Otu v Lions Den Enters., Inc.
2015 NY Slip Op 31031(U)
May 6, 2015
Supreme Court, Bronx County
Docket Number: 306015/13
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Blessing N. Otu

Plaintiffs

Decision and Order

Index No. 306015/13

-against-

Lions Den Enterprise , Inc.,

Defendant

Howard H. Sherman
J.S.C.

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Facts and Procedural Background

Plaintiff Blessing N. Otu (" Otu") seeks recovery for injuries alleged to have been sustained in a two-vehicle collision that occurred on June 5, 2013 at the intersection of East 143 rd Street and Willis Avenue, Bronx, New York

This action was commenced in October 2013, and issue was joined with the service of defendant's answer in December . The answer asserts seven affirmative defenses including the causative culpable conduct of the plaintiff driver , and with respect to the issue of damages, plaintiff's failure to use an available seat belt.

The Note of Issue was filed on December 16, 2014 .

Motion and Contention of the Parties

Plaintiff now moves for an order awarding summary judgment on the issue of liability against the defendant owner of the other vehicle involved in the accident, contending that the record demonstrates as a matter of law that there is no triable issue of

fact that the collision between the his vehicle and that of defendant was caused solely by the culpable conduct of the defendant's acknowledged employee, non-party driver, Kazadoi Kanstantsin ("Kanstantsin"). in proceeding through a red light at the intersection. Nor, it is argued, is there a material issue of fact that any conduct of the plaintiff either caused or contributed to the collision . The motion is supported by excerpts of plaintiff's deposition testimony, and that of the police officer who prepared the report [MV-104] of the accident, and a certified copy of that report.

In pertinent part, plaintiff testified that in the early afternoon of June 5th he was driving at around thirty miles an hour in light traffic on 143rd Street, a one-way street, proceeding towards Willis Avenue, and that he entered the intersection with a green traffic light , and two seconds prior to impact, he observed a truck driving on Willis Avenue, less than a car length from his vehicle. Otu tried to step on his brake, and "the next thing [he] just heard a bam." [EBT: 29:22-23]. The front side of the truck impacted the front driver's side of his vehicle [30].

Julio Nunez testified that he was a New York City Police Officer assigned to the 40th precinct , and on the day of the accident, he was posted to an area within a block of the accident scene [NUNEZ EBT: 5-7]. From this location, he heard the "bang" of the collision, and after arriving at the location, he prepared the police accident report [9] he identified at the deposition [10], and that it contained the statements of the two drivers made to

Nunez at the scene [11].

The report contains the drivers' pedigree information, and a hearsay statement attributable to the non-party driver .

In opposition, defendant argues that there are unresolved issues of fact as to whether plaintiff acted as a reasonably prudent driver in an attempt to avoid the accident, as he offers no explanation as to how he failed to see a commercial moving truck in the intersection until it was directly in front of his vehicle . In addition, defendant argues that the motion is premature as the deposition of the non-party driver has yet to occur.

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]).

As here, with respect to a motor vehicle collision at an intersection, "[u]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection." Nevarez v. S.R.M. Mgt. Corp., 58 A.D.3d 295, 298, 867 N.Y.S.2d 431 [1st Dept. 2008]

Upon review of the moving papers, and consideration of the applicable law, it is the finding of this court that plaintiff has made his prima facie showing by coming forward with unrefuted evidence that the vehicle operated by defendant's employee ran a red light at the intersection causing a collision with plaintiff's vehicle (see, Veh & Tr § 1111 (d)(1)). Plaintiff has also demonstrated that in the time afforded him , there is no issue of fact that he could have taken evasive action to have avoided the collision (see, Ramirez v. Molina, 114 A.D.3d 540, 980 NYS2d 433 [1st Dept. 2014]).

In opposition, defendant comes forward with no probative evidence to raise an issue of fact rebutting plaintiff's account of the accident . The argument that plaintiff's motion should be denied merely because defendant's driver has not been deposed is unavailing as Kanstanstin , 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 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 plaintiff 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 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