Grant-Malcolm v Fulcher
2015 NY Slip Op 32600(U)
April 22, 2015
Supreme Court, Queens County
Docket Number: 703979/14
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

SHEREE GRANT-MALCOLM,

Plaintiff,

-against-

CHANTALE FULCHER, et al.,

Defendants.

Index No. 703979/14

Motion
Date February 25, 2015

Motion
Cal. No. 48

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants, Jason P. Oskins and Stark Equine Transportation, LLC motion for an order pursuant to CPLR 3212 dismissing all claims and cross claims as against them on the issue of liability; and cross motion by defendant, Raul E. Barcia dismissing plaintiff, Sheree Grant-Malcom's Complaint against him pursuant to to CPLR 3212 are hereby decided as follows:

This is an action arising out of a multi-car motor vehicle accident which occurred on August 21, 2013 at or about the intersection of Hollis Avenue and Hillside Avenue, Queens, New York. Plaintiff, Sheree Grant-Malcom maintains that she sustained serious personal injuries as a result of the negligence of defendants.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*See Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

It is well-established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (*Reed v. New York City Transit Authority*, 299 AD2 330 [2d Dept 2002]; *see also, Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004], stating that: "[a] rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident.)"

The evidence proffered by defendants, Jason P. Oskins and Stark Equine Transportation LLC in support of the motion establishes that there are no triable issues of fact regarding defendants Jason P. Oskins and Stark Equine Transportation LLC. In support of the motion, said defendants submit, inter alia, an affidavit of defendant, Jason P. Oskins himself wherein he avers that: there was a rear-end collision where the tractor trailer

operated by himself and owned by defendant, Stark Equine Transportation LLC, was struck in the rear while at a full and complete stop for approximately one minute at an intersection by the vehicle operated by co-defendant, Chantale Fulcher.

Neither plaintiff nor co-defendants present any evidence in opposition that raises a triable issue of fact as to the liability of defendants, Jason P. Oskins and Stark Equine Transportation LLC. While defendant Raul E. Barcia argues in opposition that defendants, Jason P. Oskins and Stark Equine Transportation LLC have not established a prima facie case as the affidavit of Mr. Oskins has been notarized in the State of Kentucky by an out-of-state notary and there is no certificate of conformity, it is well-established law that an omission with respect to a Certificate of Conformity is not a fatal defect and can be cured *nunc pro tunc* (*see, Smith v. Allstate Ins. Co.*, 832 NYS2d 587 [2d Dept 2007]). A proper Certificate of Conformity has been included in the Reply papers. Plaintiff has not submitted papers opposing the position of defendants, Jason P. Oskins and Stark Equine Transportation LLC.

As there are no triable issues of fact regarding defendants, Jason P. Oskins and Stark Equine Transportation LLC, the motion is granted and plaintiff's Complaint is dismissed as against them.

The evidence proffered by defendant, Raul E. Barcia in support of the cross motion, establishes a prima facie case that there are no triable issues of fact regarding the liability of defendant, Raul E. Barcia. In support of the cross motion, said defendant submits, inter alia, an affidavit of defendant, Raul E. Barcia himself wherein he avers, inter alia, that: "At the time of the accident, my vehicle was impacted on the front passenger side area, by the vehicle operated by Miss Chantale Fulcher. My vehicle was impacted in this area, as Miss Fulcher was pulling out of a parking space in front of 211-14 Hillside Avenue, in a northbound direction. . .As I was proceeding northbound on Hillside Avenue, I did not see any obstacles or vehicles pulling out of the adjacent parking spaces until, in a split second, Miss Fulcher pulled out of her parking space, in a reckless manner, impacting my vehicle. I attempted to swerve out of the way, but I was not able to do so in time to avoid this impact. . .Although I did not see many of the impacts after the impact to my vehicle, I believe that Miss Fulcher impacted at least two other vehicles after impacting mine, which were located further down the roadway of Hillside Avenue. . .I do not believe that I am liable for the happening of this accident, because Miss Fulcher pulled out of a parking space, in a reckless manner, impacting my vehicle and

subsequently, other vehicles, which ultimately caused the entire accident. . .At no point did my vehicle ever come into contact with the plaintiff's vehicle at all." Defendant Raul E. Barcia has established that he is not liable for the happening of the accident.

Neither plaintiff nor co-defendants present any evidence in opposition that raises a triable issue of fact as to the liability of defendant, Raul E. Barcia.

Plaintiff submits opposition simply stating that the cross-motion is premature as depositions have yet to be held in this case. Plaintiff fails to submit any affidavit of herself. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion" (*Plotkin v. Franklin*, 179 AD2d 746 [2d Dept 1992]) [internal citations omitted]).

Accordingly, as there are no triable issues of fact regarding defendant, Raul E. Barcia, the motion is granted and plaintiff's Complaint is dismissed as against him.

This constitutes the decision and order of the Court.

Dated: April 22, 2015

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Howard G. Lane, J.S.C.