

Tavarez v Maxwell Plumb Mech. Corp.

2016 NY Slip Op 30661(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 152556/13

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22**

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ROSA TAVAREZ,

**Index No. 152556/13
Motion Seq: 02**

Plaintiff,

- against-

**MAXWELL PLUMB MECHANICAL CORP., MAXWELL
PLUMBING HEATING AND COOLING, INC. and
MENTOR WISLAIRS,**

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

Defendants.

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Defendants, Maxwell Plumb Mechanical Corporation, Maxwell Plumbing Heating and Cooling, Inc. and Mentor Wislairs' (defendants) motion for partial summary judgment dismissing any and all zone-of-danger claims is denied.

This action arises out of a motor vehicle accident that occurred on February 6, 2013 near the intersection of Broadway and West 135th Street in Manhattan. Plaintiff was driving southbound on Broadway and attempting to make a left turn onto West 135th Street when her vehicle collided with a car operated by defendant Mentor Wislairs and owned by defendant Maxwell Plumb Mechanical Corporation. Plaintiff was traveling with her twin, four year-old children (Abel and Joshua) and a friend at the time of the accident.

Defendants bring the instant motion claiming that plaintiff cannot recover for alleged emotional distress suffered when plaintiff witnessed injuries to her children.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“In order to recover for an alleged emotional injury based on the zone of danger theory of liability, a plaintiff must establish that [she] suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury while in the zone of danger” (*Stamm v PHH Vehicle Mgt. Servs., LLC*, 32 AD3d 784, 786, 822 NYS2d 240 [1st Dept 2006] [internal citations omitted]). “The emotional injury must not only be serious and verifiable but also tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant” (*id.*).

Defendants claim that plaintiff cannot recover under a zone-of-danger theory of liability

because plaintiff's children did not suffer serious injuries.

In opposition, plaintiff asserts that defendants failed to attach any certified or admissible records in support of defendants' motion. Plaintiff also claims that defendants fail to allege what standard applies to a serious injury in a zone-of-danger claim. Plaintiff maintains that there is an issue of fact because plaintiff observed both children rendered unconscious after the accident and that one child, Abel, had to seek continuing treatment for injuries stemming from the accident. Plaintiff acknowledges that there was very little testimony regarding the exact nature of Abel's or Joshua's injuries.

In reply, defendants claim that plaintiff's theory of liability must fail as a matter of law because plaintiff cannot establish that her children suffered a 'serious injury' under the no-fault insurance law (*see* Insurance Law 5102[d]).

As an initial matter, defendants' claim that the serious injury standard under Insurance Law § 5102 (d) applies to a zone-of-danger claim fails. A cause of action for negligent infliction of emotional distress, a zone-of-danger claim, was recognized by the Court of Appeals in *Bovsun v Sanperi* (61 NY2d 219, 473 NYS2d 357 [1984]). However, "[i]n *Bovsun*, the court made no reference to the no-fault law" (*Delosovic v City of New York*, 143 Misc2d 801, 807, 541 NYS2d 685 [Sup Ct, NY County 1989] *affd without opinion* 174 AD2d 407, 572 NYS2d 857 [1st Dept 1991])[holding that failing to prove a serious injury under the no-fault law does not preclude a plaintiff from pursuing a zone-of-danger claim]).

"While a person claiming mental distress emanating from his or her own physical injuries sustained in a motor vehicle accident would have to satisfy the 'serious injury' prerequisite to recover for the emotional injuries, a zone of danger plaintiff is in a different position" (*id.* at 808

[internal citation omitted]). “The no-fault law is in derogation of the common law right to sue for tort damages and it is to be strictly construed to avoid abrogating the common law beyond the clear impact of the statutory language . . . and is to be read narrowly” (*id.* at 809 [internal quotations and citations omitted]).

Although “serious injury” under the no-fault law *is not* the same “serious injury” for zone-of-danger purposes, defendants have not established a lack of serious injury to plaintiff’s sons. Defendants did not have their doctors examine Joshua and Abel, even though plaintiff’s zone-of-danger claim was in paragraph 24 of the complaint. Defendants brought this motion and therefore it is their burden to show a lack of serious injury. Aside from plaintiff’s deposition testimony, defendants have not elicited medical information about the children. Defendants failed to fulfill their burden on this motion.

Even though there was little deposition testimony regarding the injuries to plaintiff’s sons, defendants failed to show as a matter of law that plaintiff’s zone-of-danger claims should be dismissed. Plaintiff was in the car, the zone-of-danger, when she was involved in a motor vehicle accident allegedly caused by defendants. Plaintiff testified that the first thing she recalled after the accident was observing that her children were “knocked out and one of them had an injury on the forehead and he was bleeding” (Tavarez tr at 75, lines 10-12). Plaintiff also recalled that “[a]t first I thought they were dead and then they started to cry” (*id.* at 77, lines 11-12). Both children were taken to the hospital and plaintiff claims that Abel sought continuing treatment for his injuries. Therefore, even if defendants had met their burden, the testimony of plaintiff creates an issue of fact regarding whether her sons’ injuries were serious enough to pursue a claim under a zone-of-danger theory of liability.

Accordingly, it is hereby

ORDERED that Defendants' motion for partial summary judgment dismissing any and all zone-of-danger claims is denied.

This is the decision and order of the Court.

Dated: April 14, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC