

Shost v Duncan

2018 NY Slip Op 34114(U)

April 24, 2018

Supreme Court, Dutchess County

Docket Number: Index No. 52275/2016

Judge: Christi J. Acker

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This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period 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 DUTCHESS

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PATRICIA SHOST,

Plaintiff,

-against-

DONALD J. DUNCAN and GENERAL MOTORS LLC,

Defendants.

-----X

DECISION AND ORDER

Index No.: 52275/2016

Motion Sequence #1 Motion Date: 4/18/18

The following papers, numbered 1 to 11, were read on Plaintiff's motion for partial summary judgment on the issue of liability pursuant to CPLR 3212:

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| Notice of Motion-Affirmation of Brett J. Nomberg, Esq.-Exhibits A-C..... | 1-5 |
| Affirmation in Opposition of Kelly Robreno Koster, Esq. and Exhibits A-D | 6-10 |
| Reply Affirmation of Brett J. Nomberg, Esq..... | 11 |

Plaintiff PATRICIA SHOST (hereinafter "Plaintiff") commenced this personal injury action on or about September 13, 2016 against Defendants DONALD J. DUNCAN and GENERAL MOTORS LLC. (hereinafter "Defendants") claiming that on June 13, 2015, Plaintiff's vehicle and the vehicle driven by Defendant Duncan and owned by Defendant General Motors collided with each other. The accident occurred on Grasslands Road, west of Bradhurst Avenue, in the Town of Valhalla, Westchester County. Plaintiff's Complaint at ¶¶7 and 9, Nomberg Affirmation, Exhibit A.

Plaintiff now moves for partial summary judgment on the ground that there are no triable issues of fact with regard to Defendants' liability. In support of her motion, Plaintiff submits copies of the Summons and Complaint, Defendants' Answer, Plaintiff's Bill of Particulars, the police accident report, and Plaintiff's own affidavit.

Plaintiff's affidavit establishes that she was driving her vehicle westbound on Grasslands Road and came to a stop at a red light at the intersection with Bradhurst Avenue. Shost Affidavit, ¶2, Exhibit B, Nomberg Affirmation. She further avers that she was stopped for approximately five (5) seconds and then, without any warning, her vehicle was struck twice from behind by the vehicle driven by Defendant Duncan. The impacts to her vehicle caused her vehicle to be pushed forward, almost striking the vehicle in front of her. *Id.* at ¶4. Plaintiff states that at the time and place of the accident, the roadway was flat, the weather was sunny and the roadway was dry. *Id.* at ¶3. The police report, annexed to the Nomberg Affirmation as Exhibit C, confirms that Plaintiff's vehicle was rear-ended by Defendant Duncan.

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence [emphasis supplied]." *Orcel v. Haber*, 140 AD3d 937 [2d Dept. 2016]. In the instant matter, Plaintiff clearly established a *prima facie* case of negligence through her sworn affidavit and the police report.

In opposition to the motion, Defendants submitted an attorney affirmation and exhibits relating to outstanding discovery. Noticeably absent from the submission is an affidavit from Defendant Duncan, a person with personal knowledge of the facts, either denying the plaintiff's

allegations or offering a nonnegligent explanation for the collision. *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 737 [2nd Dept 2007]. Instead, Defendant argues that Plaintiff's motion is premature and the Court should deny partial summary judgment pursuant to CPLR 3212(f).
Koster Affirmation ¶¶ 17-20.

Pursuant to CPLR 3212(f), “[s]hould 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 [emphasis supplied].” Thus, it was incumbent upon Defendants to establish by affidavit that “...discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff[.]...” *Deleg v Vinci*, 82 AD3d 1146, 1146 [2nd Dept 2011], citing to *Kimyagarov, supra* at 736. Defendants have failed to do so.

Defendants' entire opposition revolves around Plaintiff's alleged failure to timely provide medical authorizations and appear for a deposition. However, Defendants completely fail to establish how that discovery might lead to relevant evidence on the issue of liability or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of the Plaintiff. *Deleg, supra*. “[I]n opposing plaintiff's motion, [Defendants] failed to tender an affidavit or affidavits averring the existence, in admissible form, of proof which would present a triable issue of fact or, if hearsay, an acceptable excuse for the failure to present firsthand knowledge” *Chem. Bank v. PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]; *Deleg v Vinci, supra* at 1146. An attorney affirmation claiming, without specifying, that discovery would permit them to “discover relevant facts that might support their opposition” is not enough. *See*

Koster Affirmation at ¶ 21. “[T]he defendants’ purported need to conduct discovery did not warrant denial of the motion since they already had personal knowledge of the relevant facts” *Deleg.*, at 1146, citing *Abramov v Miral Corp.*, 24 AD3d 397, 398 [2005]. Although Defendant Duncan has personal knowledge of the facts, he did not submit his own affidavit or any other evidence with respect to the happening of the accident. Therefore, Defendants have not submitted the necessary evidentiary proof to defeat Plaintiff’s motion for partial summary judgment. See *Zuckerman, supra* at 562-63; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2nd Dept 2006].

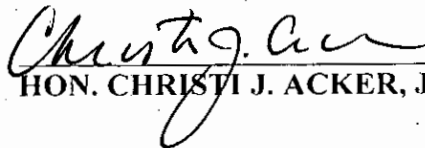
As Defendants have not denied the Plaintiff’s allegations or offered a nonnegligent explanation for the collision (*see Kimyagarov, supra*), nor shown that they are likely to discover evidence which raises a triable issue of fact, Plaintiff is entitled to summary judgment on the issue of liability.

As such, it is hereby

ORDERED that Plaintiff’s motion for partial summary judgment on liability is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 24, 2018


HON. CHRISTI J. ACKER, J.S.C.

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