Weitzel v Loeffler
2016 NY Slip Op 33208(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: Index No. 23669/2015E
Judge: Alexander W. Hunter, Jr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 23A

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MONICA WEITZEL and ALINE VARGAS,

Index No.: 23669/2015E

Plaintiffs,

-against-

Decision & Order

HERMAN LOEFFLER, JR., VINCENT BURNS, and RELIABLE HEATING OIL, INC.,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.:

The motion by the plaintiffs for an order pursuant to CPLR § 3212 granting them summary judgment on the issue of liability as against defendant Herman Loeffler, Jr. ("Loeffler") is hereby granted. The request by defendants Victor Burns ("Burns") and Reliable Heating Oil, Inc. ("Reliable") for an order pursuant to CPLR § 3212 (b) granting them summary judgment and dismissing the complaint as against them is granted.

This cause of action is for personal injuries allegedly sustained by the plaintiffs as a result of a multiple vehicle accident, which occurred on the Cross County Parkway ("the Parkway"), approximately two hundred feet east of North Columbus Avenue, Mount Vernon, New York on August 20, 2012. According to the verified complaint, plaintiff Monica Weitzel ("Weitzel") was operating a vehicle in which her daughter, plaintiff Aline Vargas ("Vargas"), was the front seat passenger. Plaintiff Weitzel asserts that she had been operating her vehicle completely within the confines of the center lane of the Parkway for at least five minutes prior to the aforesaid accident, and that said vehicle was traveling within the speed limit at approximately fifty miles per hour throughout that entire duration of time. Plaintiff Weitzel further contends that the vehicle operated by defendant Loeffler subsequently struck her vehicle, causing it to spin numerous times and to collide with the vehicle operated by defendant Burns and owned by defendant Reliable.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. **Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); CPLR § 3212 (b)**. The court's function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957)**. For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065 (1979)**. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action. **Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).**

Vehicle and Traffic Law ("VTL") § 1129 (a) requires the driver of a motor vehicle to exercise due care by maintaining a reasonable rate of speed and control over his or her vehicle when approaching another vehicle from the rear. Where a defendant fails to abide by the mandates of statutory provision of the VTL, such proscribed conduct is deemed negligent as a matter of law. **Martin v. Herzog, 228 N.Y. 164 (1920).** However, in rendering its decision, the **Martin** Court cautioned against conflating the "question of negligence with that of the causal connection between the negligence and the injury." **Id., at 170.** Thus, a mere showing that the defendant was negligent without also proffering evidence demonstrating that said negligence was the cause of the plaintiff's injuries is insufficient to warrant granting a plaintiff summary judgment.

The plaintiffs' motion is predicated upon the allegation that defendant Loeffler operated his vehicle in contravention of VTL § 1129 (a)'s commands, which culminated in his vehicle striking the rear of the plaintiffs' vehicle. However, the respective affidavits of both plaintiff Weitzel and plaintiff Vargas simply state that their vehicle was "struck from behind by another vehicle" without specifying which particular vehicle caused said contact. Similarly, they both omit any factual recitation of defendant Loeffler's allegedly negligent actions at the time of the accident.

The only descriptions offered by the plaintiffs of either the manner in which the aforementioned cars came into contact with one another or of the alleged negligence of defendant Loeffler appear in the plaintiffs' attorney's affirmation and a certified copy of a police accident report. As to the former, it is axiomatic that counsel's affirmation has no probative weight and cannot serve as the basis for denying a motion for summary judgment. **See, Johnson v. Phillips, 261 A.D.2d 269 (1st Dept. 1999).**

Although the plaintiffs argue that the certified police report is admissible as a business record exception to the hearsay rule under CPLR § 4518 (a), it only contains two statements relevant to the issue of liability, both of which fall outside of the exception's purview. The first is a statement made by a non-party eyewitness, Karen Kaplan ("Kaplan"), the substance of which informs that she observed defendant Loeffler's vehicle travel at a high rate of speed and make several unsafe lane changes immediately preceding the accident. Even presuming that the certified police report should be deemed a business record for hearsay purposes, Ms. Kaplan did not have a business duty to report the incident, which renders her statement impermissible hearsay, which may not be taken into consideration in determining the cause of an accident or, by extension, the issue of liability. **See, Holliday v. Hudson Armored Car & Courier Service, Inc., 301 A.D.2d 392, 396 (1st Dept. 2003); Kajoshaj v. Greenspan, 88 A.D.2d 538 (1st Dept. 1982).**

Additionally, plaintiff Weitzel's unsworn, presumably self-serving statement reflected in the certified police report is similarly hearsay and does not fall under any other exception to the hearsay rule. **Johnson, 261 A.D.2d at 270; Rue v. Stokes, 191 A.D.2d 245 (1st Dept. 1993).** Hence, the only relevant, admissible evidence proffered by the plaintiffs establishes merely that

their vehicle was struck about the rear by another car, causing their car to collide with BMW convertible.

However, in his affidavit, defendant Burns avers that he observed defendant Loeffler's vehicle traveling at a high rate of speed and move "aggressively" between traffic lanes immediately prior to the accident. Defendant Burns further attests that defendant Loeffler's vehicle struck the plaintiffs' car, causing it to propel into defendant Burns' vehicle. Defendant Burns' vehicle, founded upon personal knowledge, "demonstrates the existence of 'facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred," warranting the conclusion that defendant Loeffler bears sole liability for the accident. **Holliday, 301 A.D.2d at 395, *quoting* Schneider v. Kings Hwy. Hosp. Ctr., Inc., 67 N.Y.2d 743, 744 (1986)**.

This court does not contest defendant Loeffler's argument that a defendant is entitled to proffer a non-negligent explanation to rebut the inference that the defendant's negligence caused a motor vehicle accident. Nonetheless, defendant Loeffler never offered such an explanation, and instead relied on the contention that the plaintiffs' motion was premature because discovery has yet to be completed.

Defendant Loeffler is correct that a court may deny a motion for summary judgment as premature where the movant makes the threshold showing that facts essential to justify opposition to the motion may exist but cannot be stated in the opposition papers because they are within the exclusive knowledge of the other party and the parties have not yet begun or completed the discovery process. **See, CPLR § 3212 (f); Pow v. Black, 182 A.D.2d 484 (1st Dept. 1992); Smith v. City of New York, 133 A.D.2d 818 (2nd Dept. 1987); Morris v. Hochman, 296 A.D.2d 481 (2nd Dept. 2002)**. However, this argument holds little weight as defendant Loeffler has not asserted any cognizable basis upon which this court could infer that there were discoverable facts solely within the other parties' knowledge that would support his opposition.

The courts have made evident that a party's "mere hope" that he or she "might be able to uncover some evidence during the discovery process" is insufficient to deny summary judgment. **Pow, 182 A.D.2d at 485, *quoting* Jones v. Gameray, 153 A.D.2d 550, 551 (2nd Dept. 1989)**. Defendant Loeffler was in the best position to attest to what occurred at the time of the incident and has inexplicably failed to submit an affidavit of his own sworn recitation of facts. A movant's failure to provide his own sworn attestations to oppose a motion, when he would clearly be the party in possession of the relevant knowledge, renders his opposition fatally deficient. **Johnson, 261 A.D.2d at 270**.

As a final matter, this court has determined that a search of the record compels the conclusion that defendants Burn and Reliable bear no responsibility for causing the accident at issue. Upon a finding that any party other than the moving party is entitled to summary judgment, CPLR § 3212 (b) permits a court to grant such judgment without the necessity of a cross-motion, provided that the issue underlying the court's determination is the subject of the motion brought before the court by the moving party. **See, CPLR 3212 § (b); Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425, 429-430 (1996)**. Because the court's finding necessarily rests

upon its conclusion that defendant Loeffler was solely liable for causing the accident, pragmatism compels the court to award the plaintiffs summary judgment on the issue of his liability, despite their own motion's serious shortcomings.

Accordingly, the plaintiffs' motion for summary judgment on the issue of liability against defendant Herman Loeffler, Jr. is hereby granted. The request by defendants Burns and Reliable for an order pursuant to CPLR § 3212 (b) granting them summary judgment and dismissing the complaint as against them is hereby granted.

Movants are directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: March 8, 2016

ENTER:

J.S.C.