

Green v Metropolitan Transp. Auth. Bus Co.
2013 NY Slip Op 32398(U)
October 7, 2013
Sup Ct, New York County
Docket Number: 400725/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 400725/2012
GREEN, SWITZERLAND
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 7, were read on this motion to/for Summary judgment on liab.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s) <u>1</u>
<u>Notice of X'm + supporting papers</u>	No(s) <u>2, 4</u>
Answering Affidavits — Exhibits _____	No(s) <u>5, 6, 7</u>
Replying Affidavits _____	

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

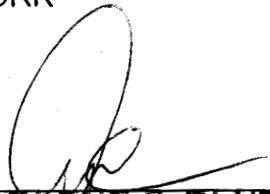
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

OCT 08 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/7/13


HON. ARLENE P. BLUTH J.S.C.

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.:400725/12
Mot Seq 002

Switzerland Green,
Plaintiff,
-against-

DECISION/ORDER

Metropolitan Transportation Authority Bus
Company, Isael Reyes, Tyese Laws and Samantha
Santiago,
Defendants.

HON. ARLENE P. BLUTH, JSC

FILED

OCT 08 2013

COUNTY CLERK'S OFFICE
NEW YORK

Defendants Laws and Santiago move for summary judgment dismissing the case against them on the grounds that they are not liable for plaintiff' accident; defendants Metropolitan Transportation Authority Bus Company(MTA) and Reyes, the bus driver, cross-move for the same relief.

In this action, plaintiff alleges that on April 8, 2011 she was sleeping on a bus and awoke to discover that the bus had been involved in an accident on Bruckner Boulevard in the Bronx. Reyes, the bus driver, claims that as he was proceeding in the right lane, a red van jumped the guard barrier in order to enter the Expressway, he moved the bus from the right lane into the left lane to avoid an impact, and then struck the vehicle driven by defendant Laws and owned by Santiago.

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 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]).

In support of the motion, Laws submits his affidavit (exh F) stating that the MTA bus swerved into his lane (the left lane), struck his vehicle and pinned his vehicle to the wall. In support of the cross-motion, the driver Reyes submits his affidavit (exh E) stating that he was proceeding in the right lane of the roadway at 15-20 miles per hour with cars behind him and to the left of him *but he does not say if there were any cars to his right* when suddenly a red van jumped the guard barrier in order to enter the Expressway and cut in front of the bus. Reyes states that he immediately moved the bus to the left in order to avoid the van, and hit the vehicle driven by Laws. Significantly Reyes did not say that he looked to the right to see if he could safely pull to into the right merging lane to avoid a collision; if the red van could jump the barrier, certainly a bus could do the same. *See Rahimi v Manhattan and Bronx Surface Transit Operating Authority*, 43 AD3d 802, 803-804, 843 NYS2d 557, 559 (1st Dept 2007) (summary

judgment appropriate only where there is no evidence that the bus driver could have avoided a collision by taking some other action). Accordingly, defendants MTA and Reyes have not satisfied their burden of establishing entitlement to judgment as a matter of law, and the burden never shifted to plaintiff to oppose the cross-motion.

Plaintiff's sole ground for opposing the main motion of defendants Laws and Santiago, is that Laws (who submitted his affidavit) and Santiago (the owner of the vehicle who did not witness the accident) have not been deposed. Significantly, not a single fact in Laws's affidavit is contested. There is no affidavit from plaintiff, and no affidavit from any other witness, either. There is only an affirmation from plaintiff's attorney, who has no personal knowledge. Rather than "laying bare" his proofs, counsel asserts that this motion should be denied simply because depositions have not yet been held; this fails to set forth grounds for this Court to deny this motion. Plaintiff has failed to show that discovery may lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge or control of the Reyes and Santiago. *See Griffin v Pennoyer*, 49 AD3d 341, 852 NYS2d 765 (1st Dept 2008) (because defendant failed to demonstrate that facts essential to justify opposition to the motion may exist but could not be stated [see CPLR 3212(f)], plaintiff's pre-discovery motion for partial summary judgment was not premature). Put another way, "the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion." *Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 (1st Dept. 2009). *See also Beamud v Gray*, 45 AD3d 257, 844 NYS2d 269-270 (1st Dept 2007) ("Plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating they were crossing the street, within the crosswalk, with the light in

their favor, when they were struck by defendant's vehicle, which was making a left turn. Defendant's unsupported speculation as to plaintiffs' alleged comparative negligence was insufficient to raise an issue of fact [citations omitted]”). Thus, with respect to the main motion, plaintiff failed to meet her burden of presenting the existence of an issue of fact which would require a jury to determine.

Accordingly, it is hereby

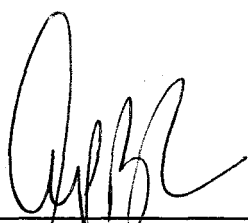
ORDERED that defendants Laws and Santiago’s motion for summary judgment dismissing the complaint as against them is granted, and the Clerk of Court and the Trial Support Office are directed to mark the court files accordingly and remove the names of these defendants from the caption; and it is further

ORDERED that defendants Metropolitan Transportation Authority Bus Company and Reyes’ cross-motion for summary judgment dismissing the complaint against them is denied.

The remaining parties are directed to appear for a compliance conference on Monday, October 28, 2013 in DCM Part 22, 80 Centre Street, Room 103 at 9:30am.

This is the Decision and Order of the Court.

**Dated: October 7, 2013
New York, New York**



HON. ARLENE P. BLUTH, JSC

FILED

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COUNTY CLERK'S OFFICE
NEW YORK