

Lenihan v Solicito & Sons Contr. Corp.

2016 NY Slip Op 32475(U)

November 2, 2016

Supreme Court, Rockland County

Docket Number: 034690/2015

Judge: Linda Christopher

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

ERICA M. LENIHAN,

Plaintiff,

-against-

**SOLICITO & SONS CONTRACTING CORP.
VINCENT B. COLUCCI, WENDELL AUGUSTE,
GN CHINCHILLASANDVL and NEW CITY
MAINTENANCE CORP.,**

Defendants.

DECISION AND ORDER

INDEX NO. 034690/2015

(Motion #'s 6, 7 & 8)

WENDELL AUGUSTE,

Plaintiff,

-against-

**SOLICITO & SONS CONTRACTING CORP., i/p/a
SOLICITO & SON and GERBER N. CHINCHILLA
SANDOVAL i/p/a GN CHINCHILLASANDVL**

Defendants.

CHRISTOPHER, J.

The following papers numbered 1- 20 were considered in connection with plaintiff Lenihan's motion for an order granting reargument of the motion for summary judgment and the Court's prior Decision and Order; defendant Colucci's cross-motion for an order granting

reargument of the motion for summary judgment and the Court's prior Decision and Order; and defendants Auguste and New City Maintenance Corp.'s (hereinafter "Auguste") cross-motion for an order granting reargument of the motion for summary judgment and the Court's prior Decision and Order:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation of Wayne A. Gavioli, Esq./Exhibits 1-7 (Motion #6)	1 - 9
Notice of Cross-Motion/Affirmation of Andrea F. Composto, Esq./ Exhibit A (Motion #7)	10 - 12
Notice of Cross-Motion/Affidavit of Debra C. Salvi, Esq./Exhibits A-C (Motion #8)	13 - 17
Affirmation of Cara E. Manz, Esq. in Opposition ¹ /Exhibits A-B	18 - 20

This action was commenced by plaintiff Auguste to recover damages due to a 5 car chain motor vehicle accident that occurred on June 23, 2015 on Route 303 at the intersection of Route 340. A second action was commenced by plaintiff Lenihan seeking damages regarding the same accident. Plaintiff Lenihan was in Vehicle #2, defendant Colucci was in Vehicle #3 behind Lenihan, defendant/plaintiff Auguste was in Vehicle #4 behind Colucci; and defendant Solicito & Sons was Vehicle #5 behind Auguste. (The 1st car that was in front of plaintiff Lenihan is not a party to this action).

¹ Ms. Manz sets forth that the Affirmation in Opposition is also in opposition to the motion filed by plaintiff Auguste "granting summary judgment in his favor on liability and as to "serious injury" and directing an inquest on damages." However, the Court notes that motion is not before this Court; it was decided by the Hon. Margaret Garvey in the Decision and Order dated May 9, 2016, and plaintiff Auguste has not moved to reargue that Decision and Order.

On May 9, 2016 the Hon. Margaret Garvey rendered a Decision on Order in connection with, *inter alia*: 1) plaintiff Lenihan's motion for an Order granting Lenihan summary judgment on liability as to defendants Solicito & Sons Contracting Corp. and Gerber N. Chinchilla Sandoval (hereinafter "Solicito"); 2) defendant Colucci's cross-motion for an Order granting Colucci summary judgment, dismissing the complaint and any and all cross-claims against him; and 3) defendant Auguste's cross-motion for an Order granting summary judgment in favor of Auguste, dismissing plaintiff Lenihan's complaint and the cross -claims of co-defendants Solicito and Colucci against Auguste. Pursuant to Justice Garvey's Decision and Order the motion and cross-motions for summary judgment were denied without prejudice. Justice Garvey found that the motion and cross-motions were supported by a police report, that was inadmissible. Exhibit 7 to Lenihan's Notice of Motion, Decision and Order dated May 9, 2016. She further noted that

[e]ach of the moving papers include an affidavit from the party, but fail to contain any affidavit from the police officer regarding his observations or the source of the information contained in the police report. Additionally, based on the outstanding discovery requests by Defendant SOLICITO & SONS and the potential material evidence and possible non-negligent reason for the Defendant SOLICITO & SON'S driver's conduct that may arise during the discovery process this Court finds that the motions for summary judgment are premature.

Id. at p 7-8.

Plaintiff Lenihan, defendant Colucci and defendant Auguste have now filed the instant motion and cross-motions to reargue Justice Garvey's Decision and Order dated May 9, 2016 pursuant to which their respective motions for summary judgment were denied.² Defendant

² Justice Garvey's Decision and Order dated May 9, 2016 also denied plaintiff Auguste's motion for summary judgment on liability, dismissing Solicito's affirmative defenses, for summary judgment as to "serious injury" and directing an inquest on damages. As previously noted, Auguste, as plaintiff, in the consolidated action. has not moved to reargue Justice Garvey's Decision and Order.

Solicito opposes the motion and cross-motions to reargue.

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” and the determination to grant same lies within the sound discretion of the court. CPLR §2221(d)(2); *see, Matter of Anthony J. Carter, DDS, P.C. v. Carter*, 81 AD3d 819 (2nd Dept. 2011). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments not previously advanced. *See, Hague v. Daddazio*, 84 AD3d 940, 942 (2nd Dept. 2011). Additionally, a motion for leave to reargue must be “made within thirty days after service of a copy of the order determining the prior motion and written notice of entry.” CPLR §2221(d)(3).

At the outset defendant Solicito opposes the motions to reargue contending they are untimely, as they were not filed within 30 days after service of a copy of Justice Garvey’s Order. An Order with Notice of entry was electronically filed by Solicito on May 19, 2016 and the motions to reargue were not filed until September 20, 2016. However, it is an appropriate exercise of discretion to allow a motion to reargue to be made after expiration of the statutory time frame if a timely notice of appeal has been served and filed. *Leist v. Goldstein*, 305 AD2d 468 (2nd Dept. 2003). In this case, a Notice of Appeal was filed on June 3, 2016 by plaintiff Lenihan. Therefore, the Court will allow the motions.

Defendant Solicito also opposes the motions to reargue claiming that inasmuch as the underlying Order was made by Justice Garvey, this motion to reargue must be made before her. However, CPLR §2221(a) states that “[a] motion for leave ...to reargue a prior motion...shall be

made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it..." In the instant matter the motions are appropriately before this Court, as Justice Garvey is retired, and unable to hear the motions.

Now, turning to the substance of the motions to reargue, plaintiff Lenihan and defendants Colucci and Auguste contend that the Court misapprehended the law in denying summary judgment. This Court agrees as set forth herein.

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 Hosp.*, 68 NY2d 320 (1986). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Med. Ctr.*, 64 NY2d 851, 853 (1985); *Cendant Car Rental Group v. Liberty Mutual Ins. Co.*, 48 AD3d 397, 398 (2d Dept. 2008); *Martinez v. 123-16 Liberty Avenue Realty Corp.*, 47 AD3d 901 (2d Dept. 2008).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Tillem v. Cablevision Sys. Corp.*, 38 AD3d 878 (2d Dept. 2007).

Here, in support of the motions for summary judgment, defendants Auguste and Colucci, and plaintiff Lenihan each submitted his or her affidavit.

Defendant Auguste presented an affidavit wherein he states he was stopped at a red light

when his vehicle was struck from behind. He states that his vehicle was at a complete stop when it was struck and that there were 3 cars in front of him, also stopped at the red light. Auguste also claims that the truck that hit his vehicle approached at fast speed, and there was no way to avoid the truck colliding with his van. Further, Auguste states that the truck that rear-ended him caused his vehicle to launch forward and collide with the car in front of him.³ Exhibit 5 to Lenihan's Notice of Motion.

Defendant Colucci provided an affidavit wherein he states that as he approached the intersection he brought his vehicle to a complete stop for a steady red traffic signal. He states that he was the third car in a line from the intersection, and that plaintiff Lenihan who was in front of him, brought her car to a stop for the same traffic light. Colucci asserts that his vehicle was at a complete stop when it was impacted in the rear by the vehicle operated by Auguste. Exhibit A to Colucci's Notice of Cross-Motion.

Plaintiff Lenihan presented an affidavit wherein she states she had come to a complete stop at a traffic light when she was suddenly hit in the rear by Colucci. She further asserts that Colucci had been hit in the rear in a chain reaction caused by Solicito. Exhibit 1 to Lenihan's Notice of Motion.

"A rear end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (citations omitted)." *LeGrand v. Silberstein*, 123 AD3d 773 (2nd Dept. 2014).

While it appears that Justice Garvey did not find the affidavits presented to be sufficient

³ The car in front of Auguste was Colucci's vehicle; the truck that rear-ended Auguste was Solicito's vehicle.

to grant summary judgment, this Court finds that taken together the affidavits of plaintiff Lenihan and defendants Colucci and Auguste establish a prima facie case of negligence on the part of Solicito entitling them to summary judgment on the issue of Solicito's liability. All 3 vehicles were in line at a complete stop at the traffic light when Solicito who was driving at a fast speed rear ended Auguste, who rear ended Colucci, who in turn rear ended Lenihan.

Auguste has established a non-negligent explanation for rear ending Colucci, and likewise, Colucci has established a non-negligent explanation for rear ending Lenihan. Both Auguste and Colucci were at a complete stop when the impact from Solicito rear ending Auguste propelled Auguste into Colucci, and Colucci into Lenihan. *See, Kilpatrick v. Lesfloris*, 256 AD2d 312 (2nd Dept. 1998).

The burden then shifts to defendant Solicito to come forward with sufficient evidence in admissible form to establish a triable issue of fact as to its negligence or comparative negligence. Defendant Solicito has failed to meet its burden. Solicito has not submitted an affidavit from the driver of its own vehicle (vehicle #5) to provide any evidence of a triable issue of fact. There are no admissible claims made by Solicito to raise a question of fact. Defendant Solicito has "failed to come forth with any defense of sudden or unavoidable circumstances which could have contributed to the happening of the accident." *Gambino v. City of New York*, 205 AD2d 583 (2nd Dept. 1994). He has failed to provide a non-negligent explanation for the collision.

While Solicito argued, and Justice Garvey agreed, that the motions for summary judgment were premature in that discovery had not yet taken place, this Court finds that the motions for summary judgment were not premature. Solicito has "failed to demonstrate that further discovery might lead to relevant evidence or that facts essential to justify opposition to

[Lenihan, Colucci and Auguste's] motion[s] were exclusively within the knowledge and control of [Lenihan, Colucci and Auguste] (citations omitted)." *Pabarroo v. TS 405 Lexington Owner, LLC*, 141 AD3d 634, 635 (2nd Dept. 2016). " ' The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion' (citations omitted)." *Id.* Here, although Solicito asserts that there has not yet been discovery in this matter, all that was provided by Solicito was an attorney's affirmation that speculates as to what further discovery might reveal. Such speculation will not defeat a motion for summary judgment.

Accordingly, the motions to reargue are granted. Upon reargument, 1) plaintiff Lenihan's motion for an Order granting Lenihan summary judgment on liability as to defendants Solicito & Sons Contracting Corp. and Gerber N. Chinchilla Sandoval is granted; 2) defendant Colucci's cross-motion for an Order granting Colucci summary judgment, dismissing the complaint and any and all cross-claims against him is granted; and 3) defendants Auguste and New City Maintenance Corp.'s cross-motion for an Order granting summary judgment in favor of Auguste and New City Maintenance Corp., dismissing plaintiff Lenihan's complaint and the cross-claim of co-defendants Solicito & Sons Contracting Corp and Corp. and Gerber N. Chinchilla Sandoval i/p/a GN Chinchillasandvl and the cross-claim of co-defendant Colucci against Auguste and New City Maintenance Corp. is granted. Therefore, it is hereby

ORDERED that an inquest shall be scheduled on the issue of damages with regard to plaintiff Lenihan's complaint against Solicito; and it is further

ORDERED that plaintiff's complaint against Colucci, Auguste and New City Maintenance Corp. is dismissed; and it is further

ORDERED that all cross claims against Colucci, Auguste and New City Maintenance Corp. are dismissed.

This matter is scheduled for a conference on November 28, 2016 at 9:15 a.m.

To the extent any relief requested in Motion Numbers 6, 7 & 8 was not addressed by the Court it is hereby denied.

This decision shall constitute the order of the Court.

ENTER

Dated: *November 2*, 2016


HON. LINDA CHRISTOPHER, J.S.C.

To: Wayne A. Gavioli, Esq.
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(Via e-file)

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