

Diaz v Mercedes Benz USA

2013 NY Slip Op 30329(U)

February 7, 2013

Supreme Court, New York County

Docket Number: 103668/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLEME P. BLUTH
Justice

PART 22

Index Number : 103668/2011
DIAZ, RAUL
vs.
MERCEDES BENZ USA AND
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion tofor Summary judgement on liability

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
COURTIAL RULES AND ORDER

FILED
FEB 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

HON. ARLEME P. BLUTH
[Signature], J.S.C.

Dated: 2-7-13

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 103668/11
Mot Seq 001

Raul Diaz,

Plaintiff,

-against-

DECISION/ORDER

Mercedes Benz USA and Evan A. Delarosa,

Defendants.

HON. ARLENE P. BLUTH, JSC

FILED

Plaintiff's motion for summary judgment against defendants of the issue of liability is denied.

FEB 14 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiff seeks damages for personal injuries he incurred when his vehicle collided with a vehicle driven by defendant Delarosa and owned by defendant Mercedes Benz USA on West 23rd Street between 6th and 7th Avenue in Manhattan.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v City of New York*, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168

* 3] .
AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]).

As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]).

Parties' Contentions

In support of his motion, plaintiff submits his deposition transcript (exh D) wherein he testified that prior to the accident he had been parked along 23rd Street, that he pulled out of the parking lane into the right westbound lane, signaled, and then moved into the left westbound lane on West 23rd Street, a two-way street which has two lanes of traffic proceeding in each direction (T. 20-21). Plaintiff saw defendant's car rapidly approaching behind him, saw defendant's car cross the double yellow line into the lane of oncoming (eastbound traffic), and attempt to pass plaintiff on the left; when defendant tried to come back into the left westbound lane, the two vehicles collided (T. 21).

In further support of this motion, plaintiff submits the statement of Christine Walters (exh G), the eyewitness listed on the police report (exh H). In her 9/14/11 affirmed statement, Ms. Walters claims that Delarosa was proceeding at a high rate of speed, crossed over the double yellow line and hit plaintiff's car as he cut back into the westbound lane, in front of plaintiff's car. Additionally, plaintiff cites to Delarosa's deposition testimony (exh E) where he stated that he did not remember certain details about plaintiff's vehicle just before and at the time of the collision (T. 64-65).

[* 4]

In opposition, defendants' counsel asserts that the motion should be denied because according to the police report (exh G), plaintiff was making a U-turn from the right lane and across defendant's path in the left lane. Additionally, defendants cite to Delarosa's deposition testimony where he testified that the first time he saw plaintiff's car was in between the parking lane and the right westbound lane of West 23rd Street, moving to the left (T. 54-55). Delarosa further stated that when he saw plaintiff's vehicle, he swerved to the left to avoid an accident, but did not remember if he crossed the double yellow line (T. 57).

Analysis

In support of his motion, plaintiff, through his deposition testimony, has made a prima facie showing, thus shifting the burden to defendants to rebut this showing, which they have done by submitting Delarosa's deposition testimony. The Court notes that the unsworn, presumably self-serving statements in the MV-104 accident report regarding the U-turn (exh G to moving papers) are hearsay, insufficient as a matter of law to raise triable factual issues, and cannot be considered in opposition to a motion for summary judgment; indeed, to do so would constitute "clear error". *See Johnson v Phillips*, 261 AD2d 269, 270-271, 690 NYS2d 545, 547 (1st Dept 1999). Accordingly, other than to corroborate the identity of the eyewitness, this Court did not consider the police report on this motion.

The parties have presented two versions of the circumstances surrounding their collision: Plaintiff claims that Delarosa was behind him, passed him on the left by crossing over the double yellow line and then caused the accident when he cut back into plaintiff's lane; Ms. Walters's

statement supports his version. On the other hand, Delarosa claims that plaintiff suddenly cut into his lane from the right which caused Delarosa to swerve around in order to avoid hitting plaintiff. Accordingly, because there is an issue of fact as to plaintiff's actions (whether he cut off defendant or was just moving in the left lane) and defendant's actions (whether he was an impatient driver going too fast or swerved to avoid an accident because plaintiff cut him off), plaintiff's motion for summary judgment on the issue of liability is denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability is denied and it is further

ORDERED that the counsel for the parties are directed to appear for a settlement conference on February 25, 2013 in Part 22, room 136 at 80 Centre Street at 10 AM; the parties are, of course, invited to attend but must at a minimum be available by telephone.

This is the Decision and Order of the Court.

HON. ARLENE P. BLUTH

Dated: February 7, 2013
New York, New York

FILED
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HON. ARLENE P. BLUTH, JSC
NEW YORK
COUNTY CLERK'S OFFICE