Awwad v Jennings
2015 NY Slip Op 30986(U)
May 1, 2015
Supreme Court, Bronx County
Docket Number: 303073/14
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Esameldin Awwad Index No. 303073/14

Plaintiff

-against-

Decision and Order

Octavia Jennings , Rong Fa Tan and
LP Food Supplies Inc.,

Defendants Howard H. Sherman
J.S.C.

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Facts and Procedural Background

Plaintiff seeks recovery for injuries alleged to have been sustained in a three - vehicle rear- end collision that occurred on September 7, 2013 at the intersection of Pike and South Streets, New York County, New York.

At that time Esameldin Awwad ("Awwad ") was the operator of a motor vehicle, which while stopped at a red light at the intersection, was struck in the rear by a motor vehicle owned and then being operated by defendant Octavia Jennings ("Jennings "), which in turn had been impacted in the rear while stopped at the intersection, by a vehicle owned by the corporate defendant then being driven by Rong Fa Tan ("Tan").

This action was commenced in June 2014, and issue was joined in August with the service of defendants Rong Fa Tan and LP Food Supplies ("LP Food") . In the following month defendant Jennings interposed her answer. Each answer asserted a cross-claim .

To date, no Note of Issue has been filed.

Motion/Cross-Motion

Plaintiff moves for an order awarding summary judgment on the issue of liability as against defendants Tan and LP Food arguing that there is no triable issue of fact that the accident was caused solely by the culpable conduct of the rear-most driver. The motion is supported by the affidavit of plaintiff's driver , and a copy of the police report. To the extent that the copy is uncertified , it is inadmissible (see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297, [1st Dept. 2009]).

Defendants Tan and LP Food oppose the motion as there are facts essential to justify opposition to the motion that exist but cannot be submitted at this time.

Defendant Jennings cross-moves for summary judgment dismissing the complaint and the cross-claim on the grounds that the evidence demonstrates as a matter of law that she was not negligent and that the motor vehicle accident was caused solely by the negligence of the rear-most driver. The motion is supported by the movant's affidavit attesting to the circumstances of the accident.

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]).

In the case of a rear-end collision, summary judgment on liability would properly lie " unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car [and] [a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle [emphasis added]." (Woodley v. Ramirez, *supra* at 452 , citing as authority, Malone v.

Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1st Dept. 2004]; Mullen v. Rigor, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1st Dept. 2004]; Agramonte v. City of New York, 288 A.D.2d 75, 732 N.Y.S.2d 414; see also, Cabrera v. Rodriguez, 72 A.D.3d 553, 900 N.Y.S.2d 29 [1st Dept. 2010]; Chowdhury v. Matos, 118 A.D.3d 488, 987 N.Y.S.2d 132 [1st Dept. 2014]).

As pertinent here, the rearmost driver in a chain-reaction collision bears a presumption of responsibility (see, De La Cruz v Ock Wee Leong, 16 AD3d 199, 200, 791 NYS2d 102 [1st Dept. 2005]; Ferguson v. Honda Lease Trust, 34 A.D.3d 356, 826 N.Y.S.2d 10 [1st Dept. 2006]).

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that plaintiff and defendant Jennings have demonstrated a prima facie case of the sole causative negligence of the rearmost driver in failing to maintain a safe distance behind Jennings' stopped car.

The co-defendants offer no probative evidence to raise a triable issue of fact of a non-negligent explanation for the accident. The argument that plaintiff's motion should be denied merely because the parties have not been deposed is unavailing as Tan who possesses personal knowledge of the relevant facts, did not provide an affidavit (see Rainford v Sung S. Han, 18 AD3d 638, 639-640, 795 NYS2d 645 [2d Dept 2005]; Johnson v Phillips, 261 AD2d 269, 270, 272, 690 NYS2d 545 [1st Dept 1999]; Delgado v. Martinez Family Auto, 113 A.D.3d 426,427, 979 N.Y.S.2d 277 [1st Dept. 2014]).

Accordingly, it is

ORDERED that the motion of the plaintiff and the cross-motion of the defendant Jennings be and hereby are granted pursuant to CPLR 3212, and it is further

ORDERED that summary judgment be entered in favor of defendant Octavia Jennings dismissing as asserted against her the complaint and cross-claim , and it is

ORDERED that summary judgment be and hereby is granted in favor of plaintiff as against the remaining defendants, Rong Fa Tan and LP Food Supplies , Inc., on the issue of liability , 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 an assessment of damages to include a determination of the issue of whether plaintiff sustained a serious injury as well as the issue of proximate cause.

This constitutes the decision and order of this court.

Dated: May 1, 2015

Howard H. Sherman