

Martinez v Pena

2019 NY Slip Op 31109(U)

April 11, 2019

Supreme Court, New York County

Docket Number: 161979/2014

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X	INDEX NO.	<u>161979/2014</u>
ZORAIDA MARTINEZ, EXPEDICTO MONTAN,		
Plaintiff,		01/30/2019, 01/30/2019,
- v -	MOTION DATE	<u>01/30/2019</u>
CARLOS PENA, JUAN SANTOS, SILVER BRICKS INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, M&A TAVERN LLC D/B/A MCDERMOTT'S PUB	MOTION SEQ. NO.	<u>002 003 004</u>

Defendant.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 120, 123, 124, 125, 126, 127, 128, 129, 130, 159, 163, 165, 166, 169, 170, 174

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 121, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 160, 164, 167, 168

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 122, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 161, 162, 171, 172, 173

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendants Juan Santos and Silver Bricks Inc.'s motion for summary judgment of dismissal (mot. seq. no. 002), defendant M&A Tavern LLC d/b/a McDermott's Pub's (hereinafter referred to as "McDermott's Pub") motion for summary judgment of dismissal (mot. seq. no. 003), and defendant Consolidated Edison Company of new York's (hereinafter referred to as "Con. Ed.") motion for summary judgment of dismissal (mot. seq. no. 004) are decided below.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 (1957). “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”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, the sequence of events is largely uncontested. On the date of the accident at issue, defendant Pena, an employee of defendant Con. Ed., went to work at 3:00pm by driving his own personal vehicle. Defendant Pena’s shift was 3:00pm to 11:00pm. On the date of the accident he was on standby, in which the workers on standby would be called if needed, and such standby workers could wait in a ready room but were not required to wait in any designated area. At 7:00pm defendant Pena went to lunch at defendant McDermott’s Pub with three co-workers, William Ferre, Antonio Ferrara, and Thomas Creamer. At unspecified times during the two hour lunch, defendant Pena has a specific memory of going to the bar two times and ordering one shot of Hennessy and one Corona beer each time. Following lunch, defendant Pena’s co-worker, Antonio Ferrara, drove him back to work. None of defendant Pena’s co-workers saw him again after returning to work following lunch. Thereafter, defendant Pena left work prior to the end of his shift without the knowledge of his co-workers. Upon leaving, defendant Pena drove his personal vehicle whereupon he struck a vehicle on the road, struck another vehicle which was

parked, and then crossed over the double yellow lines and struck the vehicle owned by defendant Silver Bricks and operated by defendant Santos, along with another vehicle. Plaintiffs were passengers in the vehicle operated by defendant Santos.

Defendants Santos and Silver Bricks move for summary judgment, arguing that they did not breach any duty to plaintiffs and are not liable for their injuries. In support of the motion, defendants Santos and Silver Bricks proffer, *inter alia*, the deposition transcripts of both plaintiffs, defendant Santos, and defendant Carlos A. Pena. Here, it is undisputed that plaintiffs were passengers in the vehicle owned by defendant Silver Bricks, and operated by defendant Santos, when such vehicle was involved in an accident with the vehicle owned and operated by defendant Pena. At the time of the accident, defendants Santos and Silver Brick's vehicle was traveling straight in the right lane of traffic and defendant Pena's vehicle was traveling in the opposite direction on the other side of the double yellow lines. According to defendant Santos, defendant Pena unexpectedly crossed over the double yellow lines into his lane of traffic and is solely liable for causing the accident and plaintiffs' injuries. Plaintiffs and defendant Pena oppose, and defendants Santos and Silver Bricks reply.

In opposition, defendant Pena adopts plaintiffs' arguments in opposition. Plaintiffs argue that defendants Santos and Silver Brick's motion must be denied as such defendants failed to annex all of the pleadings, failed to submit deposition transcripts in admissible form pursuant to CPLR § 3116, and that issues of fact exist as to whether defendant Santos caused, or contributed to causing, the accident. In support of their argument, plaintiffs contend that defendant Santos was looking in the rearview mirror at the time of the accident as he was telling plaintiffs a story.

Preliminarily, the Court notes that the Supreme Court, New York County implemented electronic filing of documents in 2011, 8 years ago. It is common knowledge amongst attorneys

practicing in the Supreme Court, New York County that actions are now subject to mandatory electronic filing with some exceptions, none of which apply herein. Here, it is undisputed that this action is electronically filed. In fact, plaintiffs voluntarily agreed to electronic filing rather than opting out with cause. Thus, all the papers filed in this action are easily accessible and available to the Court for review. Furthermore, CPLR §2214 specifically states that “in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court”. Thus, plaintiffs’ argument regarding submission of the prior papers fails.

Plaintiffs’ argument that defendants Santos and Silver Bricks failed to submit deposition transcripts in admissible form, as such transcripts are unsigned and there is no proof that they were sent to the parties for review, similarly fails. The Appellate Division, First Department has explicitly held that “unsigned deposition transcripts submitted by defendants in support of their motion were admissible...[as such transcripts were] certified by the reporter and plaintiff does not challenge its accuracy”. *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 (1st Dep’t 2013). Here, plaintiffs do not challenge the accuracy of the deposition transcripts submitted by defendants Santos and Silver Bricks. Plaintiffs, rather, merely objects to the deposition transcripts for the sole basis that they are unsigned and that there is no proof that they were sent to the parties for review. Thus, as there are no objections by any party, including plaintiffs, to the accuracy of the certified deposition transcripts, such transcripts are admissible and are considered herein.

The Court notes that a review of the deposition transcripts reveal that defendant Santos’ deposition testimony conflicts with the deposition testimony of plaintiff Expedicto Montan as to whether defendant Santos was watching the road at the time of the accident and shortly before

the accident. Furthermore, defendant Santos and plaintiff Montan's testimony also differs as to the location of the accident. Thus, issues of fact exist. It is well settled that summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). Specifically, although it is undisputed that the vehicle owned and operated by defendant Pena, crossed over the double yellow line, an issue of fact exists as to whether defendant Santos and Silver Bricks was also negligent, and whether such negligence was a contributing factor to the accident and plaintiffs' injuries. "The existence of an emergency and reasonableness of a party's response to the situation ordinarily presents questions of fact". *Weston v Castro*, 138 AD3d 517, 518 (1st Dep't 2016). As issues of fact exist, "the court cannot conclude as a matter of law that there was an emergency that absolves a finding of liability against defendant at this point in the litigation". *Id.* at 519. Thus, defendant Santos and Silver Bricks' motion for summary judgment is denied.

As to defendant McDermott's Pub's motion for summary judgment, they argue that the instant accident was caused solely by defendant Pena's negligence in driving while intoxicated and crossing over the double yellow lines. Moreover, defendant McDermott's Pub argues that they did not serve defendant Pena any alcohol while he was visibly intoxicated, such that they are not liable for the accident and plaintiffs' injuries. Plaintiffs oppose and defendant McDermott's Pub replies.

The Dram Shop Act states, in pertinent part, that "[a]ny person who shall be injured in person...by any intoxicated person...shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication". New York General Obligations Law § 11-101(1). "Under Alcoholic Beverage Control Law §65(2), it is unlawful to furnish an alcoholic beverage

to any visibly intoxicated person.” *Adamy v Ziriakus*, 92 NY2d 396, 400 (1998)(internal quotations omitted). In support of its motion, defendant McDermott’s Pub argues that William Ferre, Antonio Ferrara, and Thomas Creamer all testified that they did not see defendant Pena order or consume any alcoholic beverages during lunch at defendant McDermott’s Pub. Furthermore, all three of defendant Pena’s co-workers testified that they did not notice anything different about him, that defendant Pena was not slurring his speech, stumbling while walking, and did not smell of alcohol. At her deposition, Christina Muni, the bartender for defendant McDermott’s Pub, testified that on the night of the motor vehicle accident she was working between 7:00pm and 4:00am. She further testified that between the times that defendant Pena was having lunch at defendant McDermott’s Pub, specifically between 7:00pm and 10:00pm, no customers at the bar were visibly intoxicated. Ms. Muni further testified that she did not hear anyone with slurred speech or being loud or belligerent. Thus, defendant McDermott’s Pub has established entitlement to summary judgment by demonstrating that there is no evidence that defendant Pena was served any alcohol by defendant McDermott’s Pub while visibly intoxicated.

In opposition, plaintiffs argue, *inter alia*, that defendant McDermott’s Pub failed to meet its burden for summary judgment in that there was no affidavit from the waitress working at defendant McDermott’s Pub on the night of the accident. However, such argument fails as it is undisputed testimony that defendant Pena and his 3 co-workers did not order any alcoholic beverages from the waitress while sitting at the table, and there are no allegations that the waitress working the table service served defendant Pena any alcohol. Thus, the lack of an affidavit from the waitress from defendant McDermott’s Pub is not detrimental to its current motion.

Relying on their expert affidavit, plaintiffs also argue that an issue of fact exists as defendant Pena's blood alcohol level indicates that he should have been exhibiting signs of intoxication while having lunch at defendant McDermott's Pub. The expert affidavit proffered by plaintiff contends that, based upon a review of, *inter alia*, the police accident report, the criminal arrest report, defendant Con. Ed.'s investigation reports, the deposition transcripts of defendant Pena, Ms. Muni, Michael McDermott, Mr. Ferre, Mr. Ferrara, Mr. Creamer, and Arturo Claudio (a manager of corporate security at defendant Con. Ed.), and photographs of the interior of defendant McDermott's Pub, "there is an adequate clinical description and sufficient data from which one can extrapolate a blood ethanol level during the time that Mr. Pena was still at McDermott's Pub prior to the accident." Aff. in Opp., Exh. L, Marvin Pietruszka Aff., ¶ 9. Based upon Dr. Pietruszka's review of the record, he calculated defendant Pena's blood alcohol level to be in the range of .20 g% while at defendant McDermott's Pub, and opined that defendant Pena would have been symptomatic and "visibly intoxicated" when he was served alcohol during lunch. *Id.* at ¶14.

A review of Dr. Pietruszka's affidavit reveals that he cherry picks certain information from the materials reviewed, while ignoring other readily available information, in coming to his conclusion that defendant Pena's blood alcohol level while at defendant McDermott's Pub was in the range of .20 g%. Specifically, Dr. Pietruszka affirms that the known and accepted range of alcohol elimination in the medical community is 0.010- 0.025 gm/dL/hr and goes on to affirm that such rate tends to be higher in regular drinkers. In estimating defendant Pena's blood alcohol level, Dr. Pietruszka chose to use the weight that defendant Pena testified to, namely that he fluctuated between 180 pounds and 190 pounds, rather than the evidence recorded by the New York City Police Department that on the date of the accident defendant Pena weighed 200

pounds. *See* Aff. in Opp., Exh. K, New York City Police Department Omniform System – Arrests, p. 1. Furthermore, Dr. Pietruszka affirms that in estimating defendant Pena’s blood alcohol level, he used an average alcohol elimination rate of 0.015g% per hour at an average weight of 190 pounds. However, the 0.015g% per hour “average” that Dr. Pietruszka chose to use to calculate defendant Pena’s blood alcohol level is on the lower range of the accepted range of alcohol elimination Dr. Pietruszka himself provided in his affidavit. Dr. Pietruszka does not explain why he chose to use the lower 0.015g% per hour rate of alcohol elimination, and Dr. Pietruszka’s affidavit further appears to ignore the portion of the record which clearly indicates that defendant Pena was an alcoholic at the time of the accident. Such undisputed fact indicates that defendant Pena was a regular drinker. Despite Dr. Pietruszka’s own affidavit stating that the rate of alcohol elimination is higher in regular drinkers, he chose to ignore portions of the records he reviewed, and cherry picked the lower alcohol elimination rate without any explanation.

Moreover, in his estimate, Dr. Pietruszka ignored testimony that defendant Pena ate food during the lunch and failed to even mention how consumption of food would affect his estimate of defendant Pena’s blood alcohol level. Inexplicably, Dr. Pietruszka affirms that “to a reasonable degree of medical, technical and scientific certainty... [defendant Pena] would have been ‘visibly intoxicated’ when he was served alcohol at [defendant] McDermott’s” Pub. Aff. in Opp., Exh. L, Marvin Pietruszka Aff., ¶14. However, there was no testimony as to when, during the two hour lunch, defendant Pena consumed the alcoholic beverages. Presumably, Dr. Pietruszka is not affirming that defendant Pena was visibly intoxicated when he was served with his first round of alcoholic beverages consisting of one shot and one beer, as defendant Pena testified that he had no alcohol prior to lunch on the date of the accident. Thus, Dr. Pietruszka

must be affirming that defendant Pena was visibly intoxicated when he was served his second round of alcoholic beverages consisting of one shot and one beer. However, with no testimony or evidence indicating when defendant Pena went to the bar to order a second round of drinks, Dr. Pietruszka fails to demonstrate how he came to his conclusory assertion that defendant Pena was visibly intoxicated while being served alcohol at defendant McDermott's Pub.

Based entirely on the blood alcohol level, which Dr. Pietruszka estimated using the information he cherry picked from the record, Dr. Pietruszka opines that defendant Pena was visibly intoxicated when served alcohol during lunch. However, it is well settled, and the Court of Appeals has explicitly held that "[p]roof of high blood alcohol count alone, however, generally does not establish... 'visible' intoxication... [It] is well known that the effects of alcohol consumption may differ greatly from person to person and that tolerance for alcohol is subject to wide individual variation. Thus, even where it can be established, a high blood alcohol count in the person served may not provide a sound basis for drawing inferences about the individual's appearance or demeanor." *Romano v Stanley*, 90 NY2d 444, 450-451 (1997)(internal quotations and citations omitted). Moreover, where an expert's conclusions are speculative and conclusory, it holds no probative value. *See id.* Here, defendant Pena's blood alcohol level was never measured. Thus, aside from plaintiff's current expert report, there is no evidence of what defendant Pena's blood alcohol level was at the time of the accident and while he was in defendant McDermott's Pub. As detailed above, Dr. Pietruszka's affidavit is speculative and conclusory such that it is insufficient to raise a genuine triable issue of fact. As such, defendant McDermott's Pub's motion for summary judgment of dismissal is granted.

As to defendant Con. Ed.'s motion for summary judgment, it argues that it is not responsible for the motor vehicle accident and plaintiffs' injuries as defendant Pena was not

acting in the scope of his employment at the time of the accident. Plaintiffs oppose and defendant Con. Ed. replies.

Here, defendant Con. Ed. has established, through the deposition testimony, that defendant Pena drove to work in his own personal vehicle on the date of the accident. It has also been established that none of the three employees of defendant Con. Ed., who had lunch with defendant Pena at defendant McDermott's Pub, saw defendant Pena order or drink any alcoholic beverages. It is uncontested that defendant Pena testified that he got up from the table and went to the other side of the bar to order alcoholic beverages so that his co-workers from defendant Con. Ed. would not see him drinking. Furthermore, all three such employees testified that they did not notice anything different about defendant Pena during or after the lunch, and that he did not appear intoxicated. Finally, defendant Con. Ed. established that defendant Pena left work prior to the end of his shift without the permission or knowledge of defendant Con. Ed. and drove his own personal vehicle upon leaving. Thus, defendant Con. Ed. has demonstrated that defendant Pena was not within the course or scope of employment at the time of the motor vehicle accident.

In opposition, plaintiffs attempt to raise an issue of fact by arguing, *inter alia*, that the motor vehicle accident occurred at 10:50pm and defendant Pena's work shift did not end until 11:00pm. Thus, according to plaintiffs, defendant Pena was within the scope of employment with defendant Con. Ed. However, it was established that defendant Pena left work early without the knowledge or permission of defendant Con. Ed. Plaintiffs have failed to provide any statute or case law to support their argument that an employer should be held liable for acts of their employees when such employees voluntarily, and without the employer's knowledge, leave work prior to the end of their shift.

The Court of Appeals has consistently held that “[u]nder the doctrine of respondeat superior, ...an employer may be liable for acts of its employees in the course and scope of employment; an employee ordinarily is not acting in the course and scope of employment when traveling to and from work, so as to impose liability on the employer for negligent driving during these trips”. *D’Amico v Christie*, 71 NY2d 76, 88 (1987)(internal citations omitted). In *Lundberg v State*, the Court of Appeals held that “[a]n employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee’s activities. As a general rule, an employee driving to and from work is not acting in the scope of his employment.” 25 NY2d 467, 470-471 (1969). Here, defendant Con. Ed. has established that defendant Pena left work without defendant Con. Ed.’s knowledge and drove his personal car towards the direction of his home. Plaintiffs have failed to raise any triable issues of fact or demonstrate that defendant Pena was acting within the scope of his employment at the time of the accident. Thus, defendant Con. Ed.’s motion for summary judgment of dismissal is granted.

Accordingly, it is

ORDERED that defendants Juan Santos and Silver Bricks, Inc.’s motion for summary judgment of dismissal (mot. seq. no. 002) is denied in its entirety; and it is further

ORDERED that defendant M&A Tavern LLC d/b/a McDermott’s Pub’s motion for summary judgment of dismissal (mot. seq. no. 003) is granted and the complaint is dismissed as against them; and it is further

ORDERED that defendant Consolidated Edison Company of New York’s motion for summary judgment of dismissal (mot. seq. no. 004) is granted and the complaint is dismissed as against them; and it is further

ORDERED that any and all cross-claims against defendants M& A Tavern LLC d/b/a McDermott's Pub and Consolidated Edison Company of New York are dismissed; and it is further

ORDERED that the said claims against defendants Carlos A. Pena, Juan Santos and Silver Bricks, Inc. are severed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants M& A Tavern LLC d/b/a McDermott's Pub and Consolidated Edison Company of New York dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within thirty days of entry, defendant Consolidated Edison Company of New York shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

4/11/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE