Polanco v Rodriguez
2015 NY Slip Op 30982(U)
May 6, 2015
Supreme Court, Bronx County
Docket Number: 301903/09
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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Karisma Polanco [1] and **Elizabeth Pimental**

Plaintiffs

-against -

Luis Rodriguez , Yoanny Acosta-Compres, John Gentile and **IESI NY Corp.,**

Defendants

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Index No. 301903/09

Decision and Order

Howard H. Sherman
J.S.C.

FACTS AND PROCEDURAL HISTORY

Plaintiff Elizabeth Pimentel seek recovery for injuries allegedly sustained on June 4, 2007 in a two-vehicle collision that occurred on the southbound Major Deegan Expressway , Bronx, New York.

This action was commenced in March 2009 and issue was joined in the following month with the service of the answer of defendants John Gentile ("Gentile") and IESI NY Corp. ("IESI") , and co-defendants Luis Rodriguez ("Rodriguez") and Yovanny Acosta-Compres ("Acosta-Compres") interposed their answer in July 2009. As pertinent here, both answers interposed cross-claims and asserted affirmative

[1] Ms. Polanco's claims were discontinued with prejudice

defenses alleging plaintiff's causative culpable conduct.

The Note of Issue was filed on December 4, 2013.

Motion and Contentions of the Parties

Plaintiff now moves for an award of summary judgment on the issue of liability as there are no triable issues of fact that her conduct caused or contributed to the motor vehicle accident, and requests an assessment on the issue of damages. The motion is supported by Polanco's affidavit in which she attests that she was a rear-seat passenger in a vehicle owned by Rodriguez being driven by Acosta-Compres when it was struck in the rear by the co-defendants' truck . She further attests that immediately before the accident, she was sleeping, and immediately after the accident, she had a conversation with the driver concerning the circumstances of the rear-end collision.

By affirmation, Rodriguez and Acosta-Compres oppose the motion contending that plaintiff provides no evidence that she did not distract the driver or do anything negligent [Affirmation in Opposition ¶ 7].

Also in opposition , defendants Gentile and IESI argue that the affidavit of the non-English speaking plaintiff , which fails to include a translator's affidavit, is of no probative value, [2] and the copy of the police accident report tendered is not admissible as uncertified. Defendants also argues that to the extent plaintiff seeks an award on the issue of liability against defendants, the circumstances of the accident

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[2] Defendants submit a copy of the title pages of the transcript of plaintiff's deposition testimony, indicating that plaintiff required an interpreter at her EBT.

demonstrate that Gentile is entitled to invoke the emergency doctrine as the collision was preceded by a sudden lane change resulting from an engine failure of the co-defendants' vehicle.

In reply to defendants Rodriguez and Acosta-Compres , plaintiff argues that no evidence is tendered to support counsel's contention that she was negligent.

In reply to the co-defendants' arguments concerning the probative value of plaintiff's affidavit, plaintiff submits the affidavit of Yaharia Suriel, who attests that she is employed by plaintiff's counsel, and is fluent in Spanish, and translated the affidavit prior to its execution. Plaintiff also tenders a copy of the transcript of her 10/10/13 deposition . [3]

Discussion

Summary Judgment

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 , 427 N.Y.S. 2d 595 [1980]). Upon consideration of the motion , "the evidence must be construed in a light most favorable to the party opposing the motion (Weiss v Garfield, 21 AD2d 156). "

[3]The copy of Rodriguez's deposition said to annexed to the reply papers as an exhibit is not.

Matter of Benincasa v. Garrubbo , 141 A.D.2d 636, 637-638 ; 529 N.Y.S.2d 797 [2d Dept. 1988]; see also, Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 850 NE2d 653, 817 NYS2d 606 [2006])

This "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), as such, '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 , [1957]).

Failure to demonstrate the absence of any material issues of fact requires the denial of the motion , regardless of the sufficiency of the papers in opposition (see, Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industries, Inc., 10 NY3d 733, 735 [2008]; Vega v. Restani Constr.Corp., 18 N.Y.3d 499; 965 N.E.2d 240 [2012]).

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" (Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992])" Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 N.Y.S. 2d 594 [2d Dept. 2003]; Torres v. Indus. Container, 305

A.D.2d 136 , 760 N.Y.S.2d 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 A.D.3d 578, 876 N.Y.S.2d 38 [1st Dept. 2009]

Once a prima facie 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 [1st Dept. 1991]

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 [1st 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 [1st Dept. 1989[; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 Ad3d 276 [1st Dept. 2004]).

Conclusions

The court will consider the affidavit, as supported by that of the translator, even though the latter was submitted in reply, as there is no prejudice resulting from its consideration, however, the uncertified copy of the police report is inadmissible

(see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009]).

With respect to that branch of the motion seeking an award of summary judgment on the issue of liability as against defendants Gentile and IESI while it is settled that the "right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence " among the defendants\ (Johnson v. Phillips, 261 A.D.2d 269, 272, 690 NYS2d 545 [1st Dept. 1999], 690 NYS2d 545 [1st Dept. 1999], citing authority of Silberman v. Surrey Cadillac Limousine Serv., 109 A.D.2d 833, 834, 486 N.Y.S.2d 357 [2d Dept. 1985], the moving papers here consisting of a hearsay statement attributable to defendant Rodriguez does not permit for such a finding (compare, Perry v. Dumont, 77 A.D.3d 466, 467, 910 NYS2d 46 [1st Dept. 2010], Delgado v. Martinez Family Auto, 113 A.D.3d 426, 979 NYS2d 277 [1st Dept. 2014]).

Since it is undisputed that plaintiff was a passenger , and no evidence is submitted to rebut her showing that she was sleeping in the rear of the car before the accident occurred, as a matter of law she was free of negligence , and as such, entitled to a finding of no culpable conduct by plaintiff on the issue of liability (see, Mello v. Narco Cab Corp., 105 A.D.3d 634 , 963 NYS2d 581 [1st Dept. 2013]), and the respective affirmative defenses alleging plaintiff's causative negligence are dismissed.

Accordingly, it is ORDERED that the motion of the plaintiff be and hereby is granted solely to the extent of finding no culpable conduct by plaintiff on the issue of liability, and the affirmative defenses of defendants alleging same are dismissed.

This constitutes the decision and order of this court.

Dated: ~~April 30~~ 5/6, 2015

Howard H. Sherman