

McLaurin v Metropolitan Tr. Auth.
2017 NY Slip Op 30794(U)
March 20, 2017
Supreme Court, Bronx County
Docket Number: 308288/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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KEESHONE MCLAURIN,

Plaintiff(s),

- against -

DECISION AND ORDER

Index No: 308288/12

METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY, AND
HENRY DARRIN,

Defendant(s).

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In this action for the negligent operation of a motor vehicle, plaintiff moves seeking an order compelling defendants METROPOLITAN TRANSPORTATION AUTHORITY (MTA) and NEW YORK CITY TRANSIT AUTHORITY (NYCTA) to produce additional witness for depositions on grounds that the witness already deposed was inadequate and the witnesses sought possess relevant information. MTA and NYCTA oppose plaintiff's motion on grounds that the witnesses sought possess even less relevant information than the witness already produced and deposed by plaintiff. MTA and NYCTA also cross-move seeking an order granting them summary judgment asserting that insofar as the proximate cause of this accident was defendant HENRY DARRIN's (Darrin) negligence, MTA and NYCTA are entitled to summary judgment. Plaintiff and Darrin oppose MTA and NYCTA's cross-motion asserting that questions of fact with respect to negligence and proximate causation preclude summary judgment.

For the reasons that follow hereinafter, plaintiff's motion and MTA and NYCTA's cross-motion are denied.

According to the complaint, on September 2, 2011, plaintiff was involved in a motor vehicle accident. Specifically, it is alleged that while plaintiff was a passenger in a vehicle owned and operated by Darrin, at the intersection of Third Avenue and East 165th Street, Bronx, NY, said vehicle came into contact with a vehicle owned and operated by MTA and NYCTA. Plaintiff alleges that defendants were negligent in the operation of their vehicle, said negligence causing the accident and injuries resulting therefrom.

Plaintiff's Motion for Further Depositions

Plaintiff's motion seeking depositions of several MTA and NYCTA employees, whose names appear within the accident report created by the foregoing defendants, is denied insofar as plaintiff fails to establish that the depositions sought will produce testimony material and necessary to the claims asserted by him.

It is well settled that once a party has deposed a defendant's witness, depositions of additional witness employed by that defendant is only warranted when it is established that (1) the witness deposed had insufficient knowledge relative to the issues in the case or was otherwise inadequate; and (2) there

is a substantial likelihood that the additional witness sought to be deposed possess information which is material and necessary to the prosecution of the case (*Gomez v State of N.Y.*, 106 AD3d 870, 872 [2d Dept 2013] [Court ordered an additional deposition of defendant's employee insofar as the first witness produced by that defendant lacked insufficient knowledge of the relationship between the parties and thus could not testified regarding a primary issue in that action - supervision and control. Moreover, plaintiff established that additional witness, whose deposition was sought, would likely offer material and necessary evidence on that issue of supervision and control.]; *Gelda v Costco Wholesale Corp.*, 89 AD3d 1058, 1058 [2d Dept 2011]; *Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2d Dept 2010] [Court ordered deposition of another of defendant's employees when the first witness produced had almost no knowledge of plaintiff's accident and the maintenance of the premises in which it occurred.]; *Alexopoulos v Metropolitan Transportation Authority*, 37 AD3d 232, 233 [1st Dept 2007] [Court ordered that defendant produce another of its employees for a deposition when the first witness produced had insufficient knowledge regarding guidelines which plaintiff alleged caused the accident and documents established that the additional witness, insofar as she approved those guidelines, had knowledge that was material and necessary

to a salient issue in the case.]; *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007] [Court denied motion seeking to compel the defendant to produce an additional witness for a deposition when it was established that the witness sought would merely provide testimony duplicative to that about which the first witness testified.)).

In support of his motion, plaintiff submits portions of Rivera's deposition transcript wherein Rivera testified that had no recollection of the accident alleged by plaintiff and occurring on September 2, 2011. Rivera testified that he did, however, become aware about an accident involving his bus when he was so-apprised by his supervisor.

Plaintiff also submits MTA's Supervisor Accident/Crime Investigation Report (report), dated September 2, 2011. The report is signed by SLD. Y. Leon (Leon) and indicates that on the foregoing date, at the intersection of Third Avenue and East 165th Street, Darrin was involved in an accident with a bus operated by Rivera when the bus hit the passenger side door of Darrin's vehicle and fled. The report further indicates that Leon was called to the foregoing location by SLD Lozada (Lozada) and that Lozada was called to the foregoing location by Darrin. The report indicates moderate damage to Darrin's vehicle, that Rivera

had no recollection of the accident, that no one was injured, and that Rivera's bus had no damage.

Based on the foregoing, plaintiff's motion is denied. As noted above, it is well settled that once a defendant produces a witness for a deposition, the proponent of additional witnesses has to establish that the witness deposed had insufficient knowledge relative to the issues in the case or was otherwise inadequate; and that there is a substantial likelihood that the additional witness sought to be deposed possess information which is material and necessary to the prosecution of the case (*Gomez* at 872; *Gelda* at 1058; *Nunez* at 968; *Alexopoulos* at 233; *Those Certain Underwriters at Lloyds, London* at 364). Here, while it can hardly be disputed that Rivera - the witness produced by MTA and NYCTA - had little to no knowledge about the instant accident, on this record, it is hard to fathom how witnesses such as Leon and Lozada have any information which is material and relevant to the prosecution of this action. To be sure, the report created by Leon and which puts Lozada at the scene makes it abundantly clear that they reported there after the fact and were, thus, not eye witnesses. Furthermore, to the extent that their post-accident observations are relevant - such as damage to the respective vehicles and evidence of any injuries to the parties - such information is contained in the report. To the

extent that such report is admissible at trial as a business record¹, it obviates testimony from Leon and or Lozada. Plaintiff's motion is, therefore, denied.

MTA and NYCTA's Cross-Motion for Summary Judgment

MTA and NYCTA's cross-motion for summary judgment is denied insofar as the very evidence submitted by them raises an issue of fact with respect to whether the proximate cause of the accident alleged was Darrin's negligence and violation of VTL § 1214 or the negligence of Rivera, MTA and NYCTA's driver.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York*

¹A business record is an exception to rule barring hearsay, and the foundation for such exception requires that (1) the record be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]).

City Transit Authority, 304 AD2d 634, 634 [2d Dept 2003])). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009])).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict

requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

[s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue

determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

A defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham v Wagner*, 48 AD3d 349, 350 [1st Dept 2008]; *Cerda v Parsley*, 273 AD2d 339, 339 [2d Dept 2000]). A defendant can also establish prima facie entitlement to summary judgment by negating proximate causation (*Espinoza v Loor*, 299 AD2d 167, 168 [2d Dept 2002]; *Borges v Zukowski*, 22 AD3d 439, 439 [2d Dept 2005]).

VTL § 1214 states

[n]o person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers.

Generally, a driver who opens his vehicle's door into the path of

oncoming traffic violates VTL § 1214 and is therefore negligent (*Abbas v Salavel*, 73 AD3d 1100, 1101 [2d Dept 2010] ["The evidence established that the plaintiff violated Vehicle and Traffic Law § 1214 by opening the door on the side of his car adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of his senses, he should have seen."]; *Montesinos v Cote*, 46 AD3d 774, 774 [2d Dept 2007] ["The evidence established that the injured plaintiff violated Vehicle and Traffic Law § 1214 by opening the door on the side of her car adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, she should have seen."]; *Williams v Persaud*, 19 AD3d 686, 686 [2d Dept 2005] ["There is nothing in the record to demonstrate that the defendant breached any duty owed to the plaintiff or, assuming such a breach, that any conduct on the part of the defendant was a proximate cause of the accident. To the contrary, the evidence established that the plaintiff violated Vehicle and Traffic Law § 1214 by opening her door on the side adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, she should have seen" (internal citations omitted)]). Thus, a defendant who establishes that the

accident for which he is sued was caused by a violation of VTL § 1214 demonstrates prima facie entitlement to summary judgment (*Montesinos* at 774; *Williams* at 686). However, when there is evidence that the proximate cause of an accident is defendant's negligence, in that despite a violation of VTL § 1214, defendant could have avoided the accident and failed to do so, summary judgment ought to be denied (*Ferguson v Gassman*, 229 AD2d 464, 465 [2d Dept 1996] ["Specifically, the jury could have concluded that the plaintiff had opened the door of the taxi three seconds before it was struck by Nisenbaum, and that Nisenbaum, who testified that she was traveling at only 5 to 10 miles per hour when she passed the taxi, could have stopped her car before hitting the door of the taxi."]; *Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010] "Contrary to the defendants' contention, their submissions in support of their motion failed to establish, prima facie, that the sole proximate cause of the accident was that the plaintiff double-parked his car in violation of Vehicle and Traffic Law § 1202(2), and opened his car door in the path of moving traffic without first ensuring that it was reasonably safe to do so in violation of Vehicle and Traffic Law § 1214. While the deposition testimony of the defendant bus driver could support a finding that the plaintiff's conduct was the sole proximate cause of the accident, according the plaintiff, as the

opponent of the motion, every favorable inference from the parties' submissions, the defendants failed to meet their prima facie burden" (internal citations omitted).]).

In support of their motion, MTA and NYCTA submit plaintiff's deposition transcript wherein she testified, in pertinent part, as follows: On September 2, 2011, she was involved in an accident while sitting inside Darrin's Honda Civic as it was parked on East 165th Street near Third Avenue, a two way street with one lane of traffic and one for parking in each direction. Prior to the accident, she and Darrin were headed to the store and intended to drive there in Darrin's car. She and Darrin walked to the vehicle and entered the same. Prior to pulling out from the parking spot, Darrin indicated that he forgot something in the trunk. He exited the vehicle leaving his driver-side door open. Five minutes later, while Darrin was still behind his vehicle looking in the trunk, plaintiff felt an impact. Thereafter, she noticed that a bus had hit the door of the vehicle and was dragging it along as it drove.

MTA and NYCTA also submit Rivera's transcript wherein he testified, in pertinent part, as follows: On September 2, 2011, Rivera was a Bus Operator employed by the NYCTA. On this date, he was assigned to drive the BX15 Route, which ran from Third Avenue and Fordham Road in the Bronx to West 125th Street and 12th

Avenue in Manhattan. Rivera does not recall being involved in an accident. However, he was apprised about an accident involving his bus by a supervisor at the bus' last stop in the Bronx.


Based on the foregoing, MTA and NYCTA fails to establish prima facie entitlement to summary judgment insofar as the evidence presented raises an issue of fact with respect to whether Rivera was negligent and proximately caused this accident. To be sure, while a defendant who establishes that the accident for which he is sued was caused by a violation of VTL § 1214 establishes prima facie entitlement to summary judgment (*Montesinos* at 774; *Williams* at 686), when there is evidence that the proximate cause of an accident is defendant's negligence, in that despite a violation of VTL § 1214, defendant could have avoided the accident and failed to do so, summary judgment ought to be denied (*Ferguson* at 465; *Sayed* at 1062). Here, plaintiff testified that the door to Darrin's vehicle had been open for five minutes prior to the instant accident. As such, as in *Ferguson*, a jury could conclude that Rivera should have seen the open door prior to impact such that it could have avoided the instant accident. Stated differently, a jury could conclude that Rivera was negligent and that such negligence was the proximate cause of this accident.

MTA and NYCTA's cross-motion is therefore denied and the

Court need not consider the sufficiency of any papers submitted in opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : March 20, 2017
Bronx, New York



Ben Barbato, JSC