

Ozgider v McGovern
2019 NY Slip Op 34499(U)
May 1, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 613799/2018
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 613799/2018
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-29-19
SUBMIT DATE 4-18-19
Mot. Seq. # 01 - MD
02 - MD

-----X
FATMA OZGIDER and BULENT T. OZGIDER,

Plaintiffs,

-against-

DAVID R. MCGOVERN, JR.,

Defendant.
-----X

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Upon the following papers numbered 1 - 41 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7 - 30; Answering Affidavits and supporting papers 31 - 37; Replying Affidavits and supporting papers 38 - 41; Other ; (and after hearing counsel in support and opposed to the motion) it is,

The defendant seeks an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The plaintiffs oppose this application and cross move for an order granting them summary judgment on the issue of liability.

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented

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(*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The plaintiffs commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on October 11, 2016. Plaintiff Fatma Ozgider alleges that she was operating a motor vehicle, which was owned by plaintiff Bulent T. Ozgider, traveling on Little Plains Road near its intersection with Green Hill Lane, Town of Huntington, Suffolk County, New York, when defendant, David R. McGovern, Jr., parked his landscaping truck and trailer within the travel portion of the roadway. She attempted to drive past the truck and trailer when a vehicle approached from the opposite direction causing her to have to turn back toward her lane and collide with the trailer attached to the defendant's truck. Defendant contends that he parked his truck and trailer in the eastbound shoulder of Little Plains Road and placed a safety cone behind the truck and trailer. He was engaged in landscaping and states that when he returned to his vehicle he observed “4-5 police vehicles parked on the street in the area of my truck... [and] observed a 2004 BMW... stopped in the bushes on the right side of the roadway and in front of my truck... The cone that I had placed behind my truck was stuck in the front bumper of the 2004 BMW.” The plaintiffs contend that the landscape truck was parked on the roadway “straddling the white line” and that they “blocked almost half of the eastbound lane”. They further allege that just east of the location where the defendant was parked was “over the ridge and around a blind curve”. Plaintiff Fatma Ozgider claims that “as I carefully drove next to the truck and trailer, a car approached from the east from around the blind curve... I realized I would not have time to clear the truck and I turned back to the right.” Discovery in this action has not been completed. The defendant and plaintiffs now move for summary judgment.

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In *Mastrogiacomo v Geoghan*, 129 AD3d 1035, 1037 [2d Dept 2015], the Court held that

"[O]wners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause unique to the particular case" (*Reuter v Rodgers*, 232 AD2d 619, 648 NYS2d 989 [1996]; see *Yavkina v New York City Police Dept.*, 60 AD3d 669, 669-670, 874 NYS2d 235 [2009]). In support of their motion, the appellants submitted evidence indicating, inter alia, that Capicotto parked the truck on the side of the roadway, blocking one third to one half of the single lane of eastbound traffic, in which the plaintiff's vehicle was traveling, at the location of the accident. The appellants' submissions failed to eliminate all triable issues of fact as to whether Capicotto was negligent in the manner in which he parked the truck, and, if so, whether such negligence was a proximate cause of the accident (see *Ferrer v Harris*, 55 NY2d 285, 293-294, 434 NE2d 231, 449 NYS2d 162 [1982]; *Spadaro v Parking Sys. Plus, Inc.*, 113 AD3d 833, 835-836, 979 NYS2d 627 [2014]; *Yavkina v New York City Police Dept.*, 60 AD3d at 670).

"Owners of improperly-parked vehicles may be held liable to plaintiffs injured by negligent drivers of other vehicles (*Sieredzinski v McElroy*, 303 AD2d 575, 576 [2d Dept 2003], see also *Reuter v Rodgers*, 232 A.D.2d 619, 620, 648 N.Y.S.2d 989 [1996]; see also *Ferrer v Harris*, 55 NY2d 285, 449 N.Y.S.2d 162, 434 N.E.2d 231 [1982], amended 56 NY2d 737, 436 N.E.2d 1342, 451 N.Y.S.2d 740 [1982]; *Boehm v Telfer*, 250 A.D.2d 975, 976, 672 N.Y.S.2d 959 [1998]). "Although proof of a statutory violation is not always required in order to establish that the owner of an improperly-parked vehicle is negligent (see, *Boehm v Telfer*, 250 AD2d 975), there must, at a minimum, be some evidence that the improper placement of the vehicle... actually contributed to the accident by obstructing the ability of either the driver... to see down the street." (*Dery v DeCostole Carting, Inc.*, 281 AD2d 508, 512 [2d Dept 2001]).

Based upon a review of the motion papers the Court concludes that the defendant has failed to establish entitlement to judgment as a matter of law. There are material and triable issues of fact presented as to how and where the defendant's truck and trailer were parked. The plaintiffs have also failed to establish entitlement to judgment as a matter of law. There are material and triable issues of fact presented as to whether the plaintiff was negligent in her operation of the 2004 BMW. Therefore, it is

ORDERED that this motion by the defendant for an order granting summary judgment is denied; and it is further

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ORDERED that this cross motion by the plaintiffs for an order granting summary judgment is denied; and it is further

ORDERED that a compliance conference is presently scheduled for May 2, 2019. All unrepresented parties and attorneys shall appear on **May 2, 2019 at 9:30 a.m.** in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in a default being granted or the action being dismissed.

The foregoing shall constitute the decision and Order of this Court.

Dated: May 1, 2019


HON. JOSEPH A. SANTORELLI
J.S.C.