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| Nolasco-Garcia v Delva |
| 2015 NY Slip Op 32178(U) |
| October 7, 2015 |
| Supreme Court, Bronx County |
| Docket Number: 310756/11 |
| Judge: Howard H. Sherman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

PART 4

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RAFAEL NOLASCO-GARCIA,

Plaintiff

Decision and Order

Index No. 310756/11

-against -

SHALEM DELVA and ROBERT MILLER,

Defendants

Howard H. Sherman
J.S.C.

-----x

FACTS AND PROCEDURAL HISTORY

Plaintiff seeks recovery for injuries allegedly sustained on October 19, 2010 in a two- vehicle collision that occurred on 143 Street, Bronx, New York. At that time plaintiff was a passenger in a motor vehicle being driven by defendant Shalem Delva ("Delva") that came into contact with a vehicle owned and operated by defendant Robert Miller ("Miller").

This action was commenced in December 2011, and defendant Miller interposed his answer in February 2012, and co-defendant Delva answered in July 2012. Each defendant asserted a cross-claim against the other driver.

Motion and Contentions of the Parties

Miller now moves for summary judgment on the grounds that liability for the motor vehicle accident cannot be imputed to him because at the time of the collision, his

vehicle was stopped with only the front part within the parking lane when the co-defendant's rented car swerved into it.

In support of the motion plaintiff tenders the deposition testimony of the parties.

Co-defendant Delva opposes the motion contending that Miller has failed to make a prima facie showing of entitlement to dispositive relief as there are material issues of fact as to Miller's own negligence including whether the Miller vehicle was stopped at the time of the accident or whether it was pulling out of a driveway.

Plaintiff also opposes the motion arguing that his account of the other car's movement before the crash, as well as Miller's own inconsistent testimony raises issues of fact requiring resolution by the triers of fact.¹

In reply, Miller argues that any inconsistency in his testimony are immaterial in light of Delva's admission that he "lost control" of his car and it swerved into Miller's car.

Discussion and Conclusions

Summary Judgment

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 , 427 N.Y.S. 2d 595

¹ A copy of the police report is tendered, however, as uncertified, it is inadmissible (see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009]).

[1980]). Upon consideration of the motion , “the evidence must be construed in a light most favorable to the party opposing the motion (Weiss v Garfield, 21 AD2d 156). “ Matter of Benincasa v. Garrubbo, 141 A.D.2d 636, 637-638 ; 529 N.Y.S.2d 797 [2d Dept. 1988]; see also, Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt. L.P., 7 NY3d 96, 850 NE2d 653, 817 NYS2d 606 [2006]).

This “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), as such, ‘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 , [1957]).

Failure to demonstrate the absence of any material issues of fact requires the denial of the motion , regardless of the sufficiency of the papers in opposition (see, Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. All Industries, Inc., 10 NY3d 733, 735 [2008]; Vega v. Restani Constr.Corp., 18 N.Y.3d 499; 965 N.E.2d 240 [2012]).

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” (Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992])” Pace v. International Bus. Mach., 248 AD2d

690,691, 670 N.Y.S.2d 543 [2d Dept 1998]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 N.Y.S. 2d 594 [2d Dept. 2003]; Torres v. Indus. Container, 305 A.D.2d 136 , 760 N.Y.S.2d 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 A.D.3d 578, 876 N.Y.S.2d 38 [1st Dept. 2009].

Once a prima facie 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 [1st Dept. 1991].

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) " Johannsdottir v. Kohn, 90 AD2d 842 [1st 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 [1st Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 Ad3d 276 [1st Dept. 2004]).

Upon consideration of the record here as afforded all favorable inferences in favor of the non-moving parties, it is the finding of this court that the record presents

factual issues as to liability raised by the conflicting deposition testimony. Of significance is plaintiff's contention that when the car in which he was driving "slammed on top of them" [87:21], the "whole back of [Miller's] car" or "[I]ike half of the car" was in the roadway (see, Vehicle and Traffic Law §1143).

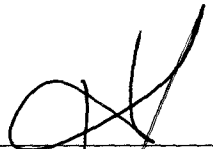
Miller testified that during the entire course of a fifteen [11-12; 30], or a two to three [34] minute period while he waited assessing traffic to exit his driveway, though only one to two cars did so in the fifteen minute interval [33], his car remained in "park", and positioned with the front wheels to the "nose" in the parking lane [20; 36-37].

It is not the court's function to assess credibility arising from these varying accounts or from internal inconsistencies within those accounts² (see, Duran v Kabir, 93 AD 3d 566; 567; 941 NYS 2d 50 [1st Dept. 2012]; Beaubrun v Boltachev, 111 A.D.3d 494, 974 N.Y.S.2d 782 [1st Dept. 2013]).

Accordingly, it is

ORDERED that the motion be and hereby is denied.

Dated : October 7, 2015


Howard H. Sherman

² It is noted that despite testifying that he did not see Miller's car until the impact, plaintiff also testified that he observed that it had reversed out of the driveway [56; 87; 54].