Espinosa v Nunez
2014 NY Slip Op 33331(U)
November 5, 2014
Supreme Court, Bronx County
Docket Number: 306021-2010
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - Part 4

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Rosa Espinosa

Plaintiff

Decision and Order

-against-

Index No. 306021-2010

Jose Nunez

Defendant

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Jose Nunez

Third-Party Plaintiff

Third Party Index No. 84056-2010

-against-

AVM Plumbing and Jess Rolnicik

Third-Party Defendant

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Recitation, as required by CPLR § 2219(a) , of the papers considered in the review of the third-party defendant's motion for summary judgment submitted September 3, 2014

Papers	Numbered
Notice of Motion - Affirmation in Support and Exhibits A-H	1
Affirmation in Opposition	2
Affirmation in Reply	3

Upon consideration of the above submissions and of the oral argument had thereon, the motion of the third-party defendant for an award of summary judgment dismissing the third-party complaint is decided as set forth below.

Facts and Procedural Background

In the main action, plaintiff seeks damages for personal injuries alleged to have been sustained on August 7, 2007, when the cab in which she was a passenger struck parked cars on West 99th Street, New York County, New York.

Plaintiff commenced the action against the driver of the cab in July 2010, and issue was joined in the following month.

Also in August 2010, defendant commenced a third-party action alleging that the primary negligence of Jess Rolnick s/h/a Jess Rolnicik in the operation of his employer' s vehicle caused the accident .

Motion

The third-party defendants now move for an award of summary judgment on the grounds that the record contains no facts upon which Rolnick can be found liable for the accident giving rise to plaintiff's personal injury claim be because the claim arises solely out of Nunez's conceded "panicked" action in stepping not on the brake, but on the accelerator while veering to the left, when, from a distance of one hundred feet , he saw Rolnick's van emerge from a parking lot. The motion is supported by the deposition testimony of Nunez and of the third-party defendant driver.

In opposition to the motion , the defendant/ third-party plaintiff argues that there

are unresolved issues of fact as to whether Rolnick, who , at the time of the accident, was in the process of exiting a parking lot located on 99th Street , was moving at the time Nunez was approaching the location .[1] As an operator of a vehicle entering a roadway, Rolnick had a duty to yield to Nunez' cab approaching on the roadway, and, it is argued that while there was no contact between the vehicles, there is an issue of fact that the failure to yield contributed to Nunez's responsive actions, including the collision with the parked vehicles on the other side of the street.

In reply, it is maintained that even were the Rolnick van moving immediately before the accident, the collision was caused solely by the failure of Nunez to keep proper control of his cab by braking instead of accelerating and veering into the parked cars, when he observed Rolnick's van exit a parking lot.

Discussion and Conclusions

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, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as

[1]Rolnick testified that immediately before the accident, he had his foot on the brake [EBT: 15-16], while Nunez testified that it was moving less than ten miles an hour and exiting the parking lot [EBT: 24-25] .

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, 144 N.E.2d 387 [1957].

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, 670 N.Y.S.2d 543 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

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, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885).

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 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt.

Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

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) " Johnannsdottir v. Kohn, 90 AD2d 842, 456 N.Y.S.2d 86 [2d 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 [2d Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 , 699 N.Y.S.2d 393 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

It is submitted that the third-party defendant has made such a showing here, and in opposition, upon review of the testimony, as afforded all favorable inferences in favor of the third-party plaintiff, it is the further finding of this court that the unresolved issue of fact as to whether Rolinick's van had stopped or was emerging from the parking lot at the time at which it was seen by Nunez estimated by him to be a distance 100 feet away from his cab, does not, without more, raise a material issue of fact to rebut defendants' showing that Rolnick's conduct neither caused or contributed to the collision with the parked vehicles.

Accordingly, it is

ORDERED that the motion of the third-party defendants for an award of summary judgment dismissing the third-party complaint be and hereby is granted.

This constitutes the decision and order of this court.

Dated: November 5, 2014

Howard H. Sherman