Forminio v Sivakumaran
2019 NY Slip Op 34991(U)
November 12, 2019
Supreme Court, Richmond County
Docket Number: Index No. 150912/2018
Judge: Wayne M. Ozzi

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: DCM PART 23

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MARY A. FORMINIO,
Plaintiff,

-against-

Index No. 150912/2018
Decision and Order

SIVAARUN SIVAKUMARAN, DOMINO'S PIZZA, INC. DOMINO'S and DONGAN FOOD, INC.
Defendants.

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Ozzi, J.

By motion dated August 5, 2019, the Plaintiff, Mary Forminio, moves this Court granting summary judgment in her favor. Defendants Domino's Pizza, Inc, Domino's, and Dongan Food, Inc. (collectively "Domino's"), filed opposition papers on September 4, 2019. Defendant Sivaarun Sivakumaran filed opposition papers on October 8, 2019. On October 9, 2019, Plaintiff filed a reply to the defendants' respective oppositions. For the reasons set forth below, Plaintiff's motion is granted in part and denied in part.

This action arises out of a two car, rear-end collision that occurred on February 16, 2018. Plaintiff was driving on Hylan Boulevard near its intersection with Norway Avenue in Staten Island, New York. Plaintiff was stopped at a traffic light for approximately five seconds when her vehicle was struck in the rear by a vehicle owned and operated by defendant Sivaarun Sivakumaran ("Sivakumaran"). In her attached Affidavit, Plaintiff claims that at the time of the accident, Sivakumaran was in the course of his employment with Domino's. See Affidavit of Mary A. Forminio.

On a motion for summary judgment, the primary function of the Court is issue finding as opposed to issue determination. Weiner v. Ga-Ro Die Cutting, 104 A.D.2d 331 (2nd Dep't 1984). A motion for summary judgment must be denied if there are facts sufficient to require a trial of any

issue of fact. CPLR 3212(b). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact. Moreover, "the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion." Marine Midland Bank, N.A. v. Dino et. al., 168 A.D.2d 1610 (2nd Dep't 1990); see also Glennon v. Mayo, 148 A.D.2d 580 (2nd Dep't 1989). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where the existence of an issue of fact is arguable. American Home Assurance Co. v. Amerford International Corp., 200 A.D.2d 472 (1st Dep't 1994).

It is well settled that when a driver approaches another vehicle from the rear, that driver has a duty to maintain a reasonably safe rate of speed and a duty of reasonable care to avoid a collision with the lead vehicle. A rear end collision with a stopped automobile establishes a prima facie case of negligence on the part of the driver of the rear vehicle and imposes a duty on the part of the rear vehicle operator to explain how the accident occurred. Gambino v. City of New York, 205 A.D.2d 583 (2nd Dep't 1994); see also Leal v. Wolff, 224 A.D.2d 392 (2nd Dep't 1996).

In his opposition papers, Defendant Sivakumaran appears to insinuate that Plaintiff's vehicle may have stopped short or slowed down without proper signaling and therefore there is an issue as to Plaintiff's comparative negligence. See Opposition of Sivakumaran, p. 3. However, even if the Court were to give credence to this assertion, summary judgment would still be appropriate in this matter given the Court of Appeals's decision in Rodriguez v. City of New York, 31 N.Y.3d 312 (2018). There, the Court of Appeals held that a plaintiff can obtain summary judgment against a negligent defendant even if there is evidence that the plaintiff bears comparative fault. The Court of Appeals found that it was against the intent of New York's comparative fault statutes to permit a total bar to recovery or summary judgment relief due to comparative fault. The Court further went on to state that "comparative fault is not a defense to the cause of action of negligence, because it is

not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action." Rodriguez v. City of New York, supra. Therefore, because comparative fault is not a defense, issues of fact related to it are insufficient to raise triable issues of fact precluding summary judgment and as such, should not be considered when deciding a motion made pursuant to CPLR 3212. Rodriguez v. City of New York, supra. Thus, following the Court of Appeals's rationale in Rodriguez, it is not a defense to a summary judgment motion for the defendant to claim that the plaintiff was comparatively negligent in allegedly stopping short.

Moreover, in the police accident report, it was reported that Sivakumaran claimed that he could not stop in time due to the wet condition of the roads.[1] However, a claim of wet road conditions is insufficient to rebut the presumption of negligence, as a driver is expected to take into account the existing road and weather conditions. See Williams v. Kadri, 112 A.D.3d 442 (1st Dep't 2013) (argument that taxi slipped on ice was insufficient to overcome the presumption of defendant's negligence for a rear-end collision).

Turning to the Domino's defendants, they argue in their opposition that Plaintiff's motion should be denied as premature as discovery is in an early stage and examinations before trial have yet to be held. Additionally, there remains issues of fact that preclude summary judgment at this juncture, specifically, whether Sivakumaran was acting within the scope of his employment when the accident occurred. The doctrine of "respondeat superior" renders an employer vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of his employment. N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 251 (2002). Factors relevant to a determination of whether an employee's acts fall within the scope of

[1]Although this is documented in the Police Accident Report, defendant makes no mention of wet road conditions in his opposition papers. Nevertheless, the Court concludes that even if such an argument were made, it would be insufficient to defeat Plaintiff's motion for summary judgment in this instance.

employment include "the connection between the time, place and occasion for the act, the history of the relationship between employer and employee as spelled out in actual practice, whether the Act is one commonly done by such employee, the extent of departure from normal methods of performance, and whether the specific act was one that the employer could reasonably have anticipated." Riviello v. Waldron, 47 N.Y.2d297, 303. In this matter, other than the affidavit of Forminio, which does not reveal how she came to learn that Sivamukaran was acting within the scope of his employment with Domino's when the accident occurred, there has not been any evidence presented that indicates same and would warrant summary judgment against Domino's at this juncture.

Having established that the operator of the rear vehicle, defendant, was at fault, Plaintiff is entitled to summary judgment against Sivakumaran. Philip v. D7D Carting Co, Inc., 136 A.D.3d 18 (2nd Dep't 2015). However, material issues of fact exist as to whether Sivakumaran was acting in the course of his employment when the accident, thus precluding summary judgment against Domino's Pizza, Inc., Domino's and Dongan Food, Inc.

Consequently, for the reasons set forth above it is hereby:

ORDERED, that Plaintiffs' motion for summary judgment as to liability against defendant Sivaarum Sivakumaran is granted; and it is further

ORDERED, that Plaintiff's motion for summary judgment as to liability against defendants Domino's Pizza Inc., Domino's and Dongan Food, Inc. is denied.

The foregoing constitutes the decision, Order, and judgment of the Court.

Dated: November 12th, 2019

ENTER:

HON. WAYNE M. OZZI, J.S.C.