

<b>Grant v New York City Tr. Auth.</b>
2020 NY Slip Op 31486(U)
May 21, 2020
Supreme Court, New York County
Docket Number: 160047/2018
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----X  
LAWRENCE GRANT,

Plaintiff,

Index No. 160047/2018

-against-

Mot Seq. 1

NEW YORK CITY TRANSIT AUTHORITY and  
OMKAR SINGH,

Decision and Order

Defendant(s).

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYSCEF #
Plaintiff's Motion/ Affirmations/Memo of Law	<u>1</u>	12-18
Defendant's Affirmation in Opposition	<u>2</u>	21-25
Plaintiff's Reply Affirmation	<u>3</u>	26-28

**SOKOLOFF, J.:**

This is an action for personal injuries allegedly sustained by plaintiff Lawrence Grant on March 4, 2018, in connection with a motor vehicle accident which occurred on Lexington Avenue at or near the intersection of East 111<sup>th</sup> Street, New York, New York. Plaintiff asserts that he was with his parked motor vehicle on Lexington Avenue, which was completely within the parking lane and at a complete stop, when a bus operated by defendant Omkar Singh (Singh), which was owned by defendant New York City Transit Authority, struck both Grant and his vehicle. Plaintiff alleges that, as a result of the collision, he sustained numerous serious and severe injuries.

Plaintiff moves, pursuant to CPLR 3212, for an order (1) granting him partial summary judgment against defendants on the issue of liability, upon the grounds that there are no triable issues of fact; (2) dismissing defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff; (3) upon granting summary judgment, setting this action down for a trial on the assessment of damages.

For the reasons set forth below, plaintiff's motion is denied.

In support of the summary judgment motion, plaintiff submits an affidavit, in which he alleges that “[a]s my vehicle was parked and at a complete stop, a vehicle which was owned by Defendant New York City Transit Authority and which was being operated by Defendant Omkar Singh, approached me and my parked vehicle and then struck my vehicle, causing a collision” (Grant aff, ¶ 4 [NYSCEF Doc No. 15]). Grant further alleges that “[m]y vehicle was completely within the parking lane on Lexington Avenue. There was an impact that caused me numerous physical injuries” (*id.*). Plaintiff contends that:

This collision was caused solely by reason of the careless driving of the defendant. This includes the fact that he failed to see what was there to be seen in the roadway in front of him, that he failed to apply the brakes of his vehicle in a timely fashion, and that he failed to stop and/or slow his vehicle down sufficiently prior to hitting my vehicle. There was no reason why the defendant driver would have been unable to see my vehicle parked in front of him, had he been looking and paying attention properly, and maintaining proper speed and control of his vehicle. Furthermore, I did nothing to cause or contribute to the happening of the collision in any way, as I was simply with my parked vehicle which was at a full and complete stop as described above, when I was inexplicably struck.

(*id.*, ¶ 5).

In his statutory hearing, plaintiff provided more details about what happened. He testified that he was going to pick up an order from the fish market, and that after “I parked, I was getting out of the car, I turned around to get my bag out of the car on the passenger seat” and that “I reached in to grab it and when I turned around the bus driver, he was over here, and I went to close the door, so he wouldn’t hit me, and he just kept going” (plaintiffs’ deposition at 22-23 [NYSCEF Doc No. 17]). Plaintiff testified that when the bus hit him, it “caught my hand and the door at the same time” (*id.* at 26). Plaintiff testified that the accident occurred on the driver side of the car (*id.* at 23).

Plaintiff also submits the police report which states that:

AT TPO, DRIVER 1 STATES AS HE WAS EXITING HIS VEHICLE DRIVER 2 DID NOT SLOW DOWN AND DID SIDE SWIPE HIS VEHICLE AND ALSO HIT HIS HAND THAT WAS GRABBING THE DOOR WHILE EXITING. DRIVER ONE DOES HAVE SWELLING TO HIS RIGHT HAND AND WAS TRANSFERRED BY AMBULANCE TO MT. SINAI HOSPITAL.

DRIVER 2 STATES THAT DUE TO A DOUBLE PARKED CAR IN THE LEFT LANE, HE HAD TO DRIVE IN THE RIGHT LANE AND WHILE HE WAS PASSING VEHICLE 1 DRIVER 1 DID OPEN HIS DOOR CAUSING DAMAGE TO MIDDLE & REAR OF VEHICLE 2 (BUS ) AS WELL AS DAMAGE TO VEHICLE 1 AND INJURY TO DRIVER 1 HAND

(NYSCEF Doc No. 16).

Plaintiff contends that the above testimony and evidence warrants a grant of partial summary judgment against defendants on the issue of liability, and dismissal of defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff. In support of this contention, plaintiff argues that "[u]nder the case law applicable to collisions, a prima facie case of negligence is established by proof that a stopped car was hit" (affirmation of Eric Horn, Esq., ¶ 18 [NYSCEF Doc No. 13]).

However, this case law must be disregarded, as all of the cases to which plaintiff cites refer to rear-end collisions with a stopped vehicle, which is not at issue here (*see e.g. Briceno v Milbry*, 16 AD3d 448, 448 [2d Dept 2005] ["A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, imposing a duty of explanation on the operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause"]) [citation omitted]; *Gaeta v Carter*, 6 AD3d 576, 576 [2d Dept 2004] ["(a) rear-end collision with a stopped 'or stopping' vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision"]).

In opposition to the motion, defendants contend that plaintiff's motion is premature and that there are issues of fact that preclude summary judgment.

In support of this contention, defendants submit their accident reports, including the Supervisor's Accident Investigation Report, as well as the statements of witnesses (and NYCTA

employees) Anthony Evans and Fernando Bocagnol (*see* NYSCEF Doc No. 23). These reports indicate that at the time of the incident herein, vehicles were illegally double parked on Lexington Avenue that would have prevented the bus from moving to avoid any obstructions in its lane. The Supervisor's Accident Report also indicates that the first point of contact between the bus and plaintiffs' vehicle was "forward of the center doors of the bus," indicating that the bus first came into contact with the door of plaintiff's vehicle after the front of the bus had passed it.

Defendants also submit a copy of the bus video from the night in question (NYSCEF Doc No. 24). Defendants assert that, according to this video and starting at time index 22:18:55, the bus can be seen driving north on Lexington Avenue at approximately 9 mph, and at 22:18:56, it is apparent that vehicles are double parked in the left travel lane of Lexington Avenue, confining the bus to the right travel lane. Defendants further assert that, at 22:19:00, a door from a car in the parking lane, presumably plaintiff's car, can be seen opening and then protruding into the right travel lane as the bus approaches.

When presented with a motion for summary judgment, the court's function is issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). If triable issues of fact exist, summary judgment is not warranted. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].)

The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Authority*, 27 N.Y.3d 1019 [2016] [internal quotation marks omitted]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a

triable issue of fact (*Alvarez*, at 324) Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Because summary judgment deprives a litigant of the party's day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]).

The movant in this matter failed to establish *prima facie* entitlement to partial summary judgment as a matter of law. The details provided in plaintiff's affidavit and his attorney's affirmation were meager and inadequate: he was with his car, which was stopped and parked within the parking lane when the collision occurred. All the details essential to determine liability were omitted. In what way was he with his car? What was his position relative to his vehicle? What part of the bus came into contact with his vehicle? What warning, if any, did he have of the bus's approach? If the court was suspicious, it would wonder if details were purposefully withheld. While some of the exhibits to the motion, like the police accident report, had more details, it is not the court's responsibility to search a movant's exhibits in order to determine summary judgment.

Even if plaintiff had made out a *prima facie* case, defendants have raised triable issues of fact which require denial of the motion. Here, defendants have provided the accident reports from the accident which indicate that the bus may have been prevented from changing lanes by illegally parked cars at the time of the accident. Further, defendants have produced video of the incident which demonstrates plaintiff opening his door into traffic just before contact was made between the two vehicles. Most importantly the defendants' submission indicates that the plaintiff's driver's door came into contact with the middle of the bus. How is it if the bus was too close to the plaintiff's car that the contact did not occur between the front of the bus and the door? Was the door opened wider after the front passed the vehicle? This court finds that these

submissions create issues of fact as to how the accident occurred, and whether Singh was faced with an emergency situation outside his control, which mandate denial of the motion.

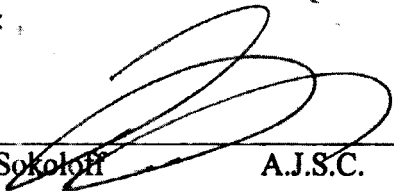
Moreover, as, to date, no party has been deposed in this matter (nor have any of the Transit Authority employees on the bus at the time of the accident), plaintiff's motion is premature. Even a motion for partial summary judgment may be denied where it is patently premature and the issue of liability is not clear cut. A motion for summary judgment shall be deemed patently premature where it is made prior to discovery being exchanged (*see Yuan Gao v City of New York*, 145 AD3d 939, 939 [2d Dept 2006]; *McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on liability is denied, with leave to renew after completion of discovery only if granted by the new Part Judge.

Dated: May 21, 2020

ENTER:

  
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Lisa A. Sokoloff A.J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: