

Switzer v Din
2018 NY Slip Op 32612(U)
October 15, 2018
Supreme Court, New York County
Docket Number: 154894/2013
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22-----X
NATHAN SWITZER,

Plaintiff,

- v -

ZATHER DIN, TYRANT HACKING CORP

Defendant.

INDEX NO. 154894/2013

MOTION DATE 09/21/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 59, 60, 61, 62, 63

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, it is ORDERED that plaintiff's motion to compel the deposition and defense physical examination of plaintiff to be held within two days of each other; to permit plaintiff to discontinue the action against defendant Zather Din; and for summary judgment in favor of plaintiff against defendant on the issue of liability is granted. This case stems from a motor vehicle incident which occurred on October 29, 2010, on Broadway and West 93rd Street, in the County, City and State of New York when a vehicle operated by defendant Zather Din and owner by defendant Tyran Hacking Corp. struck a motorcycle operated by plaintiff Nathan Switzer allegedly resulting in his serious injury.

Preliminarily, defendant Zather Din has since passed away and in an Order dated February 28, 2018, this Court granted plaintiff's Order to Show Cause to discontinue this action against Zather Din. Thus, the branch of plaintiff's motion to discontinue the against defendant Zather Din is denied as moot.

Compel

Under CPLR §3124, “if a person fails to respond or comply with any request, notice, interrogatory, demand, or question ... the party seeking disclosure may move to compel compliance or a response.” A party may move to compel further discovery pursuant to CPLR §3124 when said party demonstrates that it has made a “good faith effort to bring about a non-judicial resolution to any remaining discovery disputes” (*Barber v Ford Motor Co.*, 250 AD2d 552, 553 [1st Dep’t 1998]).

Here, the Case Scheduling Order, dated March 29, 2016, stated that “all depositions must be completed by August 16, 2016” and that “physical examination(s) of plaintiff . . . shall be completed within 45 days of plaintiff’s deposition” (CSO, 3/29/2016). Plaintiff moves to compel defendant to take plaintiff’s deposition as more than two years have passed since the deposition deadline. Further, plaintiff affirms that plaintiff resides in Oregon and is willing and able to appear for deposition and a physical, however, due to the costs of travel and stay in New York, plaintiff requests that defendant conduct the physical within two days of plaintiff’s deposition. The Court notes that plaintiff’s willingness to travel to New York from Oregon in order to participate in the deposition and examination demonstrates a good faith effort to bring about a non-judicial resolution to the remaining discovery dispute. Thus, plaintiff’s motion to compel deposition and defense physical examination of plaintiff is granted to the extent that the medical examination is to be scheduled within two days of completion of plaintiff’s deposition. The dates of the deposition and examination shall be determined at the next compliance conference on November 2, 2018.

Summary Judgment & VTL

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Violation of the Vehicle and Traffic Law constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]).

Pursuant to VTL § 1163(a) “no person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless such movement can be made with reasonable safety.” Here, plaintiff affirms that he was riding his motorcycle when defendant, who had been traveling in the lane to his right, suddenly and without warning struck him, causing the accident. In opposition, defendant states that an issue of fact exists as the deceased driver stated in the police MV 104 report that he was traveling in the left lane at the time of the incident. (Sup Aff in Op). However, in reply plaintiff aver that it is well settled in New York that the contents of a police report that are not the result of the reporting officer’s own observations but the product of statements made by a third person cannot be admitted into evidence under the business record exception to the hearsay rule unless the third person making the statement was under a business duty to do so (*Cover v Cohen*, 61 NY2d 261 [1984]). Further, the court notes that the police report is unsworn, and thus inadmissible. Thus, absent an issue of fact, the court finds that plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability.

Accordingly, it is

ORDERED that the branch of plaintiff's motion to compel the deposition and defense physical examination of plaintiff to be held within two days of each other is granted; and it is further

ORDERED that the branch of plaintiff's motion to permit plaintiff to discontinue the action against defendant Zather Din is denied as moot; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment in favor of plaintiff against defendant on the issue of liability is granted; and it is further

ORDERED that all parties appear for a compliance conference on November 2, 2018, in room 103 of 80 Centre Street at 9:30AM to schedule the deposition of plaintiff and the physical examination of plaintiff, which is to occur two days after the deposition; and it is further

ORDERED that that plaintiff shall, within 14 days from entry of this order, serve a copy of this order with notice of entry upon defendant's counsel

This constitutes the Decision/Order of the Court.

10/15/18

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE