

Weitz v Veterans Transp. Co., Inc.

2015 NY Slip Op 30997(U)

May 4, 2015

Supreme Court, Queens County

Docket Number: 700736/2014

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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ANAT WEITZ, Index No.: 700736/2014
Plaintiff, Motion Date: 04/17/1015
- against - Motion No.: 139
Motion Seq.: 1
VETERANS TRANSPORTATION CO., INC. and
JOSEPH ANDERSON,
Defendants.

FILED
MAY 13 2015
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 10 were read on this motion by plaintiff, Anat Weitz, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on serious injury and damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 4
Affirmation in Opposition-Affidavits-Exhibits.....5 - 7
Reply Affirmation.....8 - 10

This is a personal injury action in which plaintiff, Anat Weitz, seeks to recover damages for injuries she sustained as a result of a two vehicle accident that occurred on May 28, 2013, on 150th Street near its intersection with 70th Road, Queens County, New York. At the time of the accident the plaintiff was operating a motor vehicle which was allegedly stopped when it was struck by a yellow school bus while it attempted to overtake or go around the plaintiff's vehicle.

This action was commenced by the filing of a summons and complaint February 2, 2014. Issue was joined by service of the defendant's answer dated February 28, 2014. Eitan Alexander Ogden, Esq., counsel for the plaintiff, now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment in favor of the plaintiff on the issue of liability and setting the

matter down for a trial on serious injury and damages only. In support of the motion plaintiff submits a copy of the pleadings, an affirmation from counsel, and an affidavit of merit from the plaintiff dated October 2, 2014.

Plaintiff states that she was operating a 2007 Honda motor vehicle which was stopped in traffic in the right travel lane of 150th Street near the intersection with 70th Road. She states that while she was fully stopped for 4 - 5 seconds, defendants' large yellow school bus attempted to go around and overtake her vehicle, partially going over the double yellow lines and into the opposite lane of traffic. She states that in making that maneuver the right side rear of the bus clipped her vehicle's driver's side front quarter panel and driver's side of the front bumper. She states that the yellow bus was owned by Veterans Transportation Co., Inc. and operated by Joseph Anderson.

Plaintiff's counsel asserts that the defendant bus driver was negligent in improperly trying to overtake plaintiff's stopped vehicle when it was not safe to do so in violation of VTL § 1122. Counsel claims that bus driver violated VTL § 1122 in that he did not keep a safe distance from plaintiff's vehicle and tried to get back in the lane where plaintiff's vehicle was stopped without ensuring his vehicle was clear of the plaintiff's overtaken vehicle. Counsel claims that the driver also violated VTL § 1128(a) in moving his vehicle out of his lane of traffic without first ascertaining that such movement could be made with safety. Counsel also asserts that in crossing the double yellow lines into the opposing lane of traffic the defendant violated VTL §§ 1126, 1120 and 1130 by not staying to the right of the double yellow lines.

In opposition, defendants' counsel, Daniel W. McCally, Esq., asserts that the plaintiff's motion for summary judgment is premature as it was made prior to depositions of the parties. Further, counsel asserts that the plaintiff was liable for causing the accident because she rear-ended the bus when she pulled away from a parking spot without first ascertaining if it was safe to do so. In support of the opposition, plaintiff submits an affidavit from the driver of the bus, Joseph Anderson, dated March 31, 2015.

In his affidavit, Mr. Anderson states that on May 28, 2013, he was driving a yellow school van with 10 - 11 students on board on his way to Yeshiva of Central Queens School. He states that the accident occurred in front of the school on 150th Street near Jewel Avenue. He states that in that area 150th Street has one wide lane in each direction. He states that the street is wide

enough so that cars and buses can double park. He states that while proceeding southbound he was confronted with the plaintiff's vehicle that was double parked in front of the school. The next closest car in his opinion was 50 feet in front of the plaintiff's vehicle. He intended to pull his vehicle around the plaintiff's vehicle and into the space in front of the plaintiff's vehicle. He states that he drove up to the open parking space, checked his mirrors and began to pull forward. As he was in the process of pulling forward, the plaintiff's vehicle suddenly moved forward striking the passenger side of his van. He states that the plaintiff's vehicle struck the van with the driver's side front end of her vehicle. He states that the plaintiff's vehicle did not move until he had almost completely passed by in the process of pulling into a parking space. He states that the plaintiff's actions were responsible for causing the accident and therefore the plaintiff's motion for summary judgment should be denied.

Upon review of the plaintiff's motion, defendants' affirmation in opposition, and plaintiff's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Based upon a review of the affidavits of the parties this Court finds that there are material issues of fact which preclude the granting of summary judgment to the plaintiff on the issue of liability. Although the defendant admits that he went around the plaintiff's double parked vehicle there are conflicting versions as to what caused the accident. Here the plaintiff alleges that she was completely stopped when the accident occurred and the bus crossed the double yellow line and struck her vehicle while attempting to overtake her vehicle when it was not safe to do so. However, defendant states that the plaintiff's vehicle suddenly moved from her parking spot while the defendant was going around her vehicle striking his van. Therefore, there are questions of fact as to whether the plaintiff's vehicle was double parked or stopped in traffic, whether the van crossed the yellow line in overtaking her vehicle, whether it was safe for the van to overtake the vehicle when he did, and whether the plaintiff was negligent in moving her vehicle from the parking space and striking the bus while the bus was parking and at a time when it was not safe for her to move her vehicle.


The Appellate Division has stated that "there can be more than one proximate cause of an accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Winner v Star Cruiser Transp., Inc., 95 AD3d 1109 [2d Dept. 2012] citing Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Villa v Leandrou, 94 AD3d 980 [2d Dept. 2012]; Calcano v Rodriguez, 91 AD3d 468 [1st Dept. 2012]). Here, the plaintiff also had a duty to exercise reasonable care to avoid a collision with another vehicle that was parking in front of her vehicle. Thus, there are questions of fact as to whether defendant was negligent and if he was, whether the plaintiff was also negligent and whether one party was completely negligent or whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926 [2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Therefore, viewing the evidence in the light most favorable to the non-moving party (see Stukas v Streiter, 83 AD3d 18 [2d Dept. 2011]; Judice v DeAngelo, 272 AD2d 583 [2d Dept. 2000]), this court finds that there are factual issues concerning whether the respective defendants each met their respective duty to observe what should have been observed and to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]). Given the conflicting versions as to how the accident actually occurred and who was responsible for the accident, issues of credibility have been raised that cannot be determined on a motion for summary judgment (see Calderon-Scotti v Rosenstein, 119 AD3d 722 [2d Dept. 2014]; Lee v Hossain, 111 AD 3d 799 [2d Dept. 2013]; Koeppel-Vulpis v Lucente, 110 AD3d 851 [2d Dept. 2013]).

Accordingly, for all of the above stated reasons it is hereby,

ORDERED, that the motion by the plaintiff for an order granting partial summary judgment on the issue of liability is denied.

Dated: May 4, 2015
Long Island City, NY



ROBERT J. MCDONALD
J.S.C.