

Wetzler v Anderson

2018 NY Slip Op 34334(U)

January 23, 2018

Supreme Court, Nassau County

Docket Number: Index No. 608437/16

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DESIREE M. WETZLER,

Plaintiff,

- against -

JOHN R. ANDERSON,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 608437/16
Motion Seq. No.: 01
Motion Date: 11/15/17

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability. Defendant opposes the motion.

The instant action arises from personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on October 8, 2016, at approximately 2:55 p.m., on Fulton Street, at or near its intersection with Merokee Place, Farmingdale, County of Nassau, State of New York. The subject accident involved two (2) vehicles - a 2010 Volvo, owned and operated by plaintiff, and a 2002 Buick, owned and operated by defendant. *See* Plaintiff's Affirmation in Support Exhibit E.

Plaintiff commenced the instant action with the filing and service of a Summons and Verified Complaint on or about April 28, 2016. *See* Plaintiff's Affirmation in Support Exhibit A. Issue was joined on or about December 12, 2016. *See* Plaintiff's Affirmation in Support Exhibit B.

Counsel for plaintiff submits that, "[a]t the time of the accident, Plaintiff, Desiree Wetzler was operating her 2010 Volvo sedan on Fulton Street in the center lane.... While approaching the intersection of Merokee Place and Fulton Street and driving her car within the posted speed limit, she observed the Defendant's vehicle approach and (*sic*) Fulton Street from Merokee Place and proceed into the intersection and strike her car without ever stopping for the stop sign located on Merokee Place.... [I]n the accident the passenger side was struck by the front of the defendant's car.... It should be noted that while the Defendant possessed a stop sign for his way of travel, no such traffic control device existed for the traffic proceeding on Fulton, such as the Plaintiff herein.... The Defendant stated that he has no memory of the accident and thus cannot present a non-negligent explanation for proceeding into the intersection without stopping at the stop sign and striking the Plaintiff's car." *See* Plaintiff's Affirmation in Support Exhibits D and E.

Counsel for plaintiff contends that defendant was the negligent party in that he failed to stop at the stop sign and failed his duty to exercise reasonable care under the circumstances to avoid an accident. Counsel for plaintiff additionally claims that defendant cannot come up with a reasonable excuse or a non-negligent explanation for his vehicle striking plaintiff's vehicle.

In opposition to the motion, counsel for defendant argues, in pertinent part, that "[t]he deposition testimony of the plaintiff raises an triable issue of fact as to the comparative negligence of the plaintiff, Desiree Wetzler.... [P]laintiff was asked 'how long before the accident

did you first see that other car?' ... [P]laintiff responds 'seconds.' The failure of the plaintiff to observe the defendant's vehicle more than a 'split second' before this accident raises an issue of the plaintiff's own negligence [citations omitted].... Your affirmant respectfully submits the plaintiff, Desiree Wetzler's deposition testimony raises a triable issue of fact as to whether her negligence was a contributing factor to the happening of the subject accident." See Plaintiff's Affirmation in Support Exhibit D.

It is well settled that 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. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). 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. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (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. See *Zuckerman v. City of New York*, *supra*. 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. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra*.

After applying the law to the facts in this case, the Court finds that defendant has failed to meet his burden to demonstrate an issue of fact which precludes summary judgment. Counsel for defendant has not submitted any admissible evidence to rebut plaintiff's *prima facie* showing of entitlement to judgment as a matter of law.

It cannot be overlooked by the Court that, in opposition, defendant relies solely upon the affirmation of his attorney, who was obviously without personal knowledge of the facts. This

does not supply the evidentiary showing necessary to successfully resist the motion. *See* CPLR § 3212(b); *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978). An affirmation of counsel is of no evidentiary value or effect. *See Roche v. Hearst Corp.*, 53 N.Y.2d 767, 439 N.Y.S.2d 352 (1981); *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 398 N.Y.S.2d 1004 (1977).

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 23, 2018

ENTERED
JAN 25 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE