State Farm Mut. Auto. Ins. Co. v Patterson
2019 NY Slip Op 34691(U)
June 7, 2019
Supreme Court, Nassau County
Docket Number: Index No. 606697/17
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 8

X

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee of RITA GIVENS,

Plaintiff,

-against-

JAMES PATTERSON and SALIMAH GATES-LANGO,

Defendants.

Index No.: 606697/17
Motion Sequence...02, 03
Motion Date...04/11/19

X

Papers Submitted:
Notice of Motion (Seq. 02).....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Notice of Cross-Motion (Seq. 03).....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Seq. 02) by the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("State Farm"), as Subrogee of RITA GIVENS ("Givens"), seeking an Order, pursuant to CPLR §3212, granting it summary judgment on the issue of liability; and the cross-motion (Seq. 03) by

the Defendant, JAMES PATTERSON ("Patterson"), seeking an Order, pursuant to CPLR §3212, granting him summary judgment dismissing the Plaintiff's Complaint as against him, are decided as hereinafter provided.

The procedural posture of this case is noteworthy. A Preliminary Conference was initially held in this matter on September 10, 2018, at which all counsel agreed to conduct depositions in January 2019 pursuant to the Preliminary Conference Order. Prior thereto, this Court granted the parties' consent request to adjourn the depositions until February 2019. By Compliance Conference Order dated January 24, 2019, depositions were directed to be held on February 7, 2019 and February 8, 2019, and the Certification Conference was scheduled for April 11, 2019. Thereafter, this Court again granted the parties' consent request to further adjourn the depositions to March 2019. The letter confirming said adjournment reiterates this Part's Rules that the "depositions may not be further adjourned to a later date without prior court approval" (*See* Letter by Plaintiff's Counsel, dated 02/06/19). Despite such directive, however, the depositions were not held in March 2019 and no Court approval was obtained to adjourn same.

On April 11, 2019, a Certification Conference was held at which this Court learned that the prior Compliance Conference Order was not complied with by counsel. Counsel were erroneously under the impression that their respective motions automatically stayed discovery. However, the CPLR and Part 8 Rules provide that

discovery is not stayed. Accordingly, this matter was certified on that date as reflected by the Certification Order executed by all counsel and So-Ordered by this Court. Counsel for all parties entered into a side stipulation which provided for conducting party depositions. As of the date of this Order, the Court is unaware of any depositions having been held.

The instant action involves a motor vehicle accident that occurred on November 7, 2015, where a 1997 Mercury owned by the Defendant, SALIMAH GATES-LANGO ("Gates-Lango"), and allegedly operated by the Defendant, Patterson, came into contact with a parked vehicle owned by State Farm's subrogor, Givens (*See* Police Accident Report, annexed to Plaintiff's Motion as Exhibit "E" and Defendant's Cross-Motion as Exhibit "E")[1]. The certified Police Accident Report unequivocally reflects that the Defendants' vehicle struck the vehicle owned by Givens while it was legally parked and unattended (*Id.*).

In support of its motion, the Plaintiff submits the sworn affidavit of Patricia M. O'Sullivan, a claims adjuster for State Farm (*See* O'Sullivan Affidavit, sworn to on 02/14/19, annexed to Plaintiff's Motion as Exhibit "F", at ¶1). State Farm insured the motor vehicle owned by its subrogor, Givens, pursuant to a policy of insurance bearing Policy Number, 1860-178-32 (the "Policy") (*Id.* at ¶3).

[1] While defense counsel objects to the Plaintiff's reliance upon the Certified Police Accident Report in support of its motion, the Court notes that Patterson's counsel himself cites to and has annexed to his motion, the same Police Accident Report (*See* Affirmation in Support of Cross-Motion by Matthew A. Cuomo, Esq., dated 03/08/19, at ¶5).

In cross-moving for summary judgment and in opposition to the Plaintiff's motion, the Defendant, Patterson, claims that he was not involved in a motor vehicle accident on November 7, 2015; does not know who Gates-Lango is; and has never driven the subject vehicle owned by Gates-Lango (*See* Patterson Affidavit, sworn to on 11/22/17, annexed to Patterson's Cross-Motion as Exhibit "E"). Patterson further attests in his affidavit that, while he has a valid driver's license, but is unable to locate it (*Id.*). Counsel for Patterson argues that the operator of the Gates-Lango vehicle illegally and falsely used Patterson's identity, allegedly striking a parked vehicle owned by the Plaintiff's subrogor, Givens.

Notably, there is no affidavit submitted by Gates-Lango, the undisputed owner of the subject vehicle that struck the Plaintiff's subrogor's vehicle. In an attorney affirmation in opposition, counsel for Gates-Lango argues that the Plaintiff's motion for summary judgment should be denied because a question of fact exists as to who the operator of the Gates-Lango vehicle was at the time of the accident. Without submitting an affidavit or other admissible evidence, counsel for Gates-Lango merely contends that "Gates-Lango was not the operator of the subject vehicle at the time of the accident" and that Gates-Lango "also rebuts the proposition that she gave her consent for anyone to be operating the vehicle at the time of the accident." (*See* Affirmation in Opposition to Plaintiff's Motion by Brian C. Fredrickson, Esq. at ¶12). Gates-Lango's counsel further contends that, given Patterson's sworn affidavit, "it is unclear who the driver of the

vehicle was at the time of the accident, and thus, further discovery is needed to identify the operator of the motor vehicle." (*Id.*).

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). "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 admissions" (CPLR §3212[b]). The moving party's submissions must show "that there is no defense to the cause of action or that the cause of action or defense has no merit" (*Id.*). A motion for summary judgment "shall be granted if, upon all the 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" (*Id.*; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2d Dept. 1989]).

The courts have long since held that an insurer "who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing." (*Ocean Accident & Guarantee Corp. v. Hooker*, 240 N.Y. 37, 47 [1925]).

A plaintiff moving for summary judgment generally has the burden of establishing, prima facie, "all of the essential elements of the cause of action" (*Poon v.*

Nisanov, 162 A.D.3d 804 [2d Dept. 2018], citing *Nunez v. Chase Manhattan Bank*, 155 A.D.3d 641, 643 [2d Dept. 2017]. By contrast, a defendant moving for summary judgment dismissing one of the plaintiff's causes of action may generally sustain his or her prima facie burden "by negating a single essential element" of that cause of action (*Nunez*, 155 A.D.3d at 643). To defeat summary judgment, the nonmoving party need only rebut the prima facie showing made by the moving party so as to demonstrate the existence of a triable issue of fact (*See Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324).

Here, in support of Patterson's cross-motion which is for summary judgment dismissing the Complaint and all cross-claims insofar as asserted against him on the ground that he was not at fault for the happening of the accident, Patterson relies upon his own sworn affidavit wherein he attests that he was not the operator of the offending vehicle on the date in question, nor has he ever driven said vehicle. He further attests that he does not know the co-Defendant and has been unable to locate his New York State driver's license. Patterson's affidavit, standing alone, however, is insufficient to establish his prima facie entitlement to judgment as a matter of law. Indeed, no other evidence is submitted to corroborate his version of the events and to contradict the certified Police Accident Report identifying Patterson as the operator with his correct date of birth and residence address. Accordingly, denial of Patterson's cross-motion for summary judgment is warranted.

With respect to the Plaintiff's motion, a plaintiff moving for summary

judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*See Rodriguez v. City of New York*, 31 N.Y.3d 312, 321–22 [2018]; *Stukas v. Streiter*, 83 A.D.3d at 23). To obtain partial summary judgment, a plaintiff no longer bears the burden of establishing the absence of his or her own comparative fault (*Rodriguez*, 31 N.Y.3d at 324–25).

As relevant here, the Plaintiff submitted the certified Police Accident Report and the affidavit of a claims adjuster from State Farm. The evidence submitted by the Plaintiff established, prima facie, that the vehicle owned by the Defendant, Gates-Lango, and operated by an individual with the same identifying information as the Defendant, Patterson, were negligent in their operation of the motor vehicle by striking the Plaintiff's subrogor's legally parked, unattended vehicle causing property damage. In opposition, the Defendant, Gates-Lango, failed to raise an issue of fact.

On the issue of permissive use, Vehicle and Traffic Law § 388(1) "makes every owner of a vehicle liable for injuries resulting from negligence 'in the use or operation of such vehicle ... by any person using or operating the same with the permission, express or implied, of such owner' " (*Ellis v. Witsell*, 114 A.D.3d 636 [2d Dept. 2014, citing *Murdza v. Zimmerman*, 99 N.Y.2d 375, 379 [2003];Vehicle and Traffic Law § 388[1]). Under this statute, there is a presumption that the operator of a vehicle operates it with the owner's permission. The strong presumption of permissive use

afforded by Vehicle and Traffic Law § 388, can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent (*See Matter of State Farm Mut. Auto. Ins. Co. v Ellington*, 27 A.D.3d 567, 568 [2d Dept. 2006], citing *Matter of New York Cent. Mut. Fire Ins. Co. v Dukes*, 14 A.D.3d 704 [2d Dept. 2005]). Even the uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use (*See Matter of General Acc. Ins. Co. v Bonefont*, 277 A.D.2d 379 [2000]).

Here, in opposition to the Plaintiff's motion, Gates-Lango failed to submit any evidence that would rebut the strong presumption of permissive use. Indeed, Gates-Lango does not deny ownership of the subject vehicle that struck the Plaintiff's subrogor's legally parked vehicle. Further, only an attorney affirmation is submitted by Gates-Lango's counsel which raises a dispute as to whether she consented to the operation of her vehicle on the date of the accident. More importantly, as correctly noted by counsel for the Plaintiff, Gates-Lango failed to plead any defenses regarding the issue of permissive use in her Verified Answer (*See* Gates-Lango Verified Answer, annexed to Plaintiff's Motion as Exhibit "B"). Accordingly, the branch of the Plaintiff's motion which seeks summary judgment on the issue of liability insofar as asserted against the Defendant, Gates-Lango, should be granted.

The affidavit by Defendant, Patterson, however, raises an issue of fact as to

whether Patterson was negligent in the operation of Gates-Lango's vehicle and, if so, whether any such negligence caused or contributed to the accident. While Patterson's affidavit was insufficient to establish his prima facie entitlement to judgment as a matter of law, the sworn statements therein sufficiently rebut the prima facie showing made by the Plaintiff so as to demonstrate the existence of a triable issue of fact (*Poon v. Nisanov,* 162 A.D.3d at 806). As such, the branch of the Plaintiff's motion which seeks summary judgment on the issue of liability as against the Defendant, Patterson, must be denied as clear questions of fact exist as to Patterson's negligence.

Furthermore, contrary to the Defendants' contentions, the Plaintiff's motion is not premature as it relates to Gates-Lango, since they have failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge and control *of the Plaintiff or its subrogor, Givens* (*Turner v. Butler,* 139 A.D.3d 715, 716 [2d Dept. 2016], citing *Kimyagarov v. Nixon Taxi Corp.*, 45 A.D.3d 736 [2d Dept. 2007] [emphasis supplied]). While further discovery may uncover and resolve the question of culpability as between the Defendants, there has been no showing that discovery would uncover any information necessary to defeat the Plaintiff's motion as relating to the Defendant, Gates-Lango. Nor have the Defendants offered any evidentiary basis to suggest that discovery may lead to evidence that Givens' vehicle was not "legally parked and unattended" as reflected in the certified Police Accident Report.

Lastly, pursuant to the discretion afforded by CPLR § 3212(g), the Court further finds that the Plaintiff's subrogor, Givens, whose vehicle was legally parked and unattended when the accident occurred, was free from comparative fault in the happening of the accident.

Accordingly, it is hereby

ORDERED, that the branch of the motion (Seq. 02) by the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee of RITA GIVENS, seeking an Order, pursuant to CPLR §3212, granting it summary judgment on the issue of liability on the Complaint insofar as asserted against the Defendant, GATES-LANGO, is **GRANTED**; and it is further

ORDERED, that the branch of the motion (Seq. 02) by the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee of RITA GIVENS, seeking an Order, pursuant to CPLR §3212, granting it summary judgment on the issue of liability on the Complaint insofar as asserted against the Defendant, JAMES PATTERSON, is **DENIED**; and it is further

ORDERED, that the cross-motion (Seq. 03) by the Defendant, JAMES PATTERSON, seeking an Order, pursuant to CPLR §3212, granting him summary judgment dismissing the Complaint and any cross-claims asserted as against him, is **DENIED** in its entirety; and it is further

ORDERED, that, pursuant to its discretion afforded by CPLR § 3212(g),

the Court finds that the Plaintiff's subrogor, RITA GIVENS, as the owner of a legally parked, unattended vehicle at the time of the accident, was free from comparative fault in the happening of the accident.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
June 7, 2019

Hon. Randy Sue Marber, J.S.C.