Winer v Jen & Liz Mgmt. Corp.
2013 NY Slip Op 33597(U)
February 19, 2013
Sup Ct, NY County
Docket Number: 15136/13
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

Index No.: 15136/13
Motion Seq 001

Lucy M. Winer,

Plaintiff,

-against-

Hon. Arlene P. Bluth, JSC

Jen & Liz Mgmt. Corp. and Koffi M. Aviah

DECISION/ORDER

Defendants.

Plaintiff moves for summary judgment both on liability and serious injury. For the reasons that follow, the branch of the motion for summary judgment on liability is granted. However, because plaintiff failed to make a prima facie case on the issue of "serious injury" within the meaning of Insurance Law § 5102(d), that part of the motion is denied.

In this action, plaintiff Lucy M. Winer seeks damages for injuries allegedly sustained on January 24, 2013. She claims that while she was walking across Eighth Avenue at the intersection of 28th Street within the pedestrian crosswalk, she was struck by a vehicle driven by defendant Koffi M. Aviah and owned by defendant Jen & Liz Management Corp. As the car was turning left from 28th Street onto Eighth Avenue, both parties would have had the green light.

Liability

In order to prevail on a 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 her motion, plaintiff cites to her verified complaint and the affidavit of an eyewitness to the incident, Victoria Hurst. In the plaintiff's verified complaint, Ms. Winer states that she was within the pedestrian crosswalk on West 28th street traveling with the light in her favor across Eighth Avenue. (exh. A, para. 2). She states that the defendant, Mr. Aviah, made a left turn from West 28th Street onto Eighth Avenue, failing to yield to pedestrian traffic in the crosswalk and collided with her, causing her to fall onto the pavement. (exh. A, para. 3).

Victoria Hurst, an eyewitness, submitted an affidavit and states as follows: that she was driving "beyond" the taxi, in full view of the intersection and observed the light turn from red to green for Ms. Winer and the other pedestrians attempting to cross Eighth Avenue. Ms. Hurst also states that defendant, Mr. Aviah, was looking down and not paying attention when making his left turn onto Eighth Avenue. Furthermore, she states that Ms. Winer was not running and

that she was entirely within the crosswalk when she was hit, and that Mr. Aviah made no attempt to wait for her to keep crossing before completing his left turn (exh. B).

In opposition, defendant has failed to submit admissible evidence. As plaintiff's attorney pointed out, while defendant Aviah has submitted a statement, it is not notarized. Although there is a notary stamp on it, there is no jurat: there is no indication that the notary ever administered an oath to Mr. Aviah or even that Mr. Aviah signed the document in the notary's presence. Nowhere does the document say "signed before me" or "sworn to before me"; all that can be seen relating to the notary is a stamp, scribble (presumably a signature) and a date. There is no indication that the notary ever administered or that the deponent ever received a proper "oath calculated to awaken the conscience..." as required by CPLR § 2309(b).

Moreover, it is clear that Mr. Aviah did not write the statement himself- someone wrote it out and he signed it. In this document, Mr. Aviah states that he "does not speak or understand English very well" but that he speaks French. Nowhere is there an indication that someone took the information from Mr. Aviah in French and translated it into English or that Mr. Aviah knew what he was signing (it is not too much of a jump to conclude that if he said he can't understand English, that includes reading and writing it). If he had written it in French, then, as required by CPLR § 2101(b), it would have had to have a proper translation performed under oath. Here, there was apparently a middleman who never swore that the translation was proper. Of course, the fact remains that nothing was notarized, and so the statement was not considered.

Accordingly, plaintiff's and the eyewitness's version of the accident were not contradicted. Both parties had the green light; as plaintiff was in the crosswalk, she had the right of way over the defendant turning left. VTL 1111. As there is no issue of fact, summary judgment on liability against defendants is granted.

Serious Injury

Plaintiff claims a fracture from the accident, which qualifies as a serious injury under the Insurance Law. The accident happened on January 24, 2013. Plaintiff was taken from the accident by ambulance to Roosevelt Hospital where radiology tests were allegedly performed. As proof of a fracture, plaintiff has submitted an affirmation from Dr. Sherman, an orthopedic surgeon, who examined Ms. Winer on February 11, 2013 and also examined the Roosevelt Hospital radiology *reports*. It is Dr. Sherman's opinion that Ms. Winer sustained at least one fracture as a result of being struck by defendants' car.

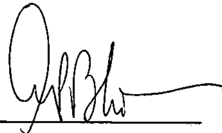
Plaintiff has failed to make out a prima facie case on serious injury. No certified hospital records have been submitted. The only medical evidence submitted is the affirmation of Dr. Sherman which refers to findings in an unaffirmed radiologist's report; Dr. Sherman never saw any films and his affirmation may not be used to "bootstrap" the unaffirmed reports *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept. 2013). Therefore, plaintiff has failed to meet her prima facie burden and the burden never shifted to defendant to rebut the plaintiff's showing.

In accordance with the foregoing, the plaintiff is granted summary judgment on liability only; the balance of the motion is denied.

The next conference is April 7, 2014 in part 22 DCM.

Dated: February 19, 2013

New York, New York



HON. ARLENE P. BLUTH, JSC