

Murano v Federal Express Corp.
2013 NY Slip Op 33802(U)
July 8, 2013
Supreme Court, Bronx County
Docket Number: 308099/12
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 4

-----x
Annette M. Murano

Plaintiff

Index No. 308099/12

-against-

Decision and Order

Federal Express Corporation , "John Doe" , the name "John Doe" being fictitious and intended to designate the person operating the vehicle of said Federal Express Corporation at the time and place herein alleged,

Defendants
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FACTS AND PROCEDURAL HISTORY

Plaintiff Annette Murano ("Murano") seeks recovery for personal injuries allegedly sustained on July 10, 2012 when the parked vehicle in which she was sitting was rear-ended by another vehicle, which it is further alleged had been rear-ended by a Federal Express truck. The incident occurred on West 16th Street in New York County.

This action was commenced in October 2012 , and issue was joined in December with service of defendants' answer.

A Preliminary Conference was held on March 6, 2013.

Motion

Plaintiff now moves for an award of partial summary judgment on the issue of liability contending that there is no evidence to raise a material issue of fact that the accident was caused solely by the culpable conduct of defendant Federal Express employee-driver. It is also maintained that there is no evidence that the plaintiff-passenger was negligent, and as such, the affirmative defenses of comparative fault should be dismissed.

In support of the motion plaintiff submits her affidavit and a copy of the Police Accident Report [MV-104].

Plaintiff attests that she was sitting in a legally parked car when it was impacted in the rear by the vehicle that had been legally parked behind it. Murano further attests that "[t]he parked vehicle behind me was caused to hit my vehicle because it was rear-ended by a Federal Express truck []", and while that truck was "trying to maneuver around the other vehicle", she wrote down the license plate number of the truck [Affidavit of Annette M. Murano ¶¶ 9-11]. The Federal Express truck then left the scene.

Defendants oppose the motion contending that there are material issues of fact that preclude an award of dispositive relief, and submit the affidavit of the driver by whom the the identified truck was operated on the date of the accident.

Joseph Peretz attests that he was employed as a Federal Express Courier and driving on 16th Street heading east towards Fifth Avenue at approximately 2:00 PM on June

10, 2012, and due to "heavy congestion" it took him several minutes before he was able to reach Fifth Avenue [Affidavit of Joseph Peretz ¶¶ 2-3]. He further attests that [a]t no point while [he] was on 16th Street was [his] vehicle involved in a collision with another vehicle ." [Id. ¶ 4].

Discussion

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 [1980] To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition. Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. Aji Industires, Inc., 10 NY3d 733, 735 [2008] Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the

merit of its claim or defense” (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]). Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent’s Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

While summary judgment is “is rarely granted in negligence cases since the very question of whether a defendant’s conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (Wilson v. Sponable, 81 AD2d 1, 5; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) ” Johannsdottir v. Kohn, 90 AD2d 842 [1st Dept. 1982] , such a motion will be granted “where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party.” (Morowitz v. Naughton, 150 AD2d 536 [1st Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 Ad3d 276 [1st Dept. 2004]).

Conclusions

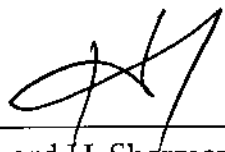
In light of the sworn statement of the now identified Federal Express driver, to which all favorable inferences must be afforded, clearly raising credibility issues that

should be resolved in factfinding proceedings (see Schrader v Carney, 180 AD2d 200, 210, 586 NYS2d 687 [1st Dept. 1992]; Matter of Eagle Ins. Co. v. Lucia, 33 A.D.3d 552, 824 N.Y.S.2d 9,[1st Dept. 2006]) it is the finding of this court that plaintiff has failed to sustain her burden to prove as a matter of law that the underlying rear-end collisions were caused by the culpable conduct of the defendant driver.

Accordingly, it is ORDERED that the motion of plaintiff for an award of partial summary judgment on the issue of liability as against the defendants be and hereby is granted solely to the extent of dismissing the first and seventh affirmative defenses, and is otherwise denied.

This constitutes the decision and order of this court.

Dated : July 8, 2013



Howard H. Sherman