

Bedward v Smith

2014 NY Slip Op 32805(U)

June 26, 2014

Supreme Court, Westchester County

Docket Number: 53739/2013

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
ALICIA BEDWARD

Plaintiffs,

-against-

**DECISION & ORDER
Index No. 53739/2013
Sequence No. 1**

**GAIL SMITH, LOVEDALE AMBULETTE, INC. and
JOY VAZHAMALAYIL KUTTAPPAN,**

Defendant.

-----X
WOOD, J.

The following documents numbered 1-16 were read in connection with the motion for summary judgment of defendants Lovedale Ambulette, Inc. and Joy Vazhamalayil Kuttappan (collectively, "Joy").

Defendant Joy's Notice of Motion, Counsel's Affirmation, Affidavit of Service Exhibits.	1-9
Defendant Gail Smith's Counsel's Affirmation in Opposition.	10
Plaintiff's Counsel's Affirmation in Opposition, Exhibit, Affidavits of Service.	11-14
Defendant Joy's Counsel's Reply Affirmation, Affidavit of Service.	15-16

This is an action to recover damages for personal injuries sustained by plaintiff, as a result of a motor vehicle accident that occurred at approximately 5:30 p.m. on February 1, 2012, on East Lincoln Avenue at the intersection with Summit Avenue in Mount Vernon ("the accident"). At the time of the accident, Kuttappan was the operator of an ambulette owned by Lovedale Ambulette, Inc., and driving on East Lincoln Avenue, which is a two way road having no traffic control device. As Kuttappan approached the intersection with Summit Avenue, defendant Gail Smith ("Smith"),

who was driving a Toyota, was at the stop sign on Summit Avenue, and started to make her way past the stop sign to cross East Lincoln Avenue, when the front of the Kuttappan ambulette struck the passenger side of Smith's vehicle, which then struck plaintiff's parked car.

Plaintiff commenced this action by the filing of a summons and complaint on or about March 18, 2013. Issue was joined by the service and filing of an answer on behalf of Joy on or about June 20, 2013. Smith appeared in the action by service of her verified answer on April 26, 2013.

Joy moves for summary judgment pursuant to CPLR 3212, claiming that Smith is solely responsible for the accident, and there is no proof that any of Joy's acts caused or contributed to the happening of the accident. Plaintiff and defendant Smith oppose the motion.

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court

is required to view the evidence presented “in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is “even arguably any doubt as to the existence of a triable issue” (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v. Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

The elements of negligence are: “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury” (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]).

It is well settled that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions (*See* Vehicle and Traffic Law §§1126(a), 1180(a)). A driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law” (Maliza v Puerto-Rican Transp. Corp., 50 AD3d 650, 651 [2d Dept 2008]). However, a driver with a right of way has a corresponding duty to use reasonable care to avoid a collision (Mateiasevici v Daccordo, 34 AD3d 651, 652 [2d Dept 2006]). There also can be more than one proximate cause of an accident. Therefore, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law (Burnett v. Reisenauer, 107 AD3d 656 [2 Dept 2013]). Here, in support of the instant motion for summary judgment, Joy claims that Kuttappan

was lawfully operating the vehicle at the time of the accident maintaining a 15 mph speed. Joy points out that Summit Avenue traffic (Smith) was controlled by a stop sign at the intersection, while there was no traffic control device for Kuttappan. Smith testified at her deposition that she stopped at the stop sign before entering the intersection, she looked to the right and then towards the left before she entered the intersection, and never saw the approaching ambulance. She was rendered unconscious by the impact and does not recall what happened after the accident. Kuttappan testified that he first saw Smith's vehicle when it was right in front of him one second prior to impact, and that he applied the brakes as soon as he saw it. He testified that prior to entering the intersection, he did not see Smith's vehicle. During the one second when he saw Smith's Toyota before the accident occurred, he observed that Smith was holding her cell phone to her ear talking, and not watching the traffic approaching. Plaintiff offered no testimony regarding the accident, because she did not witness the accident, it happened behind her while she was parked at the curb.

Joy presented uncontroverted evidence in the form of the pleadings and the deposition transcripts, that Smith proceeded into the intersection without yielding the right-of-way, in violation of Vehicle and Traffic Law § 1142 (a). Moreover, while Kuttappan had the right to assume that Smith would obey the mandate of the stop sign, stop at the intersection, and not proceed until she could do so safely (Weinstein v Nicolosi, 117 AD3d 1036 [2d Dept 2014]), Kuttappan testified that he did not see the Smith vehicle at the stop sign as he drove at 15 miles per hour. This evidence is sufficient to make out a prima facie case that the Smith was negligent, but not that Joy is free from negligence.

In opposition to the motion, plaintiff and defendant Smith point out that a determination of whether Joy is comparatively negligent necessarily depends on credibility determinations to be made

by the finder of fact. Smith notes that Kuttappan testified that he was going 15 miles per hour, but he admitted that he did not check his speedometer from the time he was stopped at the intersection before the accident, until the time the accident took place. Smith also avers that a jury could reasonable determine that Kuttappan was deliberately lying about the speed of his vehicle, or that he was not looking at the roadway in front of him. While Kuttappan had the right of way and was entitled to assume that Smith would obey the traffic laws requiring her to yield, triable issues of fact have been raised by Smith and plaintiff, and even Kuttappan's own testimony regarding not seeing Smith at the stop sign and Smith's alleged cell phone use raises a question of fact regarding whether Kuttapan saw all that was there to be seen and took reasonable care to avoid the accident. The motion for partial summary judgment on the issue of liability is DENIED.

NOW, for the above stated reasons, it is hereby

ORDERED, that defendants Lovedale Ambulette, Inc. and Joy Vazhamalayil Kuttappan's motion for partial summary judgment dismissing the complaint as against them is **DENIED**; and it is further

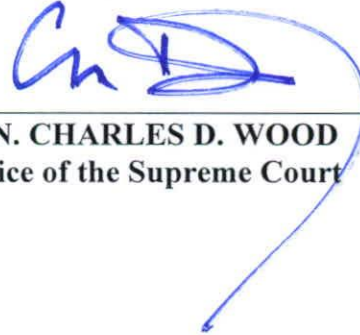
ORDERED that Joy shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that Joy is directed to serve a copy of this order with notice of its entry upon the Clerk of this Court; and it is further

ORDERED, that the parties are directed to appear at a compliance conference on July 8, 2014 at 9:30 a.m. in courtroom 800, the Settlement Conference Part of the Westchester County Courthouse.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: June 26, 2014
White Plains, New York



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Justice of the Supreme Court

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