

Arias-Breton v Pierre

2018 NY Slip Op 34508(U)

December 31, 2018

Supreme Court, Bronx County

Docket Number: Index No. 28817/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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VICTOR ARIAS-BRETON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 28817/2017E

EMMANUEL R. PIERRE and ANNE M. PIERRE-
LEBRUN,

Defendants.

-----X

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that took place on May 21, 2017. Plaintiff was traveling northbound on Olmstead Avenue near the intersection of Ellis Avenue, in Bronx County, when defendants' vehicle, travelling on Ellis Avenue, which is controlled by an stop sign, collided with plaintiff's vehicle. Plaintiff seeks partial summary judgment on the issue of defendants' liability and dismissal of defendants' first, third, fifth and sixth affirmative defenses. For the reasons that follow, plaintiff's motion is granted in part.

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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). When there is conflicting evidence as to how the accident occurred, summary judgment is inappropriate (*see Elamin v Robert Express, Inc.*, 290 AD2d 291 [1st Dept 2002]). In deciding a summary judgment motion, the court should not weigh

the parties' credibility (*see Krupp v Aetna Life & Casualty Co.*, 103 AD2d 252, 262 [2nd Dept 2002]). If there is any doubt as to existence of material issues of fact the motion should be denied (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

In support of the motion, plaintiff submits his affidavit, a copy of the pleadings and a certified police report. The police report is inadmissible hearsay (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]). In his affidavit, plaintiff averred that he was traveling northbound on Olmstead Avenue near the intersection of Ellis Avenue in Bronx County, and that traffic on Ellis Avenue was controlled by a stop sign. Plaintiff further averred that as he was approaching the intersection at 25 miles per hour, defendants' vehicle approached the intersection and failed to obey the stop sign, striking plaintiff's vehicle.

In opposition to plaintiff's motion, defendants submit the affidavit of defendant Emmanuel Pierre. In his affidavit, defendant Emmanuel averred that as he was approaching the intersection he came to a complete stop at the stop sign, and, once he deemed it safe to do so, he continued through the intersection. Defendant Emmanuel further averred that as he was travelling through the intersection a speed of no more than 5 miles per hour, he was struck by plaintiff's vehicle on the rear door of the driver's side of his vehicle. The impact of the collision propelled defendants' vehicle into the parking lane, striking parked vehicles.

The conflicting versions as to how the accident occurred demonstrate the existence of issues of fact and credibility, making summary judgment in plaintiff's favor inappropriate (*see Peritore v Anna & Diane Cab Corp.*, 127 AD3d 669 [1st Dept 2014]). Additionally, dismissal of defendants' third affirmative defense, alleging plaintiff's culpable conduct, is inappropriate.

The aspect of plaintiff's motion seeking dismissal of defendants' first affirmative defense alleging lack of personal jurisdiction -- improper service -- is granted. Plaintiff provided

an affidavit of service that demonstrates that service was complete (*see Newman & Leventhal, Inc. v Sanders*, 115 AD2d 360 [1st Dept 1985]). Defendants do not provide any admissible evidence opposing plaintiff's assertion that service of process was proper.

As to defendants' fifth affirmative defense, alleging plaintiff's failure to wear a seat belt, plaintiff avers in his affidavit that, at the time of the accident, he was wearing a seat belt. Defendants do not provide any admissible evidence to contradict plaintiff's averment.

The aspect of plaintiff's motion seeking dismissal of defendants' sixth affirmative defense, alleging collateral estoppel as to any issue that has been resolved in arbitration, is denied. At this time there has been no arbitration proceeding; however, there is the potential for future arbitration in the matter.


Accordingly, it is

ORDERED, that the aspects of plaintiff's motion seeking the dismissal of defendants' first and fifth affirmative defenses are granted, and those defenses are dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: December 31, 2018



John R. Higgins, A.J.S.C.