

Walker v Brienza

2016 NY Slip Op 31109(U)

May 10, 2016

Supreme Court, Bronx County

Docket Number: 300987/2014

Judge: Alison Y. Tuitt

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

PART IA - 5

CONCETTA M. WALKER and TRACEY WILLIAMS,

INDEX NUMBER: 300987/2014

Plaintiffs,

-against-

Present:

HON. ALISON Y. TUITT

Justice

MICHAEL J. BRIENZA,

Defendant.

The following papers numbered 1 to 6,

Read on this Plaintiff on the Counterclaim Concetta M. Walker's Motion for Summary Judgment and Plaintiff Tracey Williams' Cross-Motion to Amend the Pleadings

On Calendar of 10/26/15

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmations in Opposition 3, 4

Reply Affirmations 5, 6

Upon the foregoing papers, plaintiff on the Counterclaim Concetta M. Walker's (hereinafter "Walker") motion for partial summary judgment on the issue of liability and plaintiff Tracey Williams' cross-motion to amend the pleadings are consolidated for purposes of this decision. For the reasons set forth herein, the motion is denied and cross-motion is granted.

The within action involves a motor vehicle accident that occurred on April 15, 2013 when the vehicle operated by plaintiff Walker, and in which plaintiff Williams was a front seat passenger, was struck by defendant's vehicle which was backing out of a parking space in a parking lot. Plaintiff Walker testified that she entered the parking lot and observed an available space on the left hand side of the lot, which was a few feet in front of her. Walker observed that there were cars parked to her right, but did not observe whether any of the

parked cars had their engines on or see any taillights from any of the vehicles on the right side which would indicate that there were in the process of backing up or were about to back up. She “started driving slowly” in order to “reach the spot straight” when “the driver of a Ford car backed out of the space and hit my car” on the “right front bumper” with the rear of his vehicle. At the time of the impact, Walker had not yet begun to turn into the parking space so her vehicle was perpendicular to the parking spots on either side of the lot and she was traveling about five miles per hour. Plaintiff Williams testified at her deposition that she saw “[w]e were going into the parking lot and the guy backed out real fast.” She testified that Walker’s vehicle was “almost creeping” at the time of the impact and was traveling about “five, ten miles per hour”. Walker slammed on her brakes but the other vehicle backed out and struck Walker’s vehicle on the right passenger side where Williams was seated. Defendant testified at his deposition that he was backing out “a few inches” when he saw a car and he “stopped his vehicle before the sensors went off”. Prior to backing out, defendant looked for oncoming vehicles to the left and right. He looked through the rear door window of his vehicle on the right side where he “had a clear view”. Defendant did not see any vehicles approaching from the left, but he did notice a vehicle approaching from the right that was later involved in the accident. When he first saw the other vehicle, he was in the process of reversing out of his parking space and the other vehicle was approaching “no more than five or six feet” from the rear of his vehicle. That vehicle was proceeding at “parking lot speed”. Defendant had reversed “[n]o more than six inches” when the right bumper of his vehicle made contact with the front of the passenger side of the other vehicle. Defendant’s vehicle had cross-traffic sensors and at the time he was backing out a few inches, he stopped his vehicle before the sensors went off because he saw the other vehicle.

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).

Vehicle and Traffic Law §1211(a) “Limitations on backing” provides that “[t]he driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.” It is well-established that a “violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se”. Garcia v. Verizon New York, Inc., 781 N.Y.S.2d 93 (1st Dept 2004]; Barbieri v. Vokoun, 900 N.Y.S.2d 315 (2d Dept 2010). When a vehicle suddenly and unexpectedly backs towards another nearby vehicle, leaving a brief period to react, the backing driver may be found completely at fault for a collision. See, Garcia, 781 N.Y.S.2d at 95.

In the instant matter, plaintiff Walker’s motion for partial summary judgment on the issue of liability must be denied. Defendant’s contention that he brought his vehicle to a stop even before his sensors went off creates an issue of fact as to whether plaintiff Walker had time to see his vehicle and bring her car to a stop or take evasive action before the impact.

With respect to the cross-motion seeking to amend the complaint to add a claim by plaintiff Williams against defendant is granted. It is the policy of this State is to freely grant leave to amend pleadings in the absence of prejudice or surprise, and further providing that the amendment is not plainly and clearly lacking in good faith and merit. See, Fohey v. Ontario County, 44 N.Y.2d 934 (1978); Prote Contracting. Co., Inc. v. Board of Education of the City of New York, 672 N.Y.S.2d 109 (1st Dept. 1998). See also, Sclafani v. City of New York, 706 N.Y.S.2d 129 (2d Dept. 2000)(while a Court has broad discretion in deciding whether leave to amend should be granted, it is an improvident exercise of discretion to deny leave so as to assert an otherwise apparently meritorious cause of action absent an inordinate delay and a showing of prejudice or where the party opposing the motion to serve an amended pleading cannot demonstrate prejudice resulting directly from the delay). In the absence of prejudice, a mere delay is insufficient to defeat the amendment. 17 Vista Fee

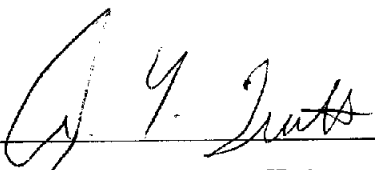
Associates. v. Teachers Insurance & Annuity Association of America, 693 N.Y.S.2d 554 (1st Dept. 1999).

Here, Williams' delay is not inordinate and the claims involve the same underlying transactions or occurrences underlying the litigation. See Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473 (1985). There is no prejudice by virtue of this proposed amendment to the pleadings. In addition, proposed plaintiff has made a showing that the sought amendment is an otherwise apparently meritorious cause of action. Furthermore, defendants' claim that the Statute of Limitations has expired is without merit. The subject motor vehicle accident occurred on April 15, 2013. The time within which to commence an action for property damage is three years. See, CPLR §214(4). Therefore, the Statute of Limitations does not expire until April 15, 2016. The date of this decision is within the Statute of Limitations.

Accordingly, plaintiff Williams is directed to serve the Summons and Complaint within 30 days after service of the within decision and Order with Notice of Entry.

This constitutes the decision and Order of this Court.

Dated: 5/10/16



Hon. Alison Y. Tuitt