

Vasquez v Obi

2014 NY Slip Op 32628(U)

September 29, 2014

Supreme Court, Bronx County

Docket Number: 300852/2013

Judge: Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

ANDY VASQUEZ

Plaintiff,

Index No. 300852/2013

-against-

DECISION AND ORDER

INNOCENT N. OBI

Defendants.

Hon. Sharon A. M. Aarons:

Plaintiff moves for summary judgment pursuant to CPLR 3212 in her favor as to liability only against defendant INNOCENT N. OBI. Written opposition was filed by defendant. The motion is granted.

In support of the motion, plaintiff submits her affidavit in support of the motion; the pleadings and bills of particulars; a stipulation dated August 19, 2013, in which the parties agreed that the defendant was precluded from testifying unless he was produced for a deposition within 45 days; and the transcript of plaintiff's deposition with a cover letter of transmittal of July 24, 2013. Plaintiff states in her affidavit that she was struck by defendant's motor vehicle on January 2, 2013, at approximately 5:45 PM, while crossing Paulding Avenue at the intersection of East 224th Street in Bronx County. Plaintiff avers that she was wholly within the crosswalk, with the light and pedestrian signal in her favor. As plaintiff was crossing, she was struck by the defendant's vehicle which "ran" a red light. Plaintiff gave consistent testimony at her deposition.

In opposition, the defendant, a livery cab driver, submits his sworn statement in which he states that at the aforementioned time and place, the light was in his favor; that he did not strike the pedestrian, but honked his horn and applied his brakes, and was able to stop in time as she crossed the street; and that the pedestrian in fact fell down when she was pulled backward by another pedestrian, at which time she sat on the street and waited to be taken away by an ambulance which was called to the scene.

In reply, plaintiff maintains that the defendant may not rely on his statement to defeat summary judgment, as he is precluded from testifying.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404.)

The plaintiff's evidence shows that plaintiff was crossing an intersection, within the crosswalk, when she was struck by the defendant's vehicle, which failed to yield the right-of-way. This establishes defendant's negligence as a matter of law. (*Kirchgaessner v. Hernandez*, 40 A.D.3d 437, 836 N.Y.S.2d 170 [1st Dept. 2007] [plaintiff was entitled to summary judgment

on issue of liability; evidence established that plaintiff's decedent was in crosswalk with favorable walk signal, when she was hit by defendants' truck; truck driver was under duty to yield to decedent and his statement that he never saw her while being observant of crosswalk was incredible as matter of law.])

The statement of the defendant does not raise an issue of fact, as it is undisputed that the defendant is precluded from testifying in this case. The opponent of a motion for summary judgment, in order to avoid the granting of the motion, must submit evidentiary proof in admissible form (*see*, CPLR 3212[b]). It has been held that the affidavit of a precluded witness can be considered in opposition to a motion for summary judgment only to show that there is admissible evidence, other than the precluded witness's testimony, which can be produced upon the trial of the action. (*Ratut v. Singh*, 186 Misc. 2d 350, 718 N.Y.S.2d 135 [Civ. Ct., Kings Co., 2000].) Moreover, the self-serving, out-of-court statement of the defendant is hearsay, and evidence of hearsay statements alone is not sufficient to defeat motion for summary judgment. (*Forest Medical Professional Condominium v. Tiburzi*, 214 A.D.2d 962, 627 N.Y.S.2d 501 [4th Dept. 1995]; *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864 [1984] [self-serving hearsay statements contained in a police accident report may not be considered in opposition to a motion for summary judgment]; compare, *Harrison v. Bailey*, 79 A.D.3d 811, 914 N.Y.S.2d 187 [2d Dept. 2010] [statements made by precluded defendant which were admissible as part of accident report which qualified as business record could be considered in opposition to motion by plaintiff for summary judgment].) Here, the defendant has offered no

evidence other than out-of-court statement, which would be inadmissible hearsay at trial, and thus may not be considered in opposition to the motion.

The parties have not litigated the issue of whether the plaintiff sustained serious injury pursuant to Insurance Law § 5102 (d). The issue of "serious injury" remains to be determined during the damages trial. (*Zecca v Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 (2002); *Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 (1st Dept. 2003).

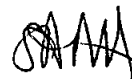
Accordingly, plaintiff's motion for summary judgment as to liability only against defendant is granted. It is hereby

ORDERED that the plaintiff's motion is granted with regard to liability only against defendant; and it is further

ORDERED that a trial of the aforesaid issues of fact including damages and the issue of "serious injury" shall be had before the court; and it is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for defendant.

Dated: September 29, 2014



SHARON A.M. AARONS, J.S.C.