

Hong v Bhatti

2022 NY Slip Op 30113(U)

January 12, 2022

Supreme Court, Kings County

Docket Number: Index No. 511404/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____ X

PETER K. HONG,

Plaintiff,

DECISION / ORDER

-against-

Index No. 511404/2019

Motion Seq. No. 2

Date Submitted: 12/16/21

BALAL S. BHATTI,

Defendant.

_____ X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment and other relief.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>37-47</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>50-60</u>
Reply Affirmation.....	<u>61</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action which arises from a motor vehicle accident. The accident took place on Coney Island Avenue near Shore Parkway in Brooklyn, New York on September 19, 2017 at around 4:00 p.m. Plaintiff alleges that defendant did not stop after he hit his car and left the scene. Defendant is alleged to have hit plaintiff's car while he was waiting for a red light, which pushed plaintiff's car into another car in the lane to his right. Plaintiff testified at his EBT that [Doc 53 P 27] the defendant was driving a gray car, and that the tow truck operator called by the police found the defendant's license plate at the scene when he went to retrieve plaintiff's car. Plaintiff was not able to get the plate number before the driver left. Plaintiff left the scene in an ambulance and was brought to Coney Island Hospital.

In Motion Sequence #2, defendant moves for summary judgment dismissing the complaint on the grounds that his vehicle was stolen, and as such, the driver was not

driving with his permission. In addition, defendant seeks an order granting him leave to amend his answer, which was amended without leave of court on August 30, 2019 to add as an affirmative defense that the vehicle was stolen, such leave to be retroactive to August 30, 2019, as plaintiff did not timely reject the amended answer.

In support of the motion, defendant provides an uncertified copy of the police report and a copy of the stolen vehicle report, which appears to be certified. It was made to the 66th Precinct in Brooklyn the day after the accident. He also provides the EBT transcripts for both parties. His EBT was held on August 4, 2020. Therein, he testified that he lives in Bethpage, NY, but on the day of the accident, he lived on Bay Parkway, a few blocks from the place where the accident took place. The stolen car report states that he parked his vehicle on Bay Parkway and when he returned it was not there. It does not say when this happened. He testified that either his insurance company or the police called him to tell him about the accident. He testified that he called the closest precinct, and an officer came to his apartment to take the report. The car was a 2012 Infiniti. He bought it as a “salvage” vehicle and fixed it up so he could register it. He testified that he could not afford to repair it after it was returned to him by the police, and so he gave it to a friend.

Plaintiff opposes the motion for summary judgment. The opposition was filed to the prior motion, which only sought summary judgment, which was withdrawn before plaintiff opposed it, and re-filed a few weeks later to also seek leave to amend defendant’s answer, and was not filed to oppose this motion. The defendant has replied, so the court has considered the papers in opposition. Plaintiff does not, therefore, oppose the branch of the motion for leave to amend his answer. He seems unaware that the second motion is different from the first. In addition, defendant argues that as plaintiff failed to submit a response to defendant’s statement of material facts, pursuant to the Uniform Rules for Trial

Courts 22 NYCRR 202.8-g the court should consider them to be admitted. While this is what the rule appears to state, the court has discretion to overlook plaintiff's failure to submit a statement controverting defendant's "facts."

With regard to the branch of the motion for summary judgment, plaintiff's attorney argues that "there is NO evidence showing that defendant's vehicle was indeed stolen at the time of the accident" [aff in opp ¶ 4]. The court agrees. Every question at his EBT about the sequence of events resulted in defendant being unable to answer the question. Therefore, as he could not establish that his car was stolen before the accident, he does not make out a prima facie case for summary judgment.

"[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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]).

Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383,

384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]).

Lastly, "[a] motion for 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'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Accordingly, it is **ORDERED** that the branch of the motion for summary judgment is denied.

It is further **ORDERED** that the branch of the motion for leave to amend the answer, *nunc pro tunc* to August 30, 2019, is granted without opposition. The amended answer filed and served on August 30, 2019 shall be deemed amended with leave of court and timely served.

This constitutes the decision and order of the court.

Dated: January 12, 2022

ENTER:



Hon. Debra Silber, J.S.C.