Jarrett v Claro
2017 NY Slip Op 32942(U)
May 9, 2017
Supreme Court, Bronx County
Docket Number: 22105/2014E
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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KERRON JARRETT,

Plaintiff,

Index No. 22105/2014E

v.

DECISION AND ORDER

CARLO C. CLARO,

Defendant.

----------X

This Motion is decided in accordance with CPLR Rule 9002.

Recitation, as required by CPLR§2219[a], of the papers considered in the review of this motion:

Papers	**Numbered**
Notice of Motion, Affirmation and Exhibits	**1, 2, 3**
Affirmation in Opposition and Exhibits	**4, 5**
Reply Affirmation	**6**

The defendant moves by Notice of Motion, dated March 23, 2016, by Andrea E. Ferucci, Esq., Attorney for the defendant, for an Order, pursuant to CPLR Rule 2221(d), (e) and (f), granting renewal and re-argument of the Order of Honorable Sharon Aarons, dated March 9, 2016, which denied the defendant's motion for summary judgment on liability, pursuant to CPLR Rule 3212.

The plaintiff opposes the motion, by Steven J. German, Esq., Attorney for the plaintiff, by Affirmation in Opposition, dated April 15, 2016. A Reply Affirmation by Andrea E. Ferucci, Esq., dated April 29, 2016, was submitted in support of the motion.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a motor vehicle accident that occurred on or about August 2, 2011, at or

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near the intersection of East Mosholu Parkway and Kossuth Avenue, in the County of Bronx, City and State of New York.

It is alleged that plaintiff was on a bicycle attempting to cross East Mosholu Parkway at its intersection with Kossuth Avenue when he was struck by the defendant's vehicle. The defendant alleges that he had the right of way while traveling along East Mosholu Parkway at the intersection of Kossuth Avenue when he was struck by the plaintiff.

PROCEDURAL HISTORY

The defendant moved by Notice of Motion, dated May 18, 2015, for an order granting summary judgment on the issue of liability against the plaintiff. By order, dated March 9, 2016, and entered on March 21, 2016, Justice Sharon Aarons denied the defendant's motion with leave to renew the motion for summary judgment upon submission of working copies of the motion and its attachments.

DISCUSSION OF LAW

A. CPLR Rule 2221 (e)

CPLR Rule 2221 (e) provides, in relevant part, that:

A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

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Justice Sharon Aarons denied the underlying summary judgment because the movant failed to provide the Court with a hard copy of the motion for summary judgment and its attachments. It is within this Court's discretion to grant renewal to allow a party the opportunity to submit its moving papers in the proper form (CPLR 2221 [e]; *see Chevalier v 368 E. 148th St. Assoc., LLC*, 80 A.D.3d 411 [1st Dept. 2011]; *Walden v. Nowinski*, 63 A.D.2d 586 [1st Dept. 1978]). In support of the instant motion to renew and reargue, the defendant submitted working copies of his underlying motion for summary judgment as directed by Justice Aarons' order.

It should be noted that the motion to renew and reargue is timely. A motion to renew and reargue shall be made within thirty days after service of a copy of the underlying order determining the prior motion with notice of its entry in accordance with CPLR 2221(d)(3). Justice Aarons' order was entered on March 21, 2016. This motion to renew and reargue was filed on March 29, 2016, well within the thirty-day statutory time period to move.

A. Motion for Summary Judgment

The law is well settled that on a Motion for Summary Judgment, the movant must "make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735, 883 N.E.2d 350, 853 N.Y.S.2d 526 [2008]). Once the movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence also in admissible form, to establish the existence of a triable issue of fact (*See Zuckerman v City of New York*, 49 NY 2d

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557 [1980]). The motion must be decided viewing the facts in the light most favorable to the non-moving party (*See Mullin v 100 Church Street*, 12 AD3d 263 [1st Dept. 2004]).

To obtain summary judgment on the issue of liability in a negligence action, the movant must eliminate any material issue, not only as to the nonmoving party's negligence, but also as to whether its own negligence contributed to the accident (*see, Thoma v Ronai*, 82 NY2d 736, 621 N.E.2d 690, 602 N.Y.S.2d 323 [1993]; *Calcano v Rodriguez*, 103 A.D.3d 490, 962 N.Y.S.2d 37 [1st Dept. 2013]). "Under the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection." (*Nevarez v. S.R.M. Mgt. Corp.*, 58 A.D.3d 295, 298, 867 NYS2d 431 [1st Dept. 2008]). In this case, although the plaintiff was on a bicycle, the same rules apply to him.

It is undisputed that the accident in question occurred at or near the intersection of Kossuth Avenue and East Mosholu Parkway. The defendant alleges he had the right of way as he entered the intersection and the plaintiff struck the driver's side of his vehicle. The plaintiff, on the other hand, alleges he had the right of way into the intersection and was struck by defendant's vehicle as he entered East Mosholu Parkway. Given the opposing allegations by the parties, as to the occurrence, there is a question of fact as to who had the right of way as they entered the intersection.

The defendant attached a certified copy of the police report in support of his motion for summary judgment, which allegedly contains an admission against the plaintiff. As a matter of law, the content of the police accident report is hearsay and insufficient to support a motion for

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summary judgment (*see Rue v Stokes*, 191 AD2d 245 [1st Dept. 1993]; *Bendik v. Dybowski*, 227 A.D.2d 228 [1st Dept. 1996]).

Based on the record before the Court the defendant has failed to sustain his burden in showing his entitlement to summary judgment on the issue of liability. Although the movant submits the certified police report in support of his motion, the report may not be submitted in support of showing who was responsible for the accident in question (*See Kajoshaj v Greenspan*, 88 AD2d 538, 539 [1st Dept. 1982]).

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

ORDERED, the defendant's motion to renew and reargue is GRANTED to the extent that the Court will render a decision on the motion for summary judgment; and it is further

ORDERED, the defendant's motion for summary judgment on liability is DENIED.

This constitutes the Decision and Order of the Court.

Dated: May 9, 2017
Bronx, New York

ENTER:

HON. DORIS M. GONZALEZ, J.S.C.