

Carter v Thony

2017 NY Slip Op 30365(U)

February 3, 2017

Supreme Court, Kings County

Docket Number: 506384/16

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

**PRESENT: HON. PAUL WOOTEN
*Justice***

PART 97

MEENA CARTER,

Plaintiff,

- against -

CALENDAR NO. 10

INDEX NO. 506384/16

ADLER THONY and AUDLEY R. HAFFENDEN,

Defendants.

The following papers, numbered 1 to 3, were read on this motion by the plaintiff.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1

2

3

This is an action brought by Meena Carter (plaintiff) to recover monetary damages against Adler Thony (Thony) and Audley R. Haffenden (Haffenden) for personal injuries allegedly sustained by the plaintiff due to an automobile accident. At the time that the subject motor vehicle accident occurred on March 14, 2016, plaintiff was a passenger in a Lexus taxi owned and operated by Haffenden which was parked at the curb on Bedford Avenue when it was struck in the rear by a motor vehicle owned and operated by Thony. Plaintiff commenced this action via Summons and Verified Complaint on April 21, 2016. On May 26, 2016, Thony submitted his Verified Answer, which asserts a cross-claim against Haffenden for contribution and/or indemnification. Haffenden submitted his Verified Answer which asserts a cross-claim against Thony on June 30, 2016.

Before the Court is a motion by Haffenden filed on August 23, 2016 for an Order,

pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and all cross-claims asserted against him. On September 28, 2016, plaintiff executed a stipulation discontinuing this matter as against Haffenden only. Accordingly, the portion of this motion which seeks dismissal of plaintiff's complaint is denied as moot. Thony is in opposition to the herein motion, and as such, the Court shall address the remaining portion of Haffenden's motion which seeks dismissal of the cross-claim asserted against him by Thony. Haffenden submits a reply.

In support of his motion, Haffenden submits, *inter alia*, a copy of the Verified pleadings; an uncertified copy of the MV-104 police report; and his affidavit. In opposition, Thony submits an attorney affirmation; an uncertified copy of the MV-104 police report; and a copy of Haffenden's affidavit.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

“When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle” (*Williams v Spencer-Hall*, 113 AD3d 759, 759-760 [2d Dept 2014]; *see Taing v Drewery*, 100 AD3d 740 [2d Dept 2012]; *see also Vehicle and Traffic Law § 1129[a]*). “In addition, Vehicle and Traffic Law § 1129 (a) requires a driver to maintain a safe distance between vehicles: ‘The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway’” (*Filippazzo v Santiago*, 277 AD2d 419, 419-420 [2d Dept 2000]). “Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident” (*Williams*, 113 AD3d at 760; *see Maragos v Sakurai*, 92 AD3d 922, 923 [2d Dept 2012]; *Balducci v Velasquez*, 92 AD3d 626, 628 [2d Dept 2012]).

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Cajas-Romero v Ward*, 106 AD3d 850, 851 [2d Dept 2013]; see *Xian Hong Pan v Buglione*, 101 AD3d 706 [2d Dept 2012]; *Volpe v Limoncelli*, 74 AD3d 795, 795 [2d Dept 2010]; see also *Gambino v City of New York*, 205 AD2d 583 [2d Dept 1994]).

The Court finds that Haffenden has met his prima facie entitlement to summary judgment as a matter of law via submission of his affidavit, wherein he describes the circumstances of the accident, to wit, that he was driving his Lexus as a taxi on March 14, 2016 and was stopped at the curb on Bedford Avenue near its intersection with Clarendon Road to pick up a passenger when he struck in the rear by Thony’s vehicle (see Notice of Motion, exhibit D ¶¶ 2, 3). Haffenden notes that he did not “stop short,” “did not suddenly stop,” “make any sudden lane changes,” “did not suddenly accelerate or decelerate,” or take any other action to cause the accident” (see *id.* ¶ 4; see also *Hakakian v McCabe*, 38 AD3d 493, 493-494 [2d Dept 2007] [“Here, the plaintiff sustained his burden of establishing a prima facie case of negligence by submitting an affidavit in which he averred that he came to a complete stop at a yellow traffic light and that his automobile was then struck in the rear by the defendants’ vehicle”]; *Williams*, 113 AD3d at 760; *Johnston v Spoto*, 47 AD3d 888, 888 [2d Dept 2008] [“The plaintiffs established a prima facie case for summary judgment by tendering the affidavit of [one of the plaintiffs], who stated that he had been at a complete stop at a stop sign at the end of the exit ramp when he was struck in the rear by the defendant’s vehicle”]; *Lundy v Llatin*, 51 AD3d 877, 877 [2d Dept 2008]).

The Court finds that Thony fails to raise a triable issue of fact or come forward with a nonnegligent explanation for the explanation for the accident (see *Filippazzo v Santiago*, 277 AD2d at 420). Notably, Thony fails to submit evidence in admissible form, like his own affidavit

to describe the circumstances of the accident, but rather relies upon an affirmation of counsel. However, his counsel lacks personal knowledge of the facts, and “[s]uch an affirmation by counsel is without evidentiary value and thus unavailing” (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; see *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006] [“An attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance”]; *Gomes v Revere Sugar Corp.*, 140 AD2d 582 [2d Dept 1988]). “The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

In his opposition, Thony claims that the uncertified police report attached to the motion papers and relied upon by Haffenden is inadmissible hearsay. While defendant is correct that the police report is inadmissible hearsay in this circumstance (see *Lacagnino v Gonzalez*, 306 AD2d 250 [2d Dept 2003]), Haffenden does not rely solely on the police report in support of his motion, but rather meets his prima facie entitlement to summary judgment via submission of his affidavit. Moreover, the Court notes that Thony himself attaches an uncertified police report in his opposition. It is undisputed that Haffenden’s vehicle was stopped when it was struck in the rear by Thony’s vehicle (see *Sayyed v Murray*, 109 AD3d 464 [2d Dept 2013]), as such the burden is on defendant to rebut the inference of negligence by providing a nonnegligent explanation for the collision, which he fails to do.

Furthermore, the Court finds unpersuasive Thony’s argument that summary judgment should be denied as premature as Thony failed to demonstrate “that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Williams*, 113 AD3d at 760; see CPLR 3212[f]). “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" (see *Lopez v WS Distribution, Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; *Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1212 [2d Dept 2011] ["[opposing party] failed to submit any affidavits establishing that facts existed which were essential to justify opposition to the motion but were not in its possession in light of the fact that discovery had yet to be completed"]; *Boorstein v 1261 48th St. Condominium*, 96 AD3d 703 [2d Dept 2012] ["[opposing party] failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the [other party]"). As such, Haffenden's motion for summary judgment dismissing the cross-claims for contribution and/or indemnification asserted against him by Thony is granted.

CONCLUSION

Accordingly is it hereby,

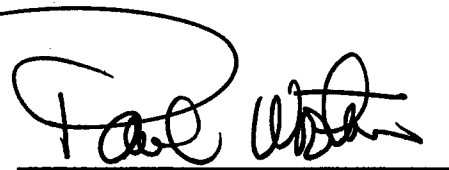
ORDERED that the portion of Haffenden's motion for summary judgment dismissing the plaintiff's complaint is denied as moot as plaintiff has already executed a stipulation discontinuing this matter as against Haffenden; and it is further,

ORDERED that the portion of Haffenden's motion for summary judgment dismissing the cross-claims asserted against him is granted; and it is further,

ORDERED that counsel for Haffenden is directed to serve a copy of this Order with Notice of Entry upon all the parties.

This constitutes the Decision and Order of the Court.

Dated: 2/3/17


PAUL WOOTEN J.S.C.

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Motion Seq. # 1

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