

Wesco Ins. Co. v Touvor
2019 NY Slip Op 32050(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 153765/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 153765/2018

WESCO INSURANCE COMPANY
Plaintiff,

MOTION DATE 02/28/2019

- v -

MOTION SEQ. NO. 001

EFOE TOUVOR,
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 17, 18, 19

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

This is a subrogation action brought by Wesco Insurance Company (Wesco) as subrogee of Eldar Blue, LLC (Eldar Blue) against Efoe Touvor. Wesco moves for partial summary judgment pursuant to CPLR § 3212. For the reasons set forth below, the motion is granted.

This action arises from a one-car motor vehicle accident on or about April 25, 2016, in which Efoe Trouvor’s motor vehicle collided with a certain building owned by Eldar Blue, causing damage to the building. Wesco commenced this action seeking damages in the amount of \$14,292.61, reflecting \$16,792.61 for cleanup and repair, less a \$2,500 deductible. Wesco now moves for partial summary judgment on the issue of liability. Efoe Touvor opposes the motion.

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]);

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). Failure to make such showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

A plaintiff may make a *prima facie* showing of negligence on the part of a defendant driver in a motor vehicle accident case by submitting a police report containing an admission against interest by the driver (*Thompson v Coca-Cola Bottling Co.*, 170 AD3d 588, 588 [1st Dept 2019]). Here, Wesco submits a police report containing the following statement in the Accident Description/Officer's Notes field: "Driver of vehicle 1 states he was sitting in his car about to go to physical therapy next thing he knows is he woke up in his vehicle inside the store" (Fitzpatrick aff., exhibit D). This statement constitutes an admission against interest. Although Efoe Touvor does not appear to recall exactly what happened, this does not constitute a non-negligent explanation for the accident (*Pane v Cisilino*, 144 AD3d 567, 567 [1st Dept 2016]).

To the extent that Efoe Touvor argues that the motion should be denied as premature, this argument is unavailing. A motion for summary judgment brought before the completion of discovery may be denied as premature where "it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated" (CPLR § 3212 [f]). The party opposing a motion for summary judgment as premature

based on a claimed need for discovery must offer an “evidentiary basis . . . to suggest that discovery may lead to relevant evidence” (*Steinberg v Schnapp*, 73 AD3d 171, 177 [1st Dept 2010], quoting *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [2000]). “The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion” (*Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] [internal quotation marks omitted]). Efoe Touvor fails to come forward with an evidentiary basis to suggest that facts essential to justify opposition may exist and that discovery may lead to relevant evidence.

Wesco is entitled to partial summary judgment against Efoe Touvor on the issue of liability and the only triable issue of fact relates to the amount of damages to which Wesco is entitled.

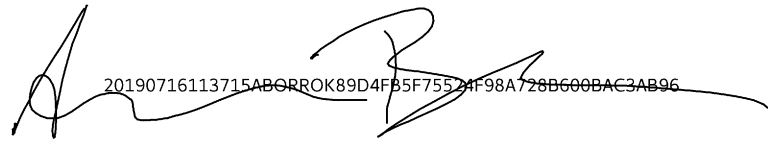
Accordingly, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that an assessment of damages against Efoe Touvor is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



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7/15/2019
DATE

ANDREW BORROK, J.S.C.

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