

Graziano v Morales-Flandez
2021 NY Slip Op 33223(U)
March 16, 2021
Supreme Court, Orange County
Docket Number: Index No. EF004904-2018
Judge: Sandra B. Sciortino
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
JACK GRAZIANO and PHYLLIS GRAZIANO,

DECISION AND ORDER
Index No.:EF004904-2018

Plaintiffs,

-against-

Motion Date: 1-22-2021
Sequence No. 1

CEASAR A. MORALES-FLANDEZ and
ALVA EDISON PROJECT, LLC,

Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 13 were considered in the plaintiffs' motion seeking an order granting plaintiffs summary judgment on the issue of liability and/or an order precluding defendant Morales-Flandez' testimony:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Greenwald)/Exhibits 1 - 8; Memorandum of Law	1 - 11
Affirmation in Opposition (Kaplan)	12
Reply Affirmation (Greenwald)	13

This personal injury action arises out of a motor vehicle accident that took place on April 7, 2016, in the City of Newburgh, County of Orange. The Complaint alleges that plaintiff's vehicle was rear-ended by a vehicle owned by defendant Alva Edison Project, LLC ("Alva") and operated by defendant Morales-Flandez. Plaintiff Jack Graziano alleges serious and permanent injuries, including fractures to his right wrist. Plaintiff Phyllis Graziano asserts a loss of services claim.

Plaintiffs commenced this action by filing a Summons and Complaint on February May 4, 2018. Issue was joined by service of defendants Verified Answer filed on July 6, 2018.

On May 23, 2019, a conference was held and this Court ordered defendant Morales-Flandez'

deposition be held by June 28, 2019. On August 21, 2019, this Court extended defendants' time to conduct the deposition until September 27, 2019. On November 14, 2019, defendants were granted a further extension to January 10, 2020 to conduct the deposition. A conference was held on December 9, 2020, at which defendants' counsel advised that defendant Morales-Flandez was unable to be located and may be out of the country.

Plaintiff Jack Graziano's Examination Before Trial was held on May 1, 2019. To date, defendant Morales-Flandez' Examination Before Trial has not been held. Note of Issue has not been filed.

Plaintiff Jack Graziano's Deposition

On April 7, 2016, plaintiff's vehicle was traveling westbound on Broadway in Newburgh. There were two lanes in each direction. Plaintiff's vehicle was traveling in the left lane. It was lightly raining, and the traffic was "average." Plaintiff's vehicle approached an intersection and was waiting for oncoming traffic to clear so he could make a left turn. Plaintiff's vehicle was stopped long "enough to let several cars go by." While plaintiff was stopped, defendant's vehicle made contact with the bumper of his vehicle. The force of the impact was described as "pretty bad... it was a big noise." Plaintiff testified that the back end of his vehicle was crushed, and the back seat struck him in the back of his head. Plaintiff briefly lost consciousness. Plaintiff did not observe defendant's vehicle before feeling the impact. Plaintiff was wearing a seatbelt and shoulder harness.

Notice of Motion

By Notice of Motion originally filed on November 23, 2020, and adjourned at the request of the parties, plaintiffs seek an order granting summary judgment on the issue of liability and an order precluding the testimony of defendant Morales-Flandez.

Plaintiffs argue defendants have refused to produce defendant Morales-Flandez for a deposition despite numerous attempts and this Court's directive that he be produced. By letter dated

May 28, 2019, defendants' counsel acknowledged this Court's directive to produce defendants by June 28, 2019, or concede liability. (Exhibit 5) By letter dated October 25, 2019, defendants' counsel sought an adjournment of an October 29, 2019 conference and advised the Court that they "will be looking to produce [their] client for a deposition" between then and the next conference. (Exhibit 6) To date, defendant Morales-Flandez has not been produced. Accordingly, plaintiffs seek an order pursuant to CPLR 3126 precluding defendant Morales-Flandez' testimony.

Plaintiffs also assert entitlement to summary judgment on liability as a rear-end collision, establishes a *prima facie* case of negligence on the part of defendants.

Based on the plaintiff's deposition testimony, plaintiff was stopped waiting to make a left turn before being struck from behind by defendant's vehicle. Plaintiff argues the defendant is unable to offer a non-negligent explanation for the accident and, therefore, is unable to raise a triable issue of fact. The Vehicle & Traffic Law requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. (McKinney's Veh. & Traffic Law §1129)

Opposition

With respect to plaintiff's motion to preclude, defendants aver that, when counsel attempted to produce the driver for a deposition, he had left the employment of defendant Alva and did not provide a forwarding address. Defendants do not object to Morales-Flandez being precluded from testifying as a witness at trial.

With respect to plaintiff's liability motion, defendants' essentially concede liability.

Reply

In reply, plaintiffs reiterate their argument.

Discussion

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d

Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle, in the absence of any negligence on the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle and to exercise reasonable care to avoid a collision. A driver has a duty to see what should be seen. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) 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 conditions of the highway."

In the matter at bar, plaintiffs established *prima facie* entitlement to summary judgment. The plaintiff's deposition testimony establishes that plaintiff's vehicle was struck from behind by defendant's vehicle. Such testimony is sufficient to establish plaintiff's claim. Such a showing requires defendant to come forward with a non-negligent explanation for the accident. (*Velazquez, citing Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) Here, defendants have failed to raise a triable issue of fact, as defendants' opposition is silent as to the issue of liability. In light of the foregoing, plaintiff's application for summary judgment is granted.

CPLR 3126 provides, "[I]f any party... refuses to obey an order for disclosure, or wilfully

fails to disclose information...the court may make such orders with regard to the failure or refusal as are just,” including “an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing evidence designated things or items of testimony...” Here, defendants do not object to preclusion of defendant Morales-Flandez’ testimony at trial. Therefore, plaintiffs’ motion is granted to the extent that defendants are precluded from offering defendant Morales-Flandez’ testimony at trial.

Conclusion

On the basis of the foregoing, it is hereby

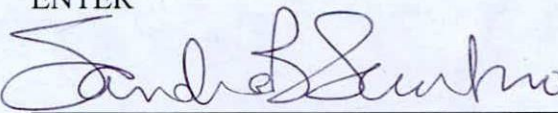
ORDERED that plaintiffs’ motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that defendants are precluded from offering defendant Morales Flandez’ testimony at trial.

This matter shall be scheduled for virtual conference on April 20, 2021 at 1:00 p.m. A link will be provided during the week prior to the conference date.

This decision shall constitute the order of the Court.

Dated: March 16, 2021
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*