

Isakova v Arthur
2018 NY Slip Op 33377(U)
December 3, 2018
Supreme Court, Kings County
Docket Number: 503182/2017
Judge: Carl J. Landicino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of December, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
MARINA ISAKOVA,

Plaintiffs,

- against -

CHARLES D. ARTHUR, EAN HOLDINGS, LLC,
ALI MAJED SALEH and DAMA TAXI, INC.

Defendants.
-----X

Index No.: 503182/2017

DECISION AND ORDER

Motions Sequence #2

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

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed.....

Opposing Affidavits (Affirmations).....

Reply Affidavits (Affirmations).....

Papers Numbered

1/2,

3,

4.

After a review of the papers and oral argument the Court determines as follows:

Plaintiff Marina Isakova moves for summary judgment (motion sequence #2) on the issue of liability as against Defendants Ali Majed Saleh and Dama Taxi, Inc. (hereinafter the "Dama Defendants"). Plaintiff contends that she was a passenger in the Dama Defendants' vehicle. The Plaintiff contends that the Dama Defendants' vehicle collided with the vehicle owned by Defendant EAN Holdings, LLC and operated by Defendant Charles D. Arthur (hereinafter the "Arthur Defendants"). The Plaintiff contends that the Dama Defendants' vehicle was double parked in the right lane of Ocean Parkway when the Arthur Defendants' vehicle made lane change from the left lane into the right lane of Ocean Parkway. The Plaintiff further contends that as the Arthur vehicle attempted to move beyond and in front of the Dama Defendants' vehicle, the Dama Defendants' vehicle unexpectedly accelerated and the vehicles collided. Plaintiff also

alleges that he had his turning light on and that the Defendant Saleh was reading his cell phone at the time of the accident. In opposition, the Dama Defendants oppose the motion and contend that it should be denied, as there is an issue of fact as to whether the Arthur Defendants are free from comparative liability.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the Plaintiff’s motion, the Court finds that the Plaintiff has provided sufficient evidence to meet her *prima facie* burden. In support of the Plaintiff’s motion, the Plaintiff relies primarily on the deposition testimony of Defendant Charles Arthur. During his deposition, Mr. Arthur testified that:

"I was in the left lane in the process of going into the right lane. I had my blinkers on and as I was proceeding to go into the right lane- - as I was going into the right lane, the driver of the cab took off. At the time he was reading his cell phone. My right side on my right fender, hit his left side of his front fender."

(Plaintiff's motion, Exhibit F, Page 16)

Q- So, the cab is double parked?

A- Yes.

Q- And when you say "parked", you mean stopped?

A- Yes.

Q- At that point you began- when you came near the cab, you began to make a move in front of the cab; is that fair?

A- Yes.

Q- At some point the cab began to move?

A- Yes, it was moving.

Q- Where was your car, the front of your car, the front of your car, compared to the front of the cab, when the cab started moving?

A- It was partially in the right lane. I was in the left lane, going into the right lane.

(Plaintiff's motion, Exhibit F, Page 21)

It is undisputed that the Plaintiff was a passenger in the Dama Defendant vehicle and is free from liability. The deposition testimony of Defendant Charles Arthur is sufficient to establish that the Dama Defendants were negligent and the sole proximate cause of the accident. *See Phillip v. D & D Carting Co.*, 136 A.D.3d 18, 22, 22 N.Y.S.3d 75 [2nd Dept, 2015].

In opposition, the Dama Defendants have failed to raise an issue of fact that would prevent this Court from granting summary judgment on the issue of liability to the Plaintiff. Defendant Ali Majed Saleh has been precluded from testifying and the Police Accident Report attached to the Affirmation in Opposition (Exhibit A) is not admissible. The report is not certified, the Police Officer did not witness the alleged incident and the report did not satisfy the party admission exception to the hearsay rule. *See Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014].

Based upon the foregoing, it is hereby ORDERED as follows:

The motion for summary judgment on the issue of liability (motion sequence #2) by the Plaintiff is granted as against the Dama Defendants, the complaint and any cross claims as against the Arthur Defendants are dismissed and the trial shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

2018 DEC 24 AM 10:32

KINGS COUNTY CLERK
FILED