

Levano v Talio

2021 NY Slip Op 33760(U)

March 25, 2021

Supreme Court, Westchester County

Docket Number: Index No. 55773/2020

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as a matter 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 WESTCHESTER

-----X
MATILDE LEVANO,

Plaintiff,

Index No. 55773/2020

- against -

DECISION & ORDER

GIOVANNA TALIO,

Motion Seq. #1

Defendant.

-----X
Hubert, J.S.C.

The following documents were read on this motion by Plaintiff Matilde Levano for an order granting summary judgment on the issue of liability as against Defendant Giovanna Talio:

- Notice of Motion - Affirmation in Support - Exhibits 1 -3 - Affidavit in Support
- Affidavit of Service
- Affirmation in Opposition
- Affirmation in Reply - Affidavit of Service

Upon consideration of the foregoing, and for the following reasons, Plaintiff's motion is granted.

The above-captioned action was commenced by the filing of a Summons and Verified Complaint by Plaintiff's counsel via the New York State Courts E-filing system ("NYSCEF") on June 4, 2020. In the Complaint, Plaintiff alleges that on or about April 23, 2019, at approximately 9:07 a.m., while working at the Valhalla Garden Center parking lot ("Garden Center") at 600 Columbus Avenue, Valhalla, New York, a car driven by Defendant hit a fence,

canopy and wooden tables, resulting in one of the tables striking Plaintiff and causing Plaintiff to be seriously injured.

Defendant filed an Verified Answer via NYSCEF on June 26, 2020, which plead general denials and four affirmative defenses. Plaintiff filed the instant motion via NYSCEF on August 14, 2020. Defendant filed opposition papers via NYSCEF on September 4, 2020, to which Plaintiff filed a Reply on that same date.

In order to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hosp.* 68 NY 2d 320 (1986). “A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries.” *Tejada v Cedeno*, 173 AD3d 808 (2d Dept. 2019).

In an affidavit in support of the instant motion, Plaintiff states that when the accident took place, she was working in the parking lot of the Garden Center when the vehicle being driven by the Defendant in the Garden Center, suddenly accelerated and hit a fence, canopy and several wooden tables. Plaintiff further states that after the Defendant’s vehicle struck the tables, one of the tables hit her, resulting in her being seriously injured.

Plaintiff has also submitted a certified copy of a police accident report. According to the report, Defendant told the police that she was entering a parked position at 601 Columbus Avenue, when she mistook the gas from the brake and accelerated into the Garden Center canopy striking a chain link fence, wooden column and several wooden tables of flowers. The report further states that Plaintiff told the police she was an employee of 601 Columbus Avenue and

was working in the area of the accident when she was struck by a wooden table.

Plaintiff has established her *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting her own affidavit, which established she was injured after Defendant's vehicle accelerated into the Garden Center canopy. The police accident report, which contains the Defendant's party admission, further establishes Defendant's culpability in the happening of the accident. See *Brown v. URS Midwest, Inc.* 132 AD3d 936 (2d Dept. 2015) (driver's statement in police report was admissible as an admission as it "tended to inculcate the defendant in connection with a material fact"); see also, *Yassin v Blackman*, 188 AD3d 62 (2d Dept. 2020)(party's admission, contained in a certified police accident report, constitutes admissible evidence on the issue of liability).

In opposition to Plaintiff's *prima facie* showing, Defendant has not raised any triable issues of fact as to the happening of the accident. Defendant has submitted an attorney affirmation only. As a general matter, an affirmation of an attorney who has no personal knowledge of the facts is insufficient proof to successfully oppose a motion for summary judgment. *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985). The only argument proffered by Defendant's attorney in her opposition papers is that the motion is premature. However, as noted by Plaintiff, Defendant has failed to demonstrate that discovery might lead to relevant evidence or that any facts essential to oppose the motion are in Plaintiff's exclusive knowledge and control *Romain v City of New York*, 177 AD3d 590 (2d Dept. 2019).

Accordingly, it is hereby:

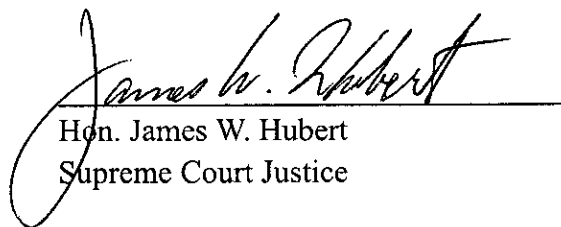
ORDERED, that Plaintiff's motion for an Order granting summary judgment as against Defendant on the issue of liability is granted; and it is further

ORDERED, that an inquest for an assessment of damages is directed and shall be scheduled by the Settlement Conference Part in accordance with existing COVID protocols; and it is further

ORDERED that Plaintiff shall serve a copy of this Decision & Order with notice of entry upon Defendant within twenty days of the date that this Order is uploaded onto the NYSCEF system.

The foregoing constitutes the Decision & Order of the Court.

Dated: White Plains, New York
March 25, 2021


Hon. James W. Hubert
Supreme Court Justice