

Yearwood v NY2 Auto Inc.

2020 NY Slip Op 35453(U)

May 8, 2020

Supreme Court, Kings County

Docket Number: Index No. 520461/2016

Judge: Reginald A. Boddie

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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 8th day of May 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

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ALVIN O. YEARWOOD,
Plaintiff(s),

Index No. 520461/2016
MS 5

Against

DECISION AND ORDER

NY2 AUTO INC. and CHRISTOPHER PIERRE
and OMAR H. BASTIDAS,
Defendant(s).

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<u>Papers</u>	<u>Numbered</u>
Notice of Motion & Annexed Affirmation/Affidavit in Support	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers, the decision and order on plaintiff’s motion for summary judgment on the issue of liability against defendants NY2 Auto Inc. and Christopher Pierre, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this lawsuit to recover for personal injuries allegedly sustained in a motor vehicle accident on July 16, 2016. A vehicle operated by defendant Christopher Pierre and owned by defendant NY2 Auto Inc. collided with the right front side of the plaintiff’s vehicle on Lenox Road at or near its intersection with Utica Avenue in Brooklyn. On October 28, 2019, Justice Colon ordered Mr. Pierre to appear for an examination before trial on or before December 20, 2019, or be precluded from testifying at trial or submitting an affidavit in response to substantive motions. Plaintiff filed his Note of Issue on November 15, 2019. On December 19, 2019, plaintiff contacted defense counsel about deposing Mr. Pierre and was allegedly told that he could not be located. Mr. Pierre never appeared for deposition.

On February 5, 2020, plaintiff filed the instant motion for summary judgment. Plaintiff argued he is entitled to summary judgment on the grounds that Mr. Pierre failed to appear for a deposition on or before December 20, 2019, pursuant to the October 28, 2019 order of Justice Colon, and is therefore precluded from testifying at trial or submitting affidavit in response to substantive motions.

Defendants opposed the motion as untimely, citing *Brill v City of New York*, 2 NY3d 648, 651 (2004). Plaintiff argued he has good cause for the delay because Mr. Pierre failed to appear for his deposition pursuant to Justice Colon's order and therefore, as of December 20, 2019, over a month after plaintiff filed his note of issue, Mr. Pierre was precluded. Plaintiff averred that this circumstance constitutes "good cause" under *Brill*, the court should properly consider the instant motion, and the motion was made less than 60 days after Defendant's failure to appear for his deposition.

Motions for summary judgment were required to be filed within 60 days of the filing of the note of issue and may only be extended upon good cause shown (NY R L KINGS Pt. C, Rule 6; CPLR 3212 [a]). Here, the note of issue was filed on November 15, 2019, and therefore, a motion for summary judgment was required to be filed on or before January 14, 2020. Plaintiff filed the instant motion 22 days late on February 5, 2020. Plaintiff argued there is good cause for his delay in filing the instant motion because Mr. Pierre failed to appear for his deposition and the preclusion order became effective on December 20, 2019, over a month after the note of issue was filed.

Brill requires a satisfactory explanation for the untimeliness (2 NY3d at 652). In *Brill*, the Court "determined that, if the merit of the motion itself constituted good cause, the statutory deadline would be circumvented and the practice of delaying such motions until the eve of trial

encouraged” (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]). Here, plaintiff’s excuse for the delay in filing the instant motion is that preclusion did not become effective against Mr. Pierre until December 20, 2019. This, however, is also the merit of plaintiff’s argument in favor of summary judgment.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Plaintiff testified he was traveling northbound on Utica Avenue when he stopped at a red light at the intersection of Lenox Road. He testified that he was the first car at the light and when the light turned green he proceeded into the intersection of Lenox Road and was struck on the passenger side front door, side quarter panel and bumper of his vehicle by a grey Toyota Corolla with TLC plates. He testified he was looking straight ahead and did not see defendant or hear any sounds prior to contact, and that he hit the brakes upon contact.

In opposition, having no testimony from Mr. Pierre to refute plaintiff’s allegations, defendant proffered a certified copy of the police report to establish there are questions of fact as to which driver is at fault for the accident. The police report indicates that each driver reported that the other ran his red light. Facts stated in a police report are not admissible unless they constitute an exception to the hearsay rule (CPLR 4518 [a]; *Memenza v Cole*, 131 AD3d 1020,

1021-1022 [2d Dept 2015]). Here, the contents of the police report do not fall into any hearsay exception and therefore defendant failed to meet its burden of proffering evidence sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562). Nevertheless, where movant fails to show good cause for the delay in filing its motion for summary judgment, the merits need not be reached.

Accordingly, the motion is denied.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court