

Bank v Juzeniw

2017 NY Slip Op 33357(U)

September 29, 2017

Supreme Court, Westchester County

Docket Number: Index No. 55973/2017

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
LAURENCE BANK,

Plaintiff,

-against-

ANDRIJ M. JUZENIW,

Defendant.
-----X

Index No. 55973/2017

DECISION/ORDER

Motion date: 8/2/17

Motion Seq. 1

ECKER, J.

The following papers numbered 1 through 9 were read on the motion of LAURENCE BANK ("plaintiff"), made pursuant to CPLR 3212, for an order granting summary judgment as to liability, as against ANDRIJ M. JUZENIW ("defendant"):

PAPERS

NUMBERED

| | |
|--|-------|
| Notice of Motion, Affirmation, Exhibits A-C ¹ | 1 - 5 |
| Affirmation in Opposition, Exhibits A-B ² | 6 - 8 |
| Reply Affirmation | 9 |

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges he sustained serious injuries when the motorcycle he was operating collided with the motor vehicle defendant was operating. The collision took place on May 11, 2016 at approximately 8:15 a.m. at the intersection of Forest Avenue and Rockingstone Avenue in the Town of Mamaroneck. Defendant lives on Rockingstone Avenue. At the time of the collision, there was no stop sign or traffic light

¹ Court rules require plaintiff to use numbered exhibit tabs.

² Court rules require the use of external exhibit tabs.

in place at the intersection. ³Plaintiff was traveling eastbound and defendant was traveling southbound.

Facts

The facts are in dispute. Plaintiff alleges defendant violated VTL § 1140 [Failure to yield], in that both vehicles entered the intersection at approximately the same time and defendant's vehicle should have yielded the right of way to plaintiff's vehicle on the right. Plaintiff stated defendant's vehicle "came into the intersection rapidly" from his left and "[t]here was nothing I could do to avoid the collision." [Pltf., Bank Aff., Ex. B, ¶ 2].

Defendant, in his affidavit, alleges that despite the absence of a traffic control device at the intersection, he came to a complete stop, looked in both directions and did not see any vehicles approaching. He entered the intersection first and did not hear any sounds, horns or brakes before the impact. He described the ensuing accident as follows:

"It should be noted that in looking to my right before proceeding, I could not see for very far due to the presence of shrubbery and poles in the vicinity. I saw everything that was in my field of vision, but Mr. Bank was not visible, perhaps because he was on a small motorcycle. Had I seen or even been able to see him, I would have yielded to him. If Mr. Bank was obeying the speed limit, he should have had enough time to stop when seeing my car enter the intersection first. Evidently, he didn't observe my car already in the intersection before he approached, or was traveling too fast to stop.

It should also be noted that at the time of the accident, Mr. Bank was proceeding East, directly into the rising sun that morning. I noted this, when I looked to my left before proceeding into the intersection. It was a sunny day and the sun was bright in the eyes of anyone traveling east that morning. Mr. Bank did not slow or stop his motorcycle in time to avoid hitting the side of my car, because he was obviously traveling too fast for the conditions, which included sun related vision impairment."

[Def't.Opp. Juzeniw Aff., ¶ 4-5]

³ Defendant states in ¶ 6 of his affidavit, that the Town of Mamaroneck has since installed a stop sign for traffic traveling southbound on Rockingham Avenue, which the court, for the purpose of this motion, assigns no probative value.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party “has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact” *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Nash v Port Washington Union Free School District*, 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]. Every available inference must be drawn in the [non-moving] party’s favor. *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016].

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], quoting *LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp., supra*. On a motion for summary judgment, the court’s function is to determine if a factual issue exists, and ‘the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and [a]n conflict in the testimony or evidence presented merely raise(s) an issue of fact.’ [internal citations omitted]. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

No discovery has occurred in this case. It is well settled that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment, inasmuch as discovery may result in disclosure of evidence relevant to the causes of action asserted in the complaint. *Brea v Salvatore*, 130 AD3d 956 [2d Dept 2015]; *Bank of America v Hillside Cycles, Inc.*, 89 AD3d 653 [2d Dept 2011]. CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears the facts supporting the position of the opposing party exist but cannot be stated. *Betz v NYC Premier Properties, Inc.*, 38 AD3d 815 [2d Dept 2007]; *Juseinoski v New York Hosp. Med. Ctr. Of Queens*, 29 AD3d 636, 637 [2d Dept 2006].

Here, defendant has sufficiently demonstrated that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion are exclusively within the knowledge of and control of the movant. (CPLR 3212[f]); *Gannon v Sadeghian*, 151 AD3d 1586 [2d Dept 2017]; *Pabaroo v TS 405 Lexington Owner, LLC*, 141 AD3d 634 [2d Dept 2016]; *Buto v Town of Smithtown*, 121 AD3d 829 [2d Dept 2014]. As such, plaintiff has failed to meet his burden of demonstrating that he is entitled to summary judgment at this time. There are many unresolved factual issues and discrepancies in the parties' recitation of the events that mandate the conduct of discovery proceedings. The police accident report is of no value since the officer did not witness the collision and there is no issue of the lack of a traffic control device on the date in issue.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby


ORDERED that the motion of plaintiff LAURENCE BANK, made pursuant to CPLR 3212, for partial summary judgment as to liability, as against defendant ANDRIJ M. JUZENIW, is denied; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811, on October 23, 2017, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the Court.

Dated: White Plains, New York
September 29, 2017

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Norman M. Block, P.C.
Attorney for Plaintiff
Via NYSCEF

Rivkin Radler LLP
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Via NYSCEF