

Morgan v Thompson
2014 NY Slip Op 33191(U)
November 3, 2014
Supreme Court, Bronx County
Docket Number: 309858/10
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. **309858/10**
Motion Calendar No. 18
Motion Date: ~~9/22/14~~

PAUL MORGAN

Plaintiff,

-against-

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

ABBE THOMPSON, "JOHN DOE" real name being
unknown and VERNAL GIBBS

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support,	
Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendant Gibbs moves this Court moves pursuant to C.P.L.R. 2221 to reargue this Court's April 14, 2014 Order which denied the underlying motion for summary judgment for non-appearance of the moving party. Defendant Gibbs further moves pursuant to CPLR § 3212 for an Order seeking summary judgment. Defendant Thompson submit written opposition.

Defendant erroneously moves to reargue this motion. Notwithstanding this procedural error, this Court properly considers this motion as a motion to vacate the April 14, 2012 default. A party seeking to vacate a default must establish both a reasonable excuse for the default and the existence of a meritorious defense (see CPLR § 5015(a)(1); Matter of Zrake v. New York City Dept. of Educ., 17 A.D. 3d 603, 793 NYS2d 151 (2nd Dept. 2005); Picinic v. Seatrain, Inc. 117 AD2d 504, 497 NYS2d 924 (1st Dept. 1986).

Plaintiffs commenced this action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on July 12, 2009.

Plaintiff was a passenger in the vehicle owned and operated by defendant Gibbs. Defendant Gibbs testified that the vehicle was stopped at a traffic light when it was struck in the rear by a vehicle which then left the scene prior to the arrival of the police.

Defendant Thompson testified that she was not operating her vehicle on the date of the incident. Her ex-husband had access to the vehicle on the date of the incident. Defendant Thompson also testified that her husband's brother, Willie Thompson had taken the car without permission. Willie Thompson submitted a statement, however this statement is unsworn and thus not admissible in opposition to the motion for summary judgment.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *see, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985) Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *see, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *see, Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957) Summary judgment in negligence cases may be granted where the facts clearly point to the negligence of one party without any culpable conduct by the other. *see, Barnes v. Lee*, 158 A.D.2d 414, 551 N.Y.S.2d 247 (1st Dept. 1990).

A rear-end collision with a stopped vehicle creates a presumption that the driver of the

moving vehicle was negligent and entitles the passengers of the stopped vehicle to summary judgment, unless the driver of the moving vehicle comes forward and demonstrates a non-negligent explanation for the accident or for her failure to maintain a safe distance between the cars as provided by Vehicle and Traffic Law § 1129.¹ *see*, Burns v. Gonzalez, 307 A.D.2d 863, 763 N.Y.S.2d 603 (1st Dept. 2003) and Agramonte v. City of New York, 288 A.D.2d 75, 732 N.Y.S.2d 414 (1st Dept. 2001).

Defendant Gibbs has met the burden for summary judgment. Defendant Gibbs has failed to submit sufficient proof to offer a non-negligent explanation to the accident. The statement of Mr. Thompson is inadmissible and *assuming arguendo*, it's admissibility, does not establish any negligence on the part of defendant Gibbs.

Accordingly, it is

ORDERED that defendant Gibb's motion for summary judgment is granted and the plaintiff's complaint dismissed as to defendant Gibbs only. It is further

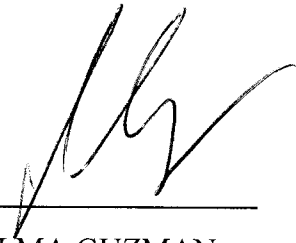
ORDERED that the Clerk of the Court mark the Court file accordingly. It is further

ORDERED that defendant Gibbs shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

11/3/14

DATE



HON. WILMA GUZMAN
Justice Supreme Court

¹ V.T.L. § 1129(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.