Thompson v Kingsley
2019 NY Slip Op 34506(U)
April 18, 2019
Supreme Court, Westchester County
Docket Number: 56544/2018
Judge: John P. Colangelo
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---x
DEBORAH THOMPSON

Plaintiffs,

-against-

GEORGE A. KINGSLEY

Defendant.
---x

DECISION AND ORDER

Index No. 56544/2018
Motion Sequence #1

COLANGELO, J.

The following papers were read on the Defendant's Motion for Summary Judgment:

	NYSEF
Notice of Motion-Affirmation	4-5
Exhibits A-F	6-11
Affirmation in Opposition	14

It is hereby ORDERED that Defendant's motion is disposed of as follows:

Background

This action was brought by Plaintiff, Deborah Thompson ("Plaintiff") seeking to recover for personal injuries alleged to have been sustained on December 11, 2015 at approximately 6:50 am when a vehicle driven by Defendant George A. Kingsley ("Defendant") came into contact with her person in the Croton-Harmon Union Free School District Garage parking lot located at

427 Yorktown Road, Croton-on-Hudson, New York. Both parties are employed as bus drivers for the Croton-Harmon School District.

By the instant motion, Defendant seeks the following relief: (A) an order pursuant to CPLR §3025(b) granting leave to amend his Answer to assert the affirmative defense of "Worker's Compensation"; and (B) an Order pursuant to CPLR §3212 granting summary judgment to Defendant and dismissing Plaintiff's Complaint in this action.

According to the Affirmation of Plaintiff's counsel, Craig J. Langer, Esq. ("Langer Aff"), Plaintiff does not oppose Defendant's request for leave to amend his Answer to asset the affirmative defense under the Workmen's Compensation Law ("WCL").

Accordingly, the first branch of relief requested in (A) of this motion is granted. Plaintiff has reserved her right to oppose the WCL defense, including the right to move for summary judgment dismissing the defense. (Langer Aff. ¶2).

With regard to the branch of relief which seeks an Order pursuant to CPLR §3212, Defendant has submitted, *inter alia* the Affirmation of Walter Fallon, Esq. ("Fallon Aff"), his own Affidavit in support of the motion (Def. Exh. C), and Plaintiff's Workers' Compensation File (Def. Exh. F).

According to Defendant, the accident occurred in the parking lot of the Croton-Harmon Union Free School District garage. Defendant was in the parking spot assigned to him by the his employer when his vehicle came into contact with Plaintiff, who was his co-employee and who was walking in the area of his parking space. (Def. Exh. C ¶3). At the time of the accident, Plaintiff was also employed by the Croton-Harmon Union Free School District as a bus driver and was walking from her vehicle parked in her assigned parking space to report to work at the

bus garage office. (*Id.* ¶4). The Plaintiff's Workers' Compensation File establishes that after the accident, Plaintiff applied for and received workers compensation benefits for her injuries.

Summary Judgment

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

It is well established that "[t]he 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 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974); *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000). Once the moving party has sustained his burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Summary judgment is a drastic remedy that "should not be granted where there is any doubt as to the existence of a triable issue." *Winegrad v New York University Medical Center*, supra at 853. In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court. *Russell v A. Barton Hepburn Hosp*., 154 A.D.2d 796, 797 (3rd Dept. 1989); See also, *Mascots v Oarlock*, 23 A.D.2d 943, 944 (3rd Dept., 1965). In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of that party. The function of the court is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist. *Derise v Jaak* 773, Inc, 127 A.D.3d 1011, 1012 (2d Dept. 2015)

In *Power v Frasier*, 131 A.D.3d 461, 462 (2d Dept. 2015), the Appellate Division, Second Department affirmed the Supreme Court's granting of summary judgment to a co-employee of the New York City Transit Authority against whom an action in tort was commenced by an injured plaintiff for injuries allegedly sustained when he was struck by a vehicle owned and driven by the co-employee in a parking lot operated by their employer, New York City Transit Authority. On the date of the accident, at approximately 3:50 pm, the plaintiff whose shift ended at 4:00 pm, was walking across the parking lot when he was struck by the car driven by his co-employee. The defendants had moved for summary judgment dismissing the complaint on the ground that the action was barred by the exclusivity provisions of the WCL. In affirming the Supreme Court's order which granted the motion, the court held that the Workers' Compensation Law "is designed to insure that an employee injured in course of employment will

be made whole and to protect a co-employee who, acting within the scope of his employment caused the injury" *quoting Maines v Cronomer Val. Fire Dept.*, 50 N.Y.2d 535, 544 [1980]). The Court reiterated that "[w]orkers' Compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as co-employees, at the time of injury", quoting *Macchirole v. Giamboi*, 97 N.Y.2d 147, 150 [2001]). As the Court of Appeals has ruled, the WCL "offers the only remedy for injuries caused by [a] co-employee's negligence" in the course of employment. (*See Tikhonova v. Ford Motor Co.*, 4 N.Y.3d 621, 624 [2005]; see also WCL §29[6]).

In the instant case, Defendant has established his prima facie entitlement to judgment as a matter of law dismissing the complaint by showing that Defendant was acting within the scope of his employment when the injured Plaintiff, his co-employee, was injured. As stated in Defendant's affidavit, he was on the property of his employer and attempting to park in his employer assigned parking space in order to report for work that morning. Plaintiff had parked her vehicle in her employer assigned spot and was on foot reporting for work. Further, after the accident, Plaintiff applied for and received benefits under the WCL. (Def. Exh. F). Since a workers' compensation award was made, 'it necessarily follows that the Workers' Compensation Board determined that an employer-employee relationship obtained, and, further, that the accident in which the plaintiff was injured arose out of and in the course of her employment. (*See Myung Sook Cho-Oh v. Choi,* 102 A.D.3d 755 [2d Dept. 2013], citing *Torre v. Schmucker*, 275 A.D.2d 365, 366 [2d Dept. 2000]).

In opposition to the summary judgment branch of Defendant's motion, Plaintiff's counsel contends that Defendant has failed to submit competent evidence to establish either that the

accident occurred while he was acting in the course of his employment, or that his employer owned or operated the parking lot to provide parking for its employees, that the employer exercised exclusive control over it, and that the accident occurred in connection with Defendant's parking there on his way to or from work. (Langer Aff. ¶3). This Court disagrees and finds that Plaintiff has failed to raise a triable fact in opposition

According and based upon the foregoing, Defendant's motion for summary judgment is granted, and Plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 18, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.