

Bonner v Colon

2020 NY Slip Op 35090(U)

March 5, 2020

Supreme Court, Orange County

Docket Number: Index No. EF000451-2019

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY**

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

-----X
OSHA NE R. BONNER,

Plaintiff,

-against-

JOSE A. COLON and UNIFIRST CORP.,

Defendants.

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.

Index No. EF000451-2019
Motion Date: March 2, 2020

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The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on the issue of liability:

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|---|-----|
| Notice of Motion - Affirmation / Exhibits - Affidavit | 1-3 |
| Affirmation in Opposition / Exhibits | 4 |
| Reply Affirmation | 5 |

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a personal injury action stemming from a rear-end motor vehicle accident that occurred on December 6, 2017 on Robinson Avenue in the City of Newburgh, New York. Plaintiff Oshane R. Bonner moves for partial summary judgment on the issue of liability based on his affidavit, wherein he avers that as he was coming to a stop on Robinson Avenue, the Defendants' vehicle suddenly and without warning rear ended his vehicle. The police accident

report (1) reflects defendant Jose A. Colon's statement that Plaintiff's vehicle "stopped in traffic suddenly", and (2) cites slippery pavement as a factor contributing to the accident. Proffering only the police report, and no affidavit from Mr. Colon, defense counsel asserts that there are triable issues of fact whether there exists a non-negligent explanation for the rear end collision. The Defendants also assert that Plaintiff's motion is premature because depositions have yet to occur in this case.

Vehicle and Traffic Law §1129(a) provides:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

Section 1129(a) requires that "[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." *Xin Fang Xia v. Saft*, 177 AD3d 823 (2d Dept. 2019); *Batashvili v. Veliz-Palacios*, 170 AD3d 791, 792 (2d Dept. 2019). *See, Cajas-Romero v. Ward*, 106 AD3d 850, 851 (2d Dept. 2013). Hence, the Second Department has consistently held that "[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Xin Fang Xia v. Saft, supra*. *See, Batashvili v. Veliz-Palacios, supra; Arslan v. Costello*, 164 AD3d 1408, 1409 (2d Dept. 2018); *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 AD3d 754, 755 (2d Dept. 2017); *Tumminello v. City of New York*, 148 AD3d 1084, 1084-85 (2d Dept. 2017); *Le Grand v. Silberstein*, 123 AD3d 773 (2d Dept. 2014); *Amador v.*

City of New York, 120 AD3d 526 (2d Dept. 2014); *Rodriguez v. Farrell*, 115 AD3d 929, 930 (2d Dept. 2014). Plaintiff having established via affidavit his a *prima facie* case of negligence on the part of defendant Colon, who rear ended his stopping vehicle, the burden shifted to Defendants to rebut the inference of negligence by providing a non-negligent explanation for the collision.

“While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle” (*Arslan v. Costello, supra*; see, *Xin Fang Xia v. Saft, supra*; *Tumminello v. City of New York, supra*), and “[a]n unavoidable skid on wet pavement may suffice as a nonnegligent explanation for a rear-end automobile accident” (*Phillip v. D & D Carting Co., Inc.*, 136 AD3d 18, 24 [2d Dept. 2015]), Defendants have produced no competent evidence that Mr. Oshane stopped short or that Mr. Colon skidded on wet pavement. Mr. Colon’s self-serving statement to the responding police officer that Plaintiff’s vehicle “suddenly stopped in traffic” is rank hearsay. Moreover, the responding officer may well have observed wet pavement at the scene of the accident, but in the absence of evidence that he witnessed the accident or performed an expert accident reconstruction, his opinion that slippery pavement contributed to the rear end collision also constitutes hearsay. In the absence of any explanation for their failure to produce a sworn affidavit from Mr. Colon, the Defendants’ showing is insufficient to demonstrate the existence of any triable issue of fact precluding summary judgment.

Defendants’ contention that summary judgment is premature because discovery has yet to occur is unavailing. CPLR §3212(f) states:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant [cit.om.]” *Singh v. Avis Rent A Car System, Inc.*, 119 AD3d 768, 770 (2d Dept. 2014). An “evidentiary basis” justifying resort to CPLR §3212(f) is required. *See, Martinez v. Kreychmar*, 84 AD3d 1037 (2d Dept. 2011). The evidence before the Court shows that Plaintiff was stopping in traffic when defendant Colon suddenly struck him from the rear. It was quite plainly Defendants’ obligation to come forward, explain how the accident occurred, and demonstrate why under those circumstances they require additional discovery. Defendants have quite obviously failed to carry their burden. *See, Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276 (1978); *Prado v. Bowne & Sons*, 207 AD2d 875 (2d Dept. 1994); *Curilae v. AIG Multi-Line Syndicate, Inc.*, 204 AD2d 237 (1st Dept. 1994). Hence, Plaintiff’s motion is not properly deniable as premature. *See, Le Grand v. Silberstein, supra; Rodriguez v. Farrell, supra; Garner v. Chevalier Transportation Corp.*, 58 AD3d 802 (2d Dept. 2009); CPLR §3212(f).

Defendants having failed to rebut the inference of negligence arising from defendant Colon’s rear ending Plaintiff’s stopping vehicle, partial summary judgment on liability is warranted.


It is therefore

ORDERED, that Plaintiff's motion for partial summary judgment against Defendants on the issue of liability only is granted.

The foregoing constitutes the decision and order of the Court.

Dated: March 5, 2020
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE