

Davis v Santos

2021 NY Slip Op 34036(U)

October 19, 2021

Supreme Court, Bronx County

Docket Number: Index No. 34474/2018E

Judge: Bianka Perez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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RENEE DAVIS,

Index No. 34474/2018E

Plaintiff,

-against-

Hon. BIANKA PEREZ

LUZ DEL ALBA SANTOS,

Justice Supreme Court

Defendant.

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The following **NYSCEF docs** numbered **14-26 and 28-41** were read on these motions (NYSCEF and CASE MANAGEMENT **Seq 1 and 2**) noticed on **November 11, 2020 and September 15, 2021**.

| | |
|--|------------------------------|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | NYSCEF No(s). 14, 15, 28, 29 |
| Answering Affidavit and Exhibits | NYSCEF No(s). 22, 39 |
| Reply Affidavit and Exhibits | NYSCEF No(s). 25, 40 |

Upon the foregoing papers, plaintiff moves for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability against defendants and also moves for an order to compel defendant to appear for depositions. Defendants oppose. For the following stated reasons both motions are denied.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on September 19, 2018, which occurred on Morris Avenue and Lebanon Street in the County of Bronx, City and State of New York. Plaintiff now moves for summary judgment on liability. Plaintiff contends that she was lawfully proceeding through the intersection on foot when a vehicle operated by defendant backed up striking her. In support of her motion, plaintiff submits her deposition transcript, a No-Fault arbitration award and the pleadings.

In opposition, defendants contend that summary judgment is improper as there are differing versions of the accident. Defendant's affidavit indicates that her vehicle never struck plaintiff's body. Defendant's affidavit further states that plaintiff hit her vehicle with her hand indicating to the defendant to stop.

Discussion

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Summary judgment is the procedural equivalent of a trial. (*Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. See (*Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223 [1978]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad, supra* at 853. In this case, the record before the court indicates there are questions of fact remaining. There is conflicting testimony as to whether plaintiff was struck by defendant's vehicle. Viewing the record in the light most favorable to the non-moving parties, there remain questions of fact as to key elements of the accident, which remain the sole province of a jury.

Plaintiff has also annexed a copy of a no-fault arbitration decision wherein the arbitrator found there was contact between defendant's vehicle and plaintiff, for purposes of deciding plaintiff's right to no-fault first party benefits. However, the arbitrator did not decide who was the proximate cause of the accident. Since, there are two different versions of how the accident occurred this material issue of fact remains to be decided by the trier of fact. Thus, we decline to hold that defendant should be bound in this action by the determination of issues made by the arbitrator in a prior no-fault proceeding, see *Mayers v. D'Agostino*, 87 A.D.2d 519, (1st Dept 1982).

Generally, negligence cases do not lend themselves to resolution by a motion for summary judgment unless the facts clearly demonstrate the negligence of one party without any culpable conduct by the other. (*Barnes v Lee*, 158 AD2d 414 [1st Dept 1990]). Furthermore when issue of

credibility are presented by conflicting testimony, a motion for summary judgment should not be granted (*Communications & Entertainment Corp. v Hibbard Brown & Co., Inc.*, 202 AD2d 191 [1st Dept 1994]), or where there is any doubt as to the existence of a material and triable issue of fact, summary judgment should not be granted (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). Here, there are conflicting versions of how the accident occurred, and summary judgment turns on the credibility of the parties. For the foregoing reasons, plaintiff's motion is denied.

As to plaintiff's motion to compel defendants to appear for depositions and/or strike their answer is denied as the parties have failed to comply with Uniform Civil Rules Section 202.20-f before resorting to motion practice, "disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice."

If necessary, a discovery conference may be requested upon written application demonstrating that all good faith efforts have been exhausted to resolve the issue(s) without court intervention. The application shall identify the good faith efforts undertaken and highlight specific point(s) of contention that require judicial resolution, as set forth in Administrative Order dated September 22, 2021 and Part 14's Court Rules.

Conclusion

Accordingly, it is hereby

ORDERED, the Plaintiff's motion for summary judgment on the issue of liability is denied, it is further

ORDERED, that Plaintiff's motion to compel defendant to appear for depositions is denied.

This constitutes the Decision and Order of this Court.

Dated: October 19, 2021

Hon.



BIANKA PEREZ, J.S.C.

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1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT