

Walker v Baychester Auto Repair & Diagnostic Ctr.
2017 NY Slip Op 32400(U)
October 10, 2017
Supreme Court, Bronx County
Docket Number: 303790/13
Judge: Norma Ruiz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT ---- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IA PART 22

Index No. 303790/13

Stephanie Walker

Plaintiff,

DECISION/ ORDER

-against-

Present: HON. NORMA RUIZ

Baychester Auto Repair & Diagnostic
Center,

Defendant.

The following papers numbered 1 to 8 Read on this motion, SUMMARY JUDGMENT
Noticed on _____ and duly submitted as No. ___ on the Motion Calendar of

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion		
to:	Papers	Numbered
	Notice of Motion (SJ) and Affidavits Annexed	1
	Memorandum of Law	
	Answering Affidavits	2
	Replying Affidavits	3
	Notice of Motion (venue) and Affidavits Annexed	
	Answering Affidavits	

Other:

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Defendant Baychester Auto Repair & Diagnostic Center moves for summary judgment.

Upon review of the motion and opposition submitted thereto the motion to dismiss the complaint is granted.

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 party

opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *Rodriguez v. Parkchester South Condominium, Inc.*, 178 A.D.2d 231 (1st Dept. 1991). 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*. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Lesocovich v. 180 Madison Avenue Corp.*, 81 N.Y.2d 982 (1993). Upon this showing, the burden shifts to plaintiff to come forward with sufficient evidence in admissible form, to defeat defendant's motion. *Licari v. Elliott*, 57 N.Y.2d 234, 455 N.Y.S.32d 570 (1982).

Plaintiff worked for the Department of Homeless Services ("DHS") for 24 years as a motor vehicle operator who transported clients and supplies. Plaintiff claims that on November 30, 2011 at about 2:20 p.m., while she was driving bus #181 on the BQE, the overhead compartment suddenly fell on her. As a rule, bus #181 was not her usual assigned bus. Nevertheless, she claimed that she followed her customary routine of inspecting the bus before taking it out on the road and, finding no issues regarding its operation or maintenance, proceeded with her assignment.

After this accident, the plaintiff claims that she heard that two weeks before another operator of bus #181, Bruce Freimor, had a similar incident with the overhead compartment falling down on him. She claims to have spoken to him regarding this incident and that he confirmed his involvement. She further stated that he informed her that following the accident he drove the bus to the defendant's shop for servicing.

Contrary to the plaintiff's understanding of the actions of Mr. Freimor, at his examination before trial, he contradicted the plaintiff by stating that at the direction of his supervisor he brought bus #181 to a vendor utilized by DHS - namely Calabrese - for repair.

Consistent with that is the testimony of Nicholas Giancaspro who, at his examination before trial, testified that he is the co-owner of the defendant Baychester Auto Repair &

Diagnostic Center, Inc. (Baychester). His repair shop began servicing department and agency vehicles for the City of New York as early as 1980. While there was no written agreement or contract awarding Baychester this work, Giancaspro's understanding was that following an inspection of his repair shop by a city-related entity, the defendant began to receive vehicles for service. At times an agency supervisor would call to inform them in advance of needed repairs, or, the vehicle would be driven there without prior notification.

At presentment, a repair order would be prepared. This order would include the year, make, model and VIN number of the vehicle. Thereafter, a mechanic would inspect it, generate a written estimate, assign a job number and call ARI - the billing company utilized by the City - for approval of the work. Once approved, ARI would provide the defendant with a Purchase Order number (which included the job number), without which no work would be commenced by the defendant since no payment would be forthcoming without it.

Once the repairs were done and the final bill filled out, the defendant would call whichever agency brought in the vehicle to return for pick-up. ARI would then pay bills presented to them by the City.

At any rate, the defendant did not repair the interiors of vehicles brought in by the City. They only performed mechanical work, such as: "front ends, engine problem, rear end", inspections and oil changes. As they were not a body repair shop, no body work, that is interior work, was performed by the defendant for the City or private vehicles.

Annexed to the plaintiff's opposition is the testimony of Ms. Hall-Palmer. The Court notes that the statements allegedly made by Ms. Jackie Hall-Palmer, the Department of Homeless Services Motor Vehicles supervisor and any statements made to her by Mr. Angel Vasquez - the Deputy Director - are rank hearsay and insufficient to raise a question of fact. "Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted." *Arnold v New York City Housing Authority*, 296 A.D.2d355 (1st Dept. 2002); *See also Narvaez v NYRAC*, 290 A.D.2d 400 (1st Dept. 2002).

The movant has come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. *Zuckerman, supra*. Upon this showing, the

burden shifts to plaintiff to come forward with sufficient evidence in admissible form, to defeat defendant's motion. *Licari v. Elliott*, 57 N.Y.2d 234, 455 N.Y.S.32d 570 (1982).

Here plaintiff fails to tender any evidence in admissible form. Her testimony regarding the defendant's repair are equally inadmissible as hearsay. *See Balsam, supra*. Moreover, the plaintiff failed to submit any documentary evidence to support her claim that the defendant did indeed perform the subject body repairs for bus #181, either contemporaneously with Bruce Freimor's incident, or shortly before the November 30, 2011 date of accident .

Based on the reasons set forth above, the Court finds the plaintiff failed to come forward with sufficient evidence in admissible form to defeat defendant's motion. *Licari, supra*.

Accordingly, the defendant's motion to dismiss the plaintiff's complaint is hereby granted. The clerk is directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the Court.

Dated: 10/10/17
Bronx, New York



NORMA RUIZ, J.S.C.