

Parker v Johns

2017 NY Slip Op 33437(U)

May 1, 2017

Supreme Court, Nassau County

Docket Number: Index No. 607679/16

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X
CLIVE A. PARKER and CLOVER GHANY,

Plaintiff(s),

-against-

JOSEPH JOHNS, LEE C. JOHNS, RACHEL K. WARREN
and RICHARD J. WARREN,

Defendant(s).
-----X

TRIAL/IAS PART 13

INDEX # 607679/16

Motion Seq. 1

Motion Date 3.21.17

Submit Date 4.26.17

The following papers were read on this motion:	E-File Docs. Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	11
Answering Affidavit	14, 18
Reply Affidavit.....	20

Defendants Joseph Johns and Lee C. Johns move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them.

This personal injury action arose out of a motor vehicle accident which occurred on February 13, 2015. Issue was joined on or about December 1, 2016. Depositions have not been held, nor has a preliminary conference been held.

In support of this motion, defendant Joseph Johns submits his affidavit sworn to on January 20, 2017. In his affidavit, Mr. Johns states that on February 13, 2015, he was operating a 2010 BMW sedan owned by his mother defendant Lee C. Johns. He was traveling southbound on the Cross Island Parkway and exited the parkway at exit 30E. He brought his motor vehicle to a stop on the exit ramp when he was struck in the rear by a 2013 Acura operated by co-defendant Rachel K. Warren. The impact caused his vehicle to be pushed forward into plaintiff's motor vehicle. His vehicle had been at a complete stop for 15 seconds prior to the impact. The impact

to the rear of his vehicle was heavy. At the time of the impact there were several vehicles in front of him. His foot was on the brake and he had no warning that his car was about to be struck in the rear. He did not hear any horns, brakes or screeching tires prior to the impact. Further, prior to the impact with plaintiff's vehicle, he was not involved in any other impacts with any other car including the vehicle directly in front of him. Joseph Johns states that he had no opportunity to take evasive action in order to avoid the accident.

In opposition to this motion, plaintiff Clover Ghany submits an examination under oath taken by the Progressive Specialty Insurance Company on May 28, 2015. There is also an affidavit from Clive A. Parker sworn to on March 17, 2017.

Ms. Ghany states that she was the right rear passenger in a motor vehicle which she believed was traveling on the Cross Island Parkway in the vicinity of I-495. It was driven by Clive (Parker). She described the accident as one big push. The car she was traveling in was moving at the time of the accident.

Plaintiff Clive A. Parker stated in his affidavit that on February 13, 2015 he was operating a 2006 Nissan vehicle southbound in the right lane of the Cross Island Parkway at approximately 50 miles per hour. Clover Ghany was his passenger. Suddenly without warning he was struck in the rear by a 2010 BMW owned by defendant Lee C. Johns and operated by defendant Joseph Johns. His vehicle was moving at the time of this accident. There were two other vehicles involved in this accident.

Counsel for Rachel K. Warren and Richard J. Warren submits her affidavit in opposition to this motion. There is no affidavit from her clients.

It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgriditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*). (*Recine v. Margolis*, 24 Misc. 3d 1244A [Nassau County 2009]).

There are four motor vehicles listed on the police accident report. There has been no significant exchange of discovery or deposition testimony from each of the parties as to how this accident occurred. Defendant Joseph Johns states his vehicle was stopped and was struck in the rear by the Warren vehicle propelling him into the plaintiff's vehicle, which was also stopped. As a result, the moving defendant has tendered sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. However, in opposition to this motion plaintiff Clive A. Parker states that his motor vehicle was moving at the time of the accident when his vehicle was struck by the John vehicle. At this juncture, facts essential to opposition may exist but cannot be stated since plaintiff had no opportunity to depose Rachel Warren regarding the happening of this accident.

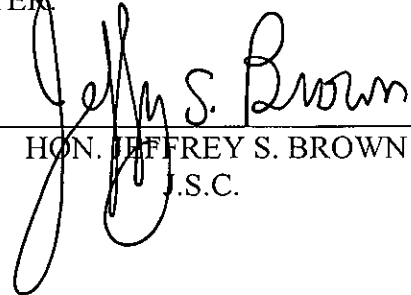
CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." In this case, Rachel Warren did not submit an affidavit detailing the facts leading up to this accident. Sharp issues of fact exist between Joseph Johns and Clive Parker as to whether plaintiff's vehicle was moving at the time of the accident. In light of the drastic nature of a summary judgment motion, it would be premature to entertain this motion prior to each party having an opportunity to depose Ms. Warren. (*See Johannsdottir v. Kohn*, 90 AD2d 842 [2d Dept 1982]). Under these circumstances, an award of summary judgment would be premature. (*See Schlichting v. Elliquence Realty, LLC*, 116 AD3d 689 [2d Dept 2014]).

Accordingly, the motion is **denied** without prejudice to renewal upon completion of discovery.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 1, 2017

ENTER:


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