

Moncayo v Accardi-McCabe

2020 NY Slip Op 35621(U)

February 27, 2020

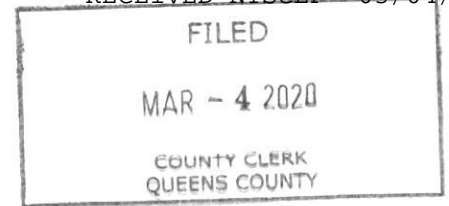
Supreme Court, Queens County

Docket Number: Index No. 714337/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

MIGUEL MONCAYO and ROCIO VELIZ,

Index No.714337/2018

Plaintiffs,

Motion

-against-

Date: January 22, 2020

Motion Cal. No.: 30

DANIELLE M. ACCARDI-MCCABE,

Motion Sequence No.: 2

Defendant.

The following e-file papers numbered EF 19-29 and 40-42 submitted and considered on this motion by plaintiffs MIGUEL MONCAYO (individually referred to as "Miguel") and ROCIO VELIZ (individually referred to as "Rocio") (collectively referred to as "Plaintiffs") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment as against defendant DANIELLE M. ACCARDI-MCCABE(hereinafter referred to as "Defendant") on the basis that she is liable to them and for such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion- Affirmation in Support	EF 19-25
Affirmation in Opp- Exhibits.....	EF 26-29
Reply Affirmation.....	EF 40-42

This is a negligence action arising out of a collision that occurred at or near the intersection of Otis Avenue and Horace Harding Expressway, County of Queens, State of New York, on June 13, 2018 at approximately 2:10 p.m. Plaintiffs each submitted an affidavit in support of their motion Plaintiffs' attested to the following:

Plaintiff Miguel was in the driver's seat and his wife plaintiff Rocio was in the front passenger seat. That prior to the collision Miguel was traveling on Otis Avenue at about 10-15 mph. That the intersection of Otis Avenue and Horace Harding Expressway is governed by a stop sign and cars traveling on Otis must obey the stop sign before merging onto Horace Harding Expressway. Miguel alleges upon observing the stop sign he gradually lowered the speed of his vehicle and eventually came to a complete stop. Miguel states he remained in the stopped position for five seconds, as he was waiting for traffic to pass for a safe entrance onto Horace Harding Expressway.

when he was “suddenly and unexpectedly” struck in the rear by Defendant’s vehicle. Plaintiffs allege they heard no horns or tires screeching prior to impact.

This action was commenced by the filing of the Summons and Complaint on September 19, 2018. Issue was joined on November 8, 2018 after Defendant filed her Verified Answer.

Summary Judgment

The Court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

“A rear-end collision is sufficient to create a *prima facie* case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle” (*Rimona Levine et al. v. Clyde Taylor et al.*, 268 A.D.2d 566 [2nd Dept 2000]). In *Levine*, the plaintiff was struck in the rear by the defendant. Defendant attempted to rebut the presumption of negligence by arguing that the plaintiff stopped short. (*Id* at 567). The court held defendant’s arguments were insufficient to rebut the presumption that he was negligent. (*Id*). “[o]ne of several non-negligent explanations for a rear-end collision [may be] a sudden stop of the lead vehicle” (*Maria Chepel v. Meyers*, 306 A.D.2d 235, 237 [2nd Dept 2003]). “[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even

if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*Dawn Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565 [2nd Dept 2001]).

Plaintiffs have established prima facie entitlement to summary judgment, the burden now shifts to the Defendant to raise a triable issue of fact.

In opposition, Defendant argues that depositions have not taken place in this case, despite the fact that Plaintiffs’ depositions were scheduled by the parties and in some instances Court ordered. On September 30, 2019, Defendant’s counsel went on the record indicating that Plaintiffs’ deposition was scheduled for that day pursuant to the Compliance Conference Order dated September 23, 2019. That Defendant counsel’s office contacted Plaintiffs counsel’s office and was told that Plaintiffs would not be produced because this summary judgment motion was pending before the Court. Defendant’s counsel also noted on the record that a prior deposition of the Plaintiffs’ was to be held on August 30, 2019 but did not occur for the same reason. Therefore, Defendant seeks dismissal of this motion pursuant to CPLR 3212(f).

In response, Plaintiffs’ counsel contests defense counsel’s representations. Plaintiffs’ counsel alleges that efforts were made by his office on September 27, 2019 to reschedule the September 30, 2019 deposition because it fell on the Jewish Holiday, Rosh Hashanah. Plaintiffs’ counsel contends he contacted defense counsel’s office to notify them that he observes Rosh Hashanah and would not be able to produce his clients for a deposition, but that they are ready to testify on a rescheduled date. Plaintiffs’ counsel represents that Defendant’s counsel, to date, has ignored his request to reschedule. However, Plaintiffs’ counsel does not dispute that the August 30, 2019 deposition failed to go forward because the current summary judgment motion was pending before this Court.

In *Scott Gillinder v Dierderik G. Hemmes et al.* (298 AD2d 493 [2d Dept 2002]) where defendant Hemmes failed to stop at a stop sign and proceeded through an intersection where his car was involved in a collision with defendant Scherman. After the collision, Hemmes continued through the intersection and struck plaintiff’s vehicle which was allegedly stopped at a stop sign (*id.*). Scherman moved for summary judgment alleging Hemmes was negligent per se by failing to yield Scherman the right of way (*id.* at 494). The court stated “[b]efore a party can defeat a motion for summary judgment claiming ignorance of facts due to unconducted discovery, he must show that he has made reasonable attempts to discover these facts and that the facts sought would give rise to a triable issue” (*id.*). The court held the parties opposing the motion failed to make the required showing, “[t]hey merely speculated that Scherman may have been negligent in the operation of his vehicle, and this is insufficient to defeat the motion” (*id.*).


Here, Defendant has made attempts to hold depositions of the Plaintiffs but despite prior schedules made by the parties and Court ordered dates depositions have yet to be completed. Nonetheless, the facts necessary to defeat this partial motion for summary judgment relate to a non-negligent explanation from the Defendant. In opposition, Defendant did not submit an affidavit, therefore, Defendant did not put forth a non-negligent explanation. Defendant has failed to prove that

she “made reasonable attempts to discover these facts and that the facts sought would give rise to a triable issue” (*id.*). Therefore it is,

ORDERED, that Plaintiffs’ motion for partial summary judgment on the issue of liability is granted. Upon the completion of discovery solely on the issue of damages, this matter shall proceed to trial on damages only.

The foregoing constitutes the decision and Order of this Court.

Dated: February 27, 2020



Hon. Chereé A. Buggs, JSC

FILED
MAR - 4 2020
COUNTY CLERK
QUEENS COUNTY