McShaw v Tingle
2015 NY Slip Op 30849(U)
April 23, 2015
Supreme Court, Bronx County
Docket Number: 308542/2012
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

AISHA I. McSHAW

Plaintiff,

-against-

JACQULYNE M. TINGLE

Defendant.

Index No. 308542/2012

DECISION AND ORDER

Hon. Sharon A. M. Aarons:

Plaintiff moves for summary judgment in her favor on liability only pursuant to CPLR 3212. Defendant submits written opposition. The motion is granted.

Plaintiff alleges that on September 27, 2012, the vehicle which she was driving was rear-ended by a vehicle owned and operated by the defendant. The defendant has been precluded from giving testimony in this action based on defendant's failure to appear for his EBT. (Order dated October 13, 2014, Laura G. Douglas, J.).

In support of the motion, plaintiff submits an uncertified copy of an accident report;[1] the pleadings and bill of particulars; the unsworn[2], certified deposition testimony of the plaintiff; and

[1]Uncertified accident reports, even those which contain statements attributable to parties, are generally inadmissible hearsay and totally lacking in probative value. (*See Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].)

[2] No objection is raised as to the submission of the unsworn and/or uncertified transcript. *Pevzner v. 1397 E. 2nd, LLC*, 96 A.D.3d 921, 947 N.Y.S.2d 543 (2d Dept. 2012) ("Supreme Court providently reviewed the unsworn deposition transcripts submitted in support of the motion, since they were certified by the reporters and the plaintiffs did not challenge their accuracy."). *See Rosenblatt v. St. George Health & Racquetball Assoc., LLC,* 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 [2d Dept. 2014] (failure to submit to the Supreme Court a

an unsigned copy of the Order precluding the defendant from giving testimony at trial. Plaintiff testified at her deposition that she was the third car stopped for a red traffic light when the defendant's vehicle unexpectedly struck her in the rear. She did not see the defendant's vehicle prior to the impact.

In opposition, defendant argues that summary judgment is a drastic remedy which should seldom be granted in an action predicated on negligence.

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 v. Twentieth Century Fox Film Corp.*, supra).

It is well established that, a rear-end collision creates a prima facie case of negligence of the part of the operator of offending vehicle and imposes a duty upon that operator to offer an explanation. (*Itingen v. Weinstein*, 260 A.D.2d 440, 688 N.Y.S.2d 582 [2nd Dept. 1999]). A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the following vehicle imposing a duty of explanation (see, *Tripp v. Gelco Corp.*, 260 A.D.2d 925, 925-926, 688 N.Y.S.2d 829, 830). It is equally well established that, "[a] nonnegligent explanation

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certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect); *Gomez v. Shop-Rite of New Greenway*, 110 A.D.3d 483, 973 N.Y.S.2d 65, 2013 N.Y. App. Div. LEXIS 6489 [1st Dept. 2013] [appropriate to rely on unsigned, certified deposition transcript where transcript was not challenged as inaccurate]).

for a collision is sufficient to overcome the inference of negligence" (*Riley v. County of Broome*, supra, at 899, 681 N.Y.S.2d 851; see, *De Vito v. Silvernail*, 239 A.D.2d 824, 825, 658 N.Y.S.2d 500).

Uncertified accident reports, even those which contain statements attributable to parties, are generally inadmissible hearsay and totally lacking in probative value. (*See Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009]; *Griffin v. Pennoyer*, 49 A.D.3d 341, 852 N.Y.S.2d 765 [1st Dept. 2008] [plaintiff submitted evidence in admissible form, including her affidavit and a police report containing admissions by defendant, demonstrating that defendant made an abrupt left-hand turn into the path of plaintiff's vehicle.]) Accordingly, although the police accident report in this case contains the report of observations made by the responding police officer, it is not in admissible form and may not be considered.

Nevertheless, the affidavits of the plaintiffs provide a sufficient basis to award summary judgment. (*Cruz v. Lise*, 2014 N.Y. App. Div. LEXIS 8666, 2014 NY Slip Op 8739 [1st Dept. 2014] [summary judgment granted in case involving rear end collision based on plaintiff's affidavit; defendant's affidavit asserting that plaintiff suddenly stopped in front of him, standing alone, was insufficient to rebut the presumption of negligence].) In opposition, the defendants have submitted no countervailing evidence to rebut the presumption of negligence against them. Defense counsel's affirmation, standing alone, does not raise an issue of fact. (*Gallo v. Jairath*, 122 A.D.3d 795, 996 N.Y.S.2d 682 [2d Dept. 2014].)

The parties have not litigated the issue of whether the plaintiff sustained a 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 [1st Dept. 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 on the issues of damages and "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: April 23, 2015

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