiness filed by plaintiff Ulna Bisnathsing (“Bisnathsing”) and striking the case from the trial calendar.

Defendants Dawn Trucking and Bridgelol oppose the MTA Long Island Bus defendants’ motion (Seq. No. 03). Plaintiff Bisnathsing also opposes the MTA Long Island Bus defendants’ motion (Seq. No. 03).

Plaintiff Serge Lambert (“Lambert”) opposes the MTA Long Island Bus defendants’ motion (Seq. No. 03) and cross-moves (Seq. No. 04), pursuant to CPLR § 3126, for an order setting a final date for the deposition of defendants Bridgelol and Dawn Trucking or, in the alternative, defendants Bridgelol and Dawn Trucking be precluded from testifying at trial and striking the defendants’ Answer; and moves, pursuant to CPLR § 3212, for an order granting plaintiff’s cross-motion for summary judgment against defendants Bridgelol and Dawn Trucking.

The within actions arise out of a motor vehicle accident on November 3, 2008, at approximately 5:00 p.m, involving a bus and a dump truck on Hempstead Turnpike, at or near its

intersection with West Gate Avenue, Elmont, Nassau County, New York.

Plaintiffs Bisnathsing and Lambert were passengers in the bus owned by the MTA Long Island Bus defendants and driven by defendant Kwan.

Plaintiff Lambert appeared for a deposition on March 7, 2011 and a further deposition on May 25, 2011. Plaintiff Bisnathsing appeared for a deposition on March 8, 2011. Defendant Kwan, the driver of the MTA Long Island Bus, appeared for a deposition on May 6, 2011. Henry Buey, the owner of defendant Dawn Trucking, appeared for a deposition on May 25, 2011. Henry Buey had no personal knowledge of the subject accident. To date, defendant Dawn Trucking has not produced the truck driver, defendant Bridgelol, for a deposition.

The MTA Long Island Bus defendants contend that the subject accident occurred when defendant Bridgelol attempted to drive defendant Dawn Trucking's dump truck from the left lane of Hempstead Turnpike into the right lane of Hempstead Turnpike, into a space that was already occupied by the subject MTA Long Island Bus. The MTA Long Island Bus defendants assert that, as defendant Bridgelol veered across the front left corner of the bus, he slammed on the dump truck's brakes, bringing it to a stop while straddling the two eastbound lanes of Hempstead Turnpike. Further, the MTA Long Island Bus defendants contend that defendant Bridgelol's illegal maneuver resulted in contact between the rear corner of the dump truck and the glass at the front left corner of the bus.

At the deposition of plaintiff Lambert, conducted on March 7, 2011, he admitted that he did not see how the accident occurred, stating:

“Q. Did you ever identify yourself to the bus operator as a witness to the accident?”

- A. No, I did not do that, because I did not really see how the accident happened. Even when the police came, I did say that I was injured, but I did not – I could not tell them how the accident happened. I didn't see it." See MTA Long Island Bus Defendants' Affirmation in Support Exhibit K pp.104-105, 109-111.

When plaintiff Lambert appeared for a further deposition demanded by defendant Dawn Trucking, he reiterated that he did not see the accident occur, explaining that he could not see how the accident occurred because he was sitting in his seat with his head down the entire time. He was not even sure that his eyes were open since he had his head down when the accident occurred. Similarly, on March 8, 2011, plaintiff Bisnathsing testified that she only knows that initially the bus was traveling straight on Hempstead Turnpike with nothing directly in front of it and that defendant Dawn Trucking's truck suddenly appeared in front of the bus driver as plaintiff Bisnathsing was looking in the direction of the bus driver. Plaintiff Bisnathsing screamed immediately as the contact between the two vehicles occurred. She specifically denies that she or anyone else in the bus screamed before the moment at which the truck was suddenly in front of the bus and contact was occurring. She realized contact occurred between the two vehicles when she heard the bus windshield crack. Defendant Kwan appeared for a deposition on May 6, 2011 and testified that he was driving the bus straight in the right lane of Hempstead Turnpike at a speed of approximately twenty (20) miles per hour, with plenty of space between the front of the bus and the rear of the next vehicle ahead in the right lane, when the subject dump truck that was traveling in the left lane of Hempstead Turnpike suddenly cut across the front left corner of the bus, slammed its brakes, coming to a sudden stop with the left wheels of the dump truck in the left lane and the right wheels of the dump truck in the right lane. Defendant Kwan applied the bus' brakes as the truck swerved into the bus' lane, but was unable to prevent the contact that occurred between the glass on the left front side of the bus and the

dump truck.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dept. 1986). Defendant Bridgelol, the driver of the dump truck owned by defendant Dawn Trucking, has not been deposed. All other parties have been deposed. No party who has appeared for a deposition in this action has provided any testimony from personal knowledge that contradicts the account of the subject accident as set forth by defendant Kwan, the driver of the MTA Long Island bus. The MTA Long Island Bus defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Conclusory statements are insufficient. *See Sofsky v. Rosenberg*, 163 A.D.2d 240, 559 N.Y.S.2d 873 (1st Dept. 1990), *aff'd* 76 N.Y.2d 927, 563 N.Y.S.2d 52 (1990); *Zuckerman v. City of New York, supra*; *Indig v. Finkelstein*, 23 N.Y.2d 728, 296 N.Y.S.2d 370 (1968); *Werner v. Nelkin*, 206 A.D.2d 422, 614 N.Y.S.2d 66 (2d Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781, 437 N.Y.S.2d 1 (1st Dept. 1981) *app. dism.* 53 N.Y.2d

1028, 442 N.Y.S.2d 496 (1981); *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 A.D.2d 868, 600 N.Y.S.2d 790 (3d Dept. 1993) *lv app den.* 82 N.Y.2d 660, 605 N.Y.S.2d 6 (1993).

In opposition to the motion for summary judgment, counsel for defendants Dawn Trucking and Bridgelol argue that they have made a good faith effort to produce the driver of the truck, defendant Bridgelol, for an Examination Before Trial (“EBT”) but have been unable to do so. The instant matter was certified on August 9, 2011 and assigned Calendar No. 2011H247. It appeared on the DCM Pre-Trial Part Calendar on December 21, 2011 and was adjourned to the DCM Trial Part for February 8, 2012. On June 7, 2011, this Court gave specific instructions “to make best efforts to produce defendant Bridgelol for EBT by July 19, 2011.” To date, although the burden was on defendant Dawn Trucking to produce defendant Bridgelol for an EBT, it has refused to do so without offering any credible excuse for defendant Bridgelol’s failure to be produced. In his affirmation dated October 17, 2011, defendant Dawn Trucking’s attorney requests on order “to preclude the testimony of Bridgelol at any trial should he not be produced for a deposition at least thirty days before such a trial.” Dawn Trucking’s application is denied. The portion of the MTA Long Island Bus defendants’ motion (Seq. No. 03) to strike defendants Dawn Trucking and Bridgelol’s Answer is hereby **GRANTED**.

The operator of a motor vehicle has a duty to drive his car at a safe distance behind the car ahead of him in order to avoid hitting the car ahead when it comes to a stop. Section 1129 of the New York State Vehicle and Traffic Law provides that “the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway.” New York State Vehicle and Traffic Law § 1129. *See also Barile v. Lazzarini*, 222 A.D.2d 635, 635 N.Y.S.2d 694 (2d Dept. 1995). A rear-end collision creates a *prima facie* case of liability on the part of the

offending vehicle absent an adequate, non-negligent explanation. *See Barba v. Best Sec. Corp.*, 235 A.D.2d 381, 652 N.Y.S.2d 71 (2d Dept. 1997); *Gladstone v. Hachuel*, 225 A.D.2d 730, 639 N.Y.S.2d 856 (2d Dept. 1996). The defendants must come forward with evidence in admissible form to rebut the inference of negligence.

Summary judgment is possible where the driver presents sufficient evidence to establish the reasonableness of his actions and there is no opposing evidentiary showing sufficient to raise a legitimate issue of fact. A driver with the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to stay in their lane. *See McGraw v. Glowacki*, 303 A.D.2d 968, 758 N.Y.S.2d 224 (4th Dept. 2003); *Dawley v. McCumber*, 48 A.D.3d 1270, 850 N.Y.S.2d 807 (4th Dept. 2008).

No triable issues of fact have been presented in opposition to the MTA Long Island Bus defendants' showing of entitlement to summary judgment. The only credible testimony is that of defendant Kwan which establishes that defendants Dawn Trucking and Bridgelol are solely liable for the accident that occurred as a result of the defendant Dawn Trucking's dump truck suddenly crossing a lane and turning into the path of the bus while slamming on its brakes. Defendant Kwan's reaction to the emergency situation created by the dangerous and illegal maneuver executed by defendant Bridgelol does not present any triable issue of negligence on the part of the MTA Long Island Bus defendants. *See New York State Vehicle and Traffic Law §§ 1128(a) and 1163(a)*; *Jacino v. Sugerman*, 10 A.D.3d 593, 781 N.Y.S.2d 663 (2d Dept. 2004); *Mancia v. Metropolitan Tr. Auth. Long Is. Bus*, 14 A.D.3d 665, 790 N.Y.S.2d 31 (2d Dept. 2005).

It is the determination of this Court that the portion of MTA Long Island Bus defendants' motion (Seq. No. 03) for an order granting them summary judgment dismissing the Complaint and all cross-claims against them is hereby **GRANTED**.

The portion of MTA Long Island Bus defendants' motion (Seq. No. 03) for an order vacating the Note of Issue and Certificate of Readiness filed by plaintiff Ulna Bisnathsing ("Bisnathsing") and striking the case from the trial calendar is hereby **DENIED**.

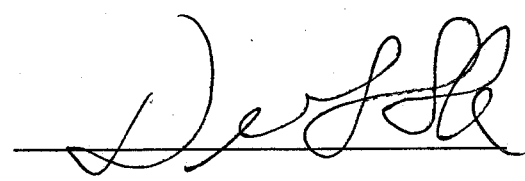
Plaintiff Lambert's cross-motion (Seq. No. 04) for an order granting summary judgment in favor of the plaintiffs against the defendants Dawn Trucking and Bridgelol on the issue of liability is also hereby **GRANTED**.

Plaintiffs shall proceed to trial forthwith on the issue of damages. Defendant Kwan and the MTA Long Island Bus defendants shall be deleted as party defendants.

The remaining parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on February 8, 2012, 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
January 6, 2012

ENTERED

JAN 12 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**