

Camacho v Zapata

2013 NY Slip Op 31509(U)

July 11, 2013

Sup Ct, Queens County

Docket Number: 16925/11

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Adela Camacho,
Plaintiff,

Index No.: 16925/11
Motion Date: 5/20/13
Motion Cal. No.: 23
Motion Seq. No.: 1

-against-

Hernando Zapata, Terri Norton and
Antonio Petito,
Defendants.

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The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR §3212 dismissing the complaint and cross-claims and granting summary judgment to defendant, Hernando Zapata, inasmuch as plaintiff has failed to establish liability on the part of defendant, Hernando Zapata for this accident; or in the alternative, precluding defendants Terri Norton and Antonio Petito from testifying at the time of trial.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Affirmation in Opposition.....	10 - 11
Affirmation in Partial Opposition.....	12 - 13

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

Defendant, Hernando Zapata (“Zapata”) moves for an Order pursuant to CPLR §3212 dismissing plaintiff’s complaint and any cross-claims as plaintiff has failed to establish liability on the part of Zapata or, alternatively, for an order precluding defendants Terri Norton and Antonio Petito from testifying at trial.

Facts

This is an action for personal injuries allegedly sustained as a result of an automobile accident on October 22, 2010 on Astoria Boulevard and its intersection with Steinway Street (“Intersection”). Plaintiff, Adela Camacho (“Camacho”) was a passenger in the vehicle operated by Zapata.

Zapata testified at his deposition that he was driving southbound on Steinway Street when he came to a stop at a red traffic light at the Intersection; that when the light turned green he entered the intersection and was struck first by a female driver and then again by a male driver.

Camacho testified at her deposition that she did not observe a traffic light at the subject intersection but that Zapata had stopped his vehicle and then slowly entered the intersection.

Defendant Terri Norton testified at her deposition that she was driving eastbound on Astoria Boulevard and observed a green traffic light, which was green when she first approached the intersection up until the moment of the accident.

Timeliness of the Summary Judgment Motion

Plaintiff argues that the within motion is untimely. Plaintiff contends the motion was made March 11, 2013. The parties agree that the time for Zapata to bring a motion for summary judgment pursuant to CPLR §3212(a) was on or before March 8, 2013. The summary judgment motion papers are dated March 6, 2013. However, a review of the movant’s papers indicates that the motion was served on all parties on March 6, 2013 and filed on March 8, 2013. Accordingly, the within motion was made timely.

Summary Judgment

Summary judgment should be granted when there is no doubt as to the absence of triable

issues. (*see Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978].)The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case and if proponent succeeds the burden shift to the party opposing the motion to produce evidentiary proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.” (*Stukas v. Streiter*, 83 A.D.3d 18, 22 [2nd Dept 2011].)

Zapata submitted sufficient evidence to establish his prima facie entitlement to judgment as a matter of law on the issue of liability. However, in opposition, the deposition testimony of Norton created an issue of fact for trial. Here, the parties have presented sharply conflicting testimony as to the color of the traffic signal at the time of the collision. Zapata contends that he had the green light and right of way while Norton testified that she had the green light and right of way. In addition, the plaintiff testified at her deposition that she did not even observe a traffic light at the intersection.

The conflicting testimony set forth in the transcripts of Zapata and Norton’s depositions regarding the circumstances surrounding the accident, raised triable issues of fact as to the happening of the accident. (See *Steiner v. Dincesen*, 95 A.D.3d 877 [2nd Dept 2012]; see also *Leung v. Bolton*, 95 A.D.3d 836[2nd Dept 2012].)

Accordingly, Zapata’s motion for summary judgment is denied.

Preclusion

Zapata also moves for an order precluding defendants’ Norton and Antonio Petito (“Petito”) from testifying at trial. Zapata contends that on December 13, 2011 a Preliminary Conference Order required all parties to appear for Examinations Before Trial on or before February 10, 2012. Zapata

and Camacho appeared for their depositions on May 25, 2013 and May 24, 2012. However, co-defendants Norton and Petito have failed to appear. Zapata contends that the depositions have been rescheduled ten times.

It is well settled that the drastic remedy of striking a pleading or dismissing the complaint pursuant to CPLR §3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith. Where a party disobeys a court order and by her conduct frustrates disclosure, dismissal is within the broad discretion of the trial court (*see, Cronin v. Perry*, 269 AD2d 351 [2d Dept. 2000]). There must be a clear showing that the plaintiff's failure to comply with the discovery was willful and contumacious. (*ACME ANC Corp. v. Read*, 55 A.D.3d 854 [2nd Dept 2008].)

The motion to preclude as to Norton is denied as Norton appeared for her deposition on March 13, 2013. Counsel for Petito contend that they have hired an investigator to assist in producing their client for a deposition. Based on the facts of the within case, Zapata has failed to establish a clear showing Petito's failure to comply was "willful and contumacious," and therefore Zapata is not entitled, pursuant to CPLR §3126, to preclusion. However, the court notes that any future default by Petito in appearing for a Deposition may be lead to the imposition of costs and legal fees.

For the reasons set forth above Zapata's motion is granted, solely to the extent of directing Petito to submit to an Examination Before Trial, in accordance with Zapata's demands.

Conclusion

Zapata's motion for summary judgment is denied in its entirety. The portion of Zapata's motion for an order of preclusion is denied as to Norton and granted as to Petito, solely to the extent

of ordering Petito to appear for a deposition within 30 days after service of a copy of the order herein.

Dated: July 11, 2013

Bernice D. Siegal, J. S. C.