

Lewis v Butler

2014 NY Slip Op 30165(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 107409/10

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 : 107409/2010
LEWIS, RICHELL
vs.
BUTLER, MARK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3, were read on this motion to/for SO

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING AFFIDAVIT/ORDER

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

FILED

JAN 23 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/14

[Signature], J.S.C.

HON. ARLENE P. BLUTH

- 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.:107409/10
Mot Seq 005 and 006

Richell Lewis,
Plaintiff,
-against-

DECISION/ORDER

Mark Butler, Magan Doucouray, Moussa Diakite,
Karen Morbeth et. al.,
Defendants.

HON. ARLENE P. BLUTH, JSC
FILED
JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

For the following reasons, Motion Sequence 5 (the Doucouray/Diakite motion for summary judgment on liability) is granted and the case is dismissed as against those defendants. Motion Sequence 6 (Butler's motion for summary judgment) is denied and Doucouray/Diakite's "me too cross-motion" on serious injury is denied as moot.

On July 1, 2007 a cab (owned by defendant Doucouray and driven by defendant Diakite) stopped to pick up plaintiff Lewis; plaintiff alleges that the cab had not pulled over to the curb, but had stopped about three feet from the curb and Lewis started to get into it anyway. As she was getting into that cab on the curb side, the cab was hit on the passenger side by a car owned by defendant Morbeth (driver named as "John Doe") and plaintiff claims serious injuries resulting therefrom. According to the police report, immediately before Morbeth's vehicle hit the cab, it was in an accident with Butler's vehicle, thus sending it into the cab; Butler, however, has made some allegations that he only hit cement and never another vehicle.

Before the Court are two motions and a cross-motion. Motion Sequence 5 is the Doucouray/Diakite motion for summary judgment to dismiss all claims and cross-claims against them; they allege that they were a stopped car and had no liability in the happening of the

accident. Motion Sequence 6 is Butler's motion to dismiss all claims against him on two grounds; he claims his vehicle never came into contact with any other vehicle and so he cannot be liable and that plaintiff was not seriously injured. Doucouray/Diakite cross-moved on motion sequence 6, a "me too" cross-motion, also claiming plaintiff did not suffer a serious injury.

Serious injury

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting

customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shimm*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

None of the defendants has satisfied the initial burden. Motion Sequence 6 lacks exhibits and the affirmation in support is of no probative value. Likewise, the "me too" cross-motion consists of a five paragraph affirmation and only annexes the pleadings and not a single medical report. Therefore, the Court need not look at plaintiff's opposition papers on this point (although medical affirmations from a treating doctor and radiologist were annexed). Accordingly, the jury will decide whether plaintiff suffered a serious injury under the Insurance Law.

Liability

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]).

That part of Butler's motion for summary judgment on liability is denied (motion sequence 6). First, it is denied for lack of any exhibits. However, the transcripts of the depositions are available to the Court as they are annexed as exhibits to Motion Sequence 5, and so even if this Court pretends that the exhibits were attached to Butler's moving papers, the motion would still be denied. While the moving affirmation claims Butler never hit another car, the depositions say otherwise: Butler testified that he remembers hitting the concrete item (barrier/flowerpot/whatever) and losing control of his car. The next thing he remembers was when he "woke up in Central Booking" (he was arrested for drunk driving) (Butler deposition, pages 24-25). The only reason he even knew he had been to the hospital was because when he "woke up" he was wearing a hospital bracelet (dep., p.25). Therefore, Butler has no idea whether he hit another car

after he hit cement, and he fails to make his prima facie case.

Motion sequence 5, the Doucouray/Diakite motion to dismiss all claims against them, presents an interesting legal issue. Mr. Diakite admitted that he stopped to pick up plaintiff in the first moving traffic lane, next to the parked cars (Diakite trans. pp. 16-17). No one alleges that Diakite was issued any tickets for being illegally parked or stopped. In any event, there is no doubt that the cab was stopped when it was hit, and Doucouray/Diakite move to dismiss on that basis - that there can be no negligence attributed to a parked vehicle that is struck by a moving vehicle. On the other hand, the opponents to the motion claim that because the cab was stopped in violation of "multiple [but unspecified] sections of the Vehicle and Traffic Law thus [automatically] creating a question of fact as to whether they proximately caused plaintiff's injuries" (Warywoda's affirmation in opposition, p. 5).

Drawing all reasonable inferences in favor of the non-moving party, as this Court must (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]), for purposes of this motion this Court will assume that the cab was negligent in double parking to pick up plaintiff. Therefore, the question presented is whether that negligent act may be viewed by a jury as a proximate cause of an accident, or did it merely furnish the occasion for it as a matter of law. In other words, did the cab's position contribute to the accident or was it just in the wrong place at the wrong time?

The First Department has held that a jury can reasonably conclude that a driver's action of parking on a shoulder or double parking on a busy street is a proximate cause of an accident that occurred *when the vehicle is struck in the rear* (*Bah v Benton*, 92 AD3d 133, 936 NYS2d 181 [1st Dept 2012]; *White v Diaz*, 49 AD3d 134, 854 NYS2d 106 [1st Dept 2008]).

Here, while the record is not consistent regarding where the cab was hit, it is clear that this cab was not struck in the rear. In his deposition, Diakite says he was hit on the driver's front side of his vehicle (dep., p. 22, lines 13-14, p. 25, lines 20-25) when the other car "came rolling" (p. 22 lines 21-24). Diakite also said the police report, which indicates the cab was hit in the rear, was incorrect (p. 26). The police report does indicate that the cab was hit in the rear (Exh. B; cab is vehicle 1 and damage codes are 7, 8 and 9, which is the entire back of the car), but that uncertified police report is hearsay and Diakite had personal knowledge; moreover, Diakite's version makes sense and the police report does not. As the other two cars were coming in the opposite direction and one vehicle crossed over into the oncoming traffic/the cab's lane, it would have been nearly impossible to strike Diakite's cab in the rear.

The obvious fact is that the cab was hit by an out-of-control Morbeth vehicle coming from the opposite direction; it hit the cab's front and side. The Morbeth vehicle was not coming from behind the cab and did not rear-end it. Therefore, even though Diakite was parked/stopped illegally in a moving lane of traffic, he was no more at fault for this accident than had he been stopped at a red light or had he stopped because he heard the noise of other cars crashing. Sure, if he was not at that location, he would not have been hit, but he was just in the wrong place at the wrong time; he had nothing to do with causing the accident. Because he was a sitting duck, he furnished the occasion for being hit; he did not contribute to the cause of the accident.

Accordingly, motion sequence 5, the Doucouray/Diakite motion to dismiss all claims against them, is granted.

For the foregoing reasons, it is hereby

ORDERED that motion Sequence 5 (the Doucouray/Diakite motion for summary judgment on liability) is granted and all claims and cross-claims are dismissed as against those defendants, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further ordered that counsel for Doucouray and Diakite shall serve a copy of this order with notice of entry on the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change of the caption herein; and it is further

ORDERED that motion and cross-motion - Motion Sequence 6 - are denied; both branches of Butler's motion for summary judgment (liability and serious injury) are denied and the serious injury "cross-motion" is denied.

This is the Decision and Order of the Court.

Dated: January 16, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

JAN 23 2014

**COUNTY CLERK'S OFFICE
NEW YORK**