Duran v Guaman
2016 NY Slip Op 31104(U)
May 17, 2016
Supreme Court, Bronx County
Docket Number: 300204/2015
Judge: Alison Y. Tuitt
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 FILED May 25 2016 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

VICTOR DURAN,

Plaintiff,

-against-

VICTOR E. GUAMAN and JGN CONSTRUCTION CORP.,

Defendants.

INDEX NUMBER: **300204/2015**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Plaintiff's Motion for Summary Judgment

On Calendar of **11/30/15**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, plaintiff's motion for summary judgment is granted for the reasons set forth herein.

The within action involves a motor vehicle accident that occurred on February 22, 2014 as a result of which plaintiff claims to have sustained serious injuries. Plaintiff was the operator of a motor vehicle on the northbound I-87 in the County of Westchester, New York when it was involved in a collision with the vehicle operated by defendant Victor E. Guaman (hereinafter "Guaman") and owned by defendant JGN Construction Corp. (hereinafter "JGN"). Pablo Peralta was a passenger in plaintiff's vehicle at the time of the accident.

Plaintiff moves for summary judgment arguing that he was not negligent in the happening of the

accident. In support of his motion, plaintiff submits an affidavit wherein he states that prior to the accident, he was traveling in his employer's vehicle with co-worker Pablo Peralta, on the New York State Thruway I-87. The Thruway at the location of the accident has three moving lanes and his vehicle was in the middle lane of travel and had been there for several minutes when his vehicle was struck from the right side in front of the passenger side door. The impact pushed his vehicle to the left lane and moved back towards the right and the defendants' van then struck his vehicle again. His vehicle was then again pushed into the left lane of travel at which point his vehicle was struck on the driver's side by the front left wheel by a third vehicle. After being struck by the third vehicle, plaintiff's vehicle again moved towards the right and he was able to bring the vehicle to a stop. After striking his vehicle for the second time, defendants' van veered towards the right side of the roadway. Plaintiff states that he did not have any opportunity to avoid the accident.

Mr. Peralta also submits an affidavit wherein he states that the accident occurred as they were driving in a northerly direction on the New York State Thruway. Their vehicle was in the middle lane of the three lane highway when it was struck forcibly from the right side in front of his door pushing their vehicle to the left and the front of their vehicle struck the center divider. Mr. Peralta did see the defendants' vehicle before the impact but only for a second or two. After striking the divider, their vehicle moved back towards the right and the defendants' vehicle struck them again causing them to move into the left lane and then being struck by a third vehicle.

The police accident report provides that "V-1 [defendant] was traveling in the right lane, v-2 [plaintiff] in the center lane and v-3 in the left lane all parallel to each other on n/b I 87. Op v-1 stated that he struck a patch of black ice which caused him to loose (sic) control of v-1 and veer into the center lane striking v-2. V-1 was then veered off of the right shoulder striking a guard rail and v-2 was forced into the left lane from the collision."

The Court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary

judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra.*

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Plaintiff's motion for summary judgment on the issue of liability must be granted as defendants have failed to raise any issues of fact. Plaintiff submits his affidavit as well as the affidavit of his co-worker and passenger, Mr. Peralta which attest that plaintiff was traveling in the middle lane, within his lane of travel, when his vehicle was suddenly and unexpectedly struck from the right side by defendants' vehicle. These facts are uncontested as defendants do not submit an affidavit from Guaman to dispute plaintiff and Mr. Peralta's version of how this accident occurred. Defendants' contention that the police accident report is inadmissible as it contains hearsay statements does not warrant a denial of the motion. While it is true that the statements contained in the police accident report are hearsay, hearsay evidence may be considered in opposition to a motion for summary judgment, so long as it is not the only evidence submitted. Here, there is other admissible evidence such as the affidavit of the plaintiff and non-party Mr. Peralta. See, Rodriguez v. Sixth President, Inc., 771 N.Y.S.2d 368 (1st Dept. 2004); Arnold v. New York City Housing Authority, 745 N.Y.S.2d 26 (1st Dept. 2002); Narvaez v. NYRAC, 737 N.Y.S.2d 76 (1st Dept. 2002); Guzman v. L.M.P. Realty Corp., 691 N.Y.S.2d 483 (1st Dept. 1999); Thomas v. Our Lady of Mercy Medical Center, 734 N.Y.S.2d 33 (1st Dept. 2001).

Defendants have failed to raise any issues of fact precluding summary judgment. Accordingly, plaintiff is granted summary judgment on the issue of liability. Moreover, as defendants failed to offer any opposition regarding plaintiff's application to strike the Second Affirmative Defense of failure to wear a

seatbelt, the Second Affirmative Defenses is stricken.

This constitutes the decision and Order of this Court.

Dated: 5/17/16

Hon. Alison Y. Tuitt