Berihuete v High Velocity Testing & Balancing, Inc.
2015 NY Slip Op 31906(U)
September 24, 2015
Supreme Court, Bronx County
Docket Number: 306511/2014
Judge: Howard H. Sherman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

FILED Sep 29 2015 Bronx County Clerk

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Decision and Order

----------x

Jose Berihuete ,

Plaintiff

Index No. 306511/2014

-against-

High Velocity Testing & Balancing, Inc.,
and **Joseph Gomes,**

Defendants

----------x

Facts and Procedural Background

Plaintiff Jose Berihuete ("Berihuete") seeks recovery for injuries alleged to have been sustained on November 6, 2014 in a two-vehicle collision that occurred on November 7, 2011 on West 110 th Street in the proximity of 8th Avenue, New York County, New York.

At that time Berihuete was the driver of a motor vehicle that remained stopped for a few seconds before it was impacted in the rear by a vehicle owned by the corporate defendant that was then being driven by Joseph Gomes.

This action was commenced in December 2014, and issue was joined in the same month.

Motion

Plaintiff now moves for an order awarding summary judgment on the issue of liability as against defendant arguing that there is no triable issue of fact that the rear-end collision was caused solely by the culpable conduct of the defendant driver. The motion

is supported by plaintiff's affidavit attesting to the circumstances of the accident.

Defendant contends that the motion should be denied as premature, especially, and particularly with regard to the issue of damages.

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]).

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

The defendant offer no probative evidence to raise a triable issue of fact of a non-negligent explanation for the accident, and any argument that a dispostive determination on the issue of liability should be denied merely because the parties have not been deposed is unavailing, as Gomes, who possesses personal knowledge of the relevant facts, did not provide an affidavit with respect to this issue (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 pursuant to CPLR 3212, and it is further

ORDERED that summary judgment on the issue of liability be entered in favor of plaintiff as against the defendants, 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 determinations 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: September 24, 2015

Howard H. Sherman