

D'Amato v Cantone

2019 NY Slip Op 34529(U)

September 5, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 620411/2018

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 620411/2018
CAL No. _____

ORIGINAL

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 6-10-19
SUBMIT DATE 8-8-19
Mot. Seq. # 02 - MG

-----X
ALEXA D'AMATO,

Plaintiff,

-against-

GINO A. CANTONE,

Defendant.

-----X

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; ~~Notice of Cross Motion and supporting papers~~ ---; Answering Affidavits and supporting papers 8 - 12; Replying Affidavits and supporting papers 13 - 15; Other ---; (and after hearing counsel in support and opposed to the motion) it is,

The plaintiff, Alexa D'Amato, seeks an order pursuant to CPLR 3212 granting summary judgment on the issue of liability. The defendant opposes this application.

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 (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has

D'Amato v Cantone
Index No. 620411/2018
Page No. 2

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 plaintiff commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on June 6, 2018. Plaintiff, Alexa D'Amato, alleges that she was operating a vehicle northbound on Wading River Road and was proceeding through its intersection with the Long Island Expressway eastbound exit 69 off ramp, Town of Brookhaven, Suffolk County, New York when defendant Gino A. Cantone, who was traveling eastbound on the off ramp for exit 69, passed a stop sign without stopping and collided with the plaintiff's vehicle. The plaintiff states that “after I fully proceeded into the intersection with the right-of-way, Defendant... traveled into the intersection without stopping at the stop sign and struck my vehicle”, “defendant ‘T-boned’ my vehicle, striking the driver's side of my vehicle with the front of his vehicle.” She further states that “the force of the impact was so severe that my vehicle overturned multiple times.”

In opposition, the defendant's attorney argues that there are issues of fact requiring a trial and that the copy of the police report attached to the papers is uncertified and inadmissible. In addition, the defense argues that discovery has not been completed.

The Court in *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519, 520, 813 NYS2d 120 (App Div 2d Dep't 2006), held that

The defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that the plaintiff violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of the defendants' vehicle as it legally proceeded with the right of way (*see Moreback v Mesquita*, 17 AD3d 420, 793 NYS2d 148 [2005]; *Torro v Schiller*, 8 AD3d 364, 777 NYS2d 915 [2004]; *Casaregola v Farkouh*, 1 AD3d 306, 767 NYS2d 57 [2003]; *Rieman v Smith*, 302 AD2d 510, 755 NYS2d 256 [2003]; *Russo v Scibetti*,

D'Amato v Cantone
Index No. 620411/2018
Page No. 3

298 AD2d 514, 748 NYS2d 871 [2002]; *Agin v Rehfeldt*, 284 AD2d 352, 726 NYS2d 131 [2001]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2000]). As the defendants' vehicle had the right of way, Lam was entitled to anticipate that the plaintiff would obey the traffic laws which required him to yield to the defendants' vehicle (see *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2005]; *Moreback v Mesquita*, supra; *Russo v Scibetti*, supra; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, 277 AD2d 312, 715 NYS2d 750 [2000]; *Cenovski v Lee*, 266 AD2d 424, 698 NYS2d 868 [1999])... he was negligent as a matter of law in failing to see that which he should have seen through the proper use of his senses (see *Bongiovi v Hoffman*, supra; *Spatola v Gelco Corp.*, 5 AD3d 469, 773 NYS2d 101 [2004]; *Breslin v Rudden*, 291 AD2d 471, 738 NYS2d 674 [2002]; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, supra; *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [1997]; see also *Weigand v United Traction Co.*, 221 NY 39, 116 NE 345 [1917]).

It is noted that the certified copy of the police accident report submitted is in admissible form and was therefore considered on this motion for summary judgment (see, *Haff v. Fidalgo*, 2010 NY Slip Op 32490 [N.Y. Sup. Ct. Aug. 30, 2010]; *Lacagnino v Gonzalez*, 306 AD2d 250, 760 N.Y.S.2d 533, [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 N.Y.S.2d 463 [2d Dept 1999]). In *Donovan v W. Indian Am. Day Carnival Ass'n, Inc.*, 6 Misc 3d 1016[A], 1016A, 2005 NY Slip Op 50052[U], *9 [Sup Ct, Kings County 2005], the Court noted that

while police accident reports are, for the most part, inadmissible hearsay evidence and, thus, may not generally be considered in support of a summary judgment motion (*Snorac, Inc. v Charles*, 3 Misc. 3d 1102 [A], 2004 NY Slip Op 50337[U], *3, 787 N.Y.S.2d 681 [2004]) or, under several circumstances, even to defeat summary judgment (*Stankowski v Kim*, 286 A.D.2d 282, 283, 730 N.Y.S.2d 288 [2001]), there is at least some authority for the proposition that a police accident report should be "credited by [the court] and used to support the grant of summary judgment" where it is not the only evidence offered to support summary judgment and, as arguably appears to be the case here, each piece of evidence is unrebutted and gives the same account of the accident (*Bendik v Dybowski*, 227 A.D.2d 228, 231-232, 642 N.Y.S.2d 284 [1996], in dissent, citing *Rue v Stokes*, 191 A.D.2d 245, 594 N.Y.S.2d 749 [1993]).

Here, the plaintiff has established her prima facie entitlement to judgment as a matter of law. The defendant was then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, the defendant did not rebut that prima facie entitlement.

D'Amato v Cantone
Index No. 620411/2018
Page No. 4

Therefore, this motion by plaintiff for an order awarding summary judgment in her favor on the issue of liability is granted; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order upon opposing counsel and upon the Calendar Clerk of this court within twenty (20) days from the date of this order; and it is further

ORDERED that this action shall proceed to trial on the issue of damages; and it is further

ORDERED that a preliminary conference is hereby scheduled to be held on **Thursday, October 24, 2019 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time.

The foregoing constitutes the decision and Order of this Court.

Dated: September 5, 2019



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