Jenkins v Wasp Taxi LLC
2016 NY Slip Op 30445(U)
February 25, 2016
Supreme Court, Bronx County
Docket Number: 302224/15
Judge: Howard H. Sherman
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 FILED Mar 01 2016 Bronx County Clerk

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

Decision and Order

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Cheryl Jenkins

Index No. 302224/15

Plaintiff

-against-

Wasp Taxi LLC., Harry Sasu,
and **Albert Broadus**

Defendants

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Facts and Procedural Background

Plaintiff Cheryl Jenkins ("Jenkins") seeks recovery for injuries alleged to have been sustained on October 14, 2014 in a two-vehicle collision that occurred at the intersection of Central Park West and West 88th Street, New York County, New York. At that time she was the passenger of a motor vehicle, which was then being driven by defendant Albert Broadus (Broadus)[1] that was stopped at a red light and impacted in the rear by a vehicle owned by the corporate defendant that was then being driven by Harry Sasu (Sasu).

This action was commenced in May 2015 and issue was joined in June with the service of the answer of defendants Wasp Taxi LLC and Sasu . Broadus served his answer in August.

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[1] Defendant's surname is spelled as "Broados" in the affidavit in support of the motion .

To date, no Note of Issue has been filed.

Motion /Cross-Motion

Broadus now moves for summary judgment dismissing the complaint and cross-claim on the grounds that there is no issue of fact that the sole proximate cause of the motor vehicle accident was the failure of Sasu to maintain a safe distance behind the co-defendant's stopped vehicle. The motion is supported by Broados' affidavit attesting to the circumstances of the rear-end collision, including his gradual stop at the intersection then controlled by a red light , and the subsequent impact to the rear of his vehicle [Broados Affidavit , Exhibit B].

Plaintiff cross-moves for summary judgment on the issue of liability as against defendants wasp Taxi LLC and Sasu "for the reasons articulated in the motion", adopting and incorporating the Broadus affidavit.

In opposition, the co-defendants argue that the motion and cross-motion must be denied as there are unresolved issues of fact concerning the circumstances of the underlying accident, and they submit Sasu's affidavit in which he attests that his vehicle never came into contact with the Broadus vehicle.

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]). The movants here have failed to make such a showing.

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that there are material issues of fact devolving from the discrepant accounts of the underlying incident that require assessments of credibility more properly reserved for the triers of fact, and precluding dispositive relief.

Accordingly, it is

ORDERED that the motion of the defendant and the cross-motion of the plaintiff be and hereby are denied.

This constitutes the decision and order of this court.

Dated: February 25, 2016

Howard H. Sherman