Florentino v Dominguez
2015 NY Slip Op 30985(U)
May 6, 2015
Supreme Court, Bronx County
Docket Number: 303064/13
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Emmanuel Florentino and **Dalia Florentino**

Plaintiffs

-against-

Millie Dominguez

Defendant

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Decision and Order

Index No. 303064/13

Howard H. Sherman
J.S.C.

Facts and Procedural Background

Plaintiff Emmanuel Florentino [1] ("Florentino") seeks recovery for injuries alleged to have been sustained in a two-vehicle collision that occurred on February 3, 2012 near the intersection of East Gunhill Road and Bainbridge Avenue, Bronx, New York

This action was commenced in May 2013, and issue was joined with the service of defendant's answer in July .

Motion

Plaintiffs move for an order awarding partial summary judgment on the issue of liability contending that the record demonstrates as a matter of law that there is no triable issue of fact that the collision between the Flornetino vehicle and that of defendant was caused solely by the culpable conduct of the defendant in making a left-hand turn across

[1] Dalia Florentino interposes a derivative claim .

two lanes of traffic without ensuring that both lanes of traffic were clear, or that the conduct of the plaintiff -driver neither caused nor contributed to the collision . The motion is supported by nine pages of excerpts of the drivers' respective deposition testimony.

Florentino testified that he was driving west in the right lane of East Gun Hill Road ata speed of less than 20 miles per hour , when at a distance of approximately 90 to 100 feet from the Bainbridge intersection, and three seconds before impact, he observed the headlights of plaintiff's vehicle as that vehicle was entering a parking lot entrance on the westbound side of the road , and despite braking, and sounding his horn, and turning his wheel to the left , he struck defendant's car.

Dominguez testified that she was stopped in the left lane of two in the eastbound direction waiting for traffic to allow her to make a wide left turn into the parking lot, and another car was stopped in the opposite direction also waiting to turn, and after checking to see no cars coming from behind that parked car, she proceeded to make her turn and was struck by plaintiff's oncoming car.

In opposition, defendant submits a copy of her complete deposition, and that of plaintiff's spouse,[2] contending that unresolved material issues preclude dispositive relief, arising out of the fact that plaintiff's vehicle struck the rear passenger side of her car, at

[2] As the co-plaintiff was not a passenger in the vehicle at the time of he accident, the deposition testimony is of no probative value on the issue of liability.

a point at which her car had entered the sidewalk area in front of the parking lot into which she was turning, and under such circumstances, there are unresolved questions as to whether the plaintiff driver was traveling at an excessive rate of speed because he was unable to stop despite having seen defendant's vehicle prior to impact.

In reply, plaintiffs argue that there is no evidence proffered to raise a triable issue of fact that plaintiff driver was comparatively negligent in striking defendant's vehicle, or that the accident was caused by anything other than the failure of defendant to exercise reasonable care in making the turn across oncoming traffic without having seen what was to be observed.

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 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]).

A motorist always owes a duty to "everyone else on the road" to operate his or her vehicle with reasonable care (PJI 2:77), which encompasses the duty to see what is there to be seen (PJI 2:77.1) " (Ohlhausen v. City of New York, 73 A.D.3d 89, 92-93, 898 N.Y.S.2d 120 [1st Dept. 2010]), and a driver breaches this duty if he or she has failed to see that which, through the proper use of senses, should have been seen (see, Berner v. Koegel, 31 A.D.3d 591, 819 N.Y.S.2d 89 [2d Dept. 2006]).

With respect to the specific claim here, a driver "intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."(Vehicle and Traffic Law § 1141; see also Foreman

v Skeif, 115 AD3d 568, 569, 982 N.Y.S.2d 314 [1st Dept 2014]; Sarac-Marshall v. Mikalopas, 125 A.D.3d 570, 4 N.Y.S.3d 195 [1st Dept. 2015]).

Upon review of the moving papers, and consideration of the applicable law, it is the finding of this court that plaintiffs have made their prima facie showing by coming forward with unrefuted evidence that the vehicle operated by defendant made a left turn across the path of Florentino's car without having observed it in the right eastbound lane , and despite immediately braking, and turning his wheel to the left , Florentino could not have avoided the collision (see, Foreman v. Skeif , 115 A.D. 3d 568 , 982 NYS 2d 314 [1st Dept. 2014]; Cadeau v. Gregorio , 104 A.D.3d 464, 961 NYS2d 106 [1st Dept. 2013]).

In opposition, defendant fails to come forward with probative proof by expert affidavit or otherwise, to support the assertion that the plaintiff driver was traveling at an excessive rate of speed, or that in the three-second time limit afforded him, Florentino otherwise could have avoided the accident (see; Sarac-Marshall , supra at 571; Ramirez v. Molina, 114 A.D.3d 540, 980 NYS 2d 433 [1st Dept. 2015]).

Accordingly, it is

ORDERED that the motion of the plaintiffs be and hereby is granted, and it is further

ORDERED that summary judgment on the issue of liability be and hereby is awarded in favor of plaintiffs as against defendant , and it is further

ORDERED that upon the completion of all discovery with respect thereto and the filing of the Note of Issue this matter be set down for assessments of damages to include a determination of whether plaintiff Emmanuel Florentino sustained an accident-related serious injury" as well as the issue of proximate cause.

This constitutes the decision and order of this court.

Dated : May 6, 2015

Howard H. Sherman