

Cochinos v Pryear
2020 NY Slip Op 35266(U)
August 3, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2020-50248
Judge: Hal B. Greenwald
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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

NICHOLAS G. COCHINOS,

Plaintiff,

-against-

TERRY Y. PRYEAR,

Defendant.

DECISION AND ORDER
Index No. 2020-50248
Motion Seq. No. 1

x

The following documents were reviewed and considered by the Court in reaching the within Decision and Order.

NYSCEF Doc. Nos. 1, 2, 4-10, 12-16

This action arises from a two (2) car accident that occurred on July 15, 2017 at the intersection of Hooker Avenue and Mildred Road, in the City of Poughkeepsie, Dutchess County.

The Plaintiff NICHOLAS G. CONCHINOS (COCHINOS), was the driver of a car that was rear-ended by a vehicle driven by Defendant TERRY Y. PRYEAR (PRYEAR). The Plaintiff suffered serious personal injury and Plaintiff claimed that he was lawfully stopped when it was hit by Defendant’s motor vehicle that was negligently operated by PRYEAR. On January 21, 2020 and PRYEAR filed an Answer that contained denials and affirmative defenses. Thereafter, on March 12, 2020. Plaintiff COCHINOS filed a Notice of Motion for Summary Judgment on the issue of liability and seeks dismissal of PRYER’s first and third affirmative defenses. PRYEAR interposed Opposition papers on June 22, 2020; and a Reply was filed by COCHINOS on June 23, 2020.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), 1957], summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (See *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [1978]; *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 [1968]; *Barrett v. Jacobs*, 255 N. Y. 520 [1931]). Specifically, automobile accident cases do not generally lend themselves to disposition under summary judgment rules as the question of negligence is essentially one of fact. However, when there is no issue of fact,

summary judgment should be granted to prevent "...prompt adjudication...." (*Andre v. Pomeroy*, 35 N.Y.2d 361, 362 [1974]). The facts as presented herein establish Plaintiff's liability. (*Opalek v. Oshrain*, 33 AD2d 521 [2nd Dept, 1969]).

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." (*Esteve v. Abad*, 271 A.D. 725 [1st Dep't, 1947]).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." (*Pullman v. Silverman*, 28 N.Y.3d 1060 [2016], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. (*See e.g. Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25 [1933]). If the opposition can show there are questionable issues of fact that require a trial of the action, then summary judgment must be denied. (*Cattonar v. Edward Ermold Co.*, 277 A.D. 564 [1st Dept. 1951]). In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is: "...even arguably any doubt as to the existence of a triable issue". (*Baker v. Briarcliff School Dist.*, 205 A.D. 2d 652 [2nd Dep't, 1994]).

DISCUSSION

As recently set forth in the Second Department in *Perez v Persad*, 183 A.D.3d 771 (2nd Dep't, 2020) "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" (*see Tutrani v. County of Suffolk*, 10 N.Y.3d 906 [2008]; *Edgerton v. City of New York*, 160 A.D.3d 809 [2nd Dep't, 2018]).

COCHINOS is not only seeking summary judgment as to liability, he is also questioning whether he has any comparative fault. (*Lopez v Dobbins*, 164 A.D.3d 776 [2nd Dep't, 2018]; *Edgerton v. City of New York*, 160 A.D.3d 809 [2nd Dep't, 2018]). Since *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018) N.Y. Slip Op. 02287, 2018 WL 1595658 [Apr. 3, 2018] a plaintiff can be entitled to summary judgment on liability without having to demonstrate comparative fault.

In the instant matter, the plaintiff established he was completely stopped for at least thirty (30) seconds when he was hit by the car operated by the defendant. The burden then shifts to the defendant to refute plaintiff. Defendant asserted he was stopped at a red light behind the plaintiff's

white Honda CRV. He alleged the light turned green and he looked away. He admits: “When I looked forward again, the vehicle in front of me was at a dead stop, for no reason.”. The defendant’s response that plaintiff came to a sudden stop was insufficient to raise a triable issue whether there was a nonnegligent explanation for the accident. (*Brothers v. Bartling*, 130 A.D.3d 554 [2nd Dep’t, 2015]; *Gutierrez v. Trillium, USA*, 111 A.D.3d 669 [2nd Dep’t, 2013]). The defendant’s assertion “for no reason”, is a conclusory statement and is insufficient as a non-negligent explanation. (*Ex. Kastritsios v. Marcello*, 84 A.D.3d 1174 [2nd Dep’t, 2011]; C [2nd Dep’t, 2010]). As stated herein, defendant failed to provide a non-negligent explanation for the collision. There was nothing in the record to support defendant’s alleged defense. Therefore, defendant’s defense is not persuasive, and defendant did not raise any triable issue of fact to thwart plaintiff’s motion for summary judgment.

Additionally, contrary to the defendant's contention, the plaintiff's motion for summary judgment was not premature. The defendant failed to demonstrate that discovery might lead to relevant evidence. (*See Figueroa v. MTLR Corp.*, 157 A.D.3d 861, [2nd Dep’t, 2018]; *Turner v. Butler*, 139 AD3d 715, [2nd Dep’t, 2016]; *Hewitt, Supra*).

“The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Figueroa, Supra*; *see Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759 [2nd Dep’t, 2006]; *Bentick v. Gatchalian*, 147 A.D.3d 890 [2nd Dep’t, 2017]).

THE FIRST AFFIRMATIVE DEFENSE MAY BE STRICKEN

The governing statute pertaining to a party’s demand to dismiss a defense is CPR 3211 (b) which states:

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

The instant motion by plaintiff not only sought summary judgment on the issue of liability, but also sought to dismiss the 1st and 3rd affirmative defenses set forth in defendant’s Answer. The First Affirmative Defense asserted states:

“That the plaintiff(s) acted in such a careless and negligent manner so as to cause or contribute to the cause of their own injuries as alleged in the Complaint.”

This affirmative defense is merely conclusory and self-serving. Plaintiff avers that he was completely stopped for thirty (30) seconds before he was hit by the car operated by defendant. The defendant offered no plausible explanation as to what plaintiff’s possible comparative fault would be. (*Lopez, Supra.*) Plaintiff cited two other cases in support of his theory to dismiss the affirmative defense of comparative fault. *Hewitt v. Gordon-Fleetwood*, 163 A.D.3d 536 (2nd Dep’t, 2018), is almost on point with the instant matter except the car in *Hewitt* was stopped for only 5 seconds. However, although it reached the correct decision as to summary judgment, *Hewitt* is not persuasive in terms of dismissing comparative negligence. Further, *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974) does not support plaintiff’s case as comparative negligence was a non-issue where the

plaintiff daughter was reading in the back seat of the car driven by the defendant mother. Not consistent with the facts at hand. However, plaintiff correctly asserts that his actions did not contribute to the causation of the accident.

THE THIRD AFFIRMATIVE DEFENSE MAY BE STRICKEN

Plaintiff also seeks for the defendant's Third Affirmative defense to be stricken, which states:

"That any recovery in favor of the plaintiff(s) be reduced or diminished to the extent which said plaintiff's injuries were caused or aggravated by the said plaintiff's **failure to wear seat belts or other safety restraining devices.**". (Emphasis added)

Plaintiff asserts he was wearing his seatbelt at the time of the accident. Not only does he claim this in his sworn to affidavit, but the police report does not note that he was not wearing it.

By reason of all the foregoing it is

ORDERED that Plaintiff NICHOLAS G. COCHINOS' Motion for Summary Judgment on the issue of liability is **granted**; and it is further

ORDERED that Plaintiff NICHOLAS G. COCHINOS' Motion seeking dismissal of Defendant TERRY Y. PRYEAR First Affirmative defense of comparative negligence is **granted**; and it is further

ORDERED that Plaintiff NICHOLAS G. COCHINOS' Motion seeking dismissal of Defendant TERRY Y. PRYEAR Third Affirmative defense of not wearing a seatbelt is **granted**; and it is further

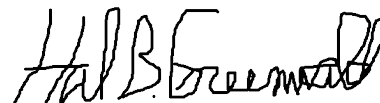
ORDERED, that parties shall appear for a virtual status conference on **September 15, 2020 at 11:30 A.M.** An email providing both the virtual link to participate as well as a telephone number will be forthcoming, please ensure this Court has email addresses for all parties (via NYSCEF).

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Date: August 3, 2020
Poughkeepsie, New York

ENTER:



HON. HAL B. GREENWALD, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.