

DeRosa v Bastain

2018 NY Slip Op 34491(U)

July 27, 2018

Supreme Court, Bronx County

Docket Number: Index No. 30774/2017E

Judge: Donald Miles

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No. **30774/2017E**
Motion Calendar No. 4
Motion Date: 6/25/18

JOSEPH DeROSA,

Plaintiffs,

-against-

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court

DREW BASTAIN,

Defendants,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for partial summary Judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits (A through C) in Support.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, and following oral argument, the Decision/Order on this Motion is as follows:

Plaintiff's motion for an order granting partial summary judgment against defendant on the issue of liability is hereby granted.

This action arises from a motor vehicle accident that occurred on July 26, 2017 on Pennyfield Avenue at or near its intersection with Harding Avenue, in the County of Bronx, City and State of New York, whereby plaintiff alleges that the vehicle owned and operated by plaintiff was struck in the rear by the vehicle owned and operated by the defendant, while the plaintiff's vehicle was at a complete stop.

The plaintiff now seeks partial summary judgment on the issue of liability on the grounds that no material issue of fact exists since the defendant Drew Bastain was solely responsible for the underlying motor vehicle accident, alleged to have caused personal injuries to the plaintiff. The defendant has submitted written opposition.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable

inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *see, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *see, Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY 1957).

Unless the driver of the moving vehicle comes forward and demonstrates a non-negligent explanation for the accident or for his failure to maintain a safe distance between the cars as provided by Vehicle and Traffic Law §1129, a rear-end collision with a stopped vehicle creates a presumption that the driver of the moving vehicle was negligent. *Burns v. Gonzalez*, 307 AD2d 863, 763 NYS2d 603 (1st Dept. 2003).

In support of the motion for summary judgment, plaintiff submits a copy of the pleadings and his own sworn affidavit. Plaintiff attests that on July 26, 2017, he was the operator of a vehicle that was at a complete stop for about ten (10) seconds at a stop sign, when it was struck in the rear by a vehicle owned and operated by defendant Bastain, which was traveling in the same direction behind the plaintiff's vehicle.

Plaintiff has sufficiently established *prima facie* entitlement to summary judgment on the issue of liability. The burden now shifts to defendant to raise a triable issue of fact by presenting a non-negligent explanation for the accident.

In opposition, the defendant submits the affirmation of defense counsel whereby counsel argues that the instant motion is premature since no discovery has been conducted on this action as yet. Defendant has failed to raise a triable issue of fact. Defendant failed to submit a duly executed and sworn affidavit from anyone with personal knowledge of the accident. The affirmation submitted by defense counsel is insufficient to raise a triable issue of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980). Finally, although the defendant argues that the motion for summary judgment should be denied as discovery has not been conducted, the lack of discovery will only serve as the grounds for denial of a summary judgment motion, where facts necessary to defeat the motion are not within the possession of the party opposing the motion for

summary judgment. *Rite Aid Corp. v. Grass*, 2008 WL 517717 (1st Dept. 2008). That is not the case here. Notably, the defendant fails to state what missing and relevant discovery would affect the outcome of the instant motion.

Accordingly, it is

ORDERED, that the plaintiff's motion for partial summary judgment against defendant on the issue of liability is hereby granted. Upon the filing of a Note of Issue, this action shall be set down for an assessment of damages.

Plaintiff shall serve a copy of this Order with Notice of Entry upon defendant by regular mail within thirty (30) days of entry of the order.

This is the decision and Order of the Court.

JUL 27 2018

DATE



HON. DONALD MILES, J.S.C.