Chevalier v Alalamua
2022 NY Slip Op 31802(U)
June 8, 2022
Supreme Court, New York County
Docket Number: Index No. 155574/2020
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

---X

ANEUDY CHEVALIER,

Plaintiff,

- v -

LOIMATA ALALAMUA, THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT

Defendants.

---X

INDEX NO. 155574/2020

MOTION DATE 07/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on January 1, 2020, at approximately 2:05 am, as he was driving a vehicle with New York State License Plate Number KBS0220 on West 37th Street and 12th Avenue, in the County, City and State of New York. Plaintiff alleges that his vehicle was struck by a vehicle owned by defendant City of New York, with New York State License Plate Number 675614, and operated by defendant Loimata Alalamua (the "City Driver"), who was employed by defendant New York City Police Department (the NYPD"). The City vehicle was an NYPD tow truck, and collectively, the defendants are referred to as the "City." Plaintiff further alleges that the City vehicle was traveling in the left lane, while plaintiff's vehicle was traveling on the far-right lane on 12th Avenue, when the City vehicle attempted to turn into plaintiff's lane and struck plaintiff's vehicle.

Now pending before the court is a motion filed by plaintiff seeking an order, pursuant to Civil Practice Law and Rules ("CPLR") 3212, granting plaintiffs summary judgment on the issue of liability as against defendants, and striking defendants' affirmative defenses of comparative fault, culpable conduct, assumption of risk, and failure to wear a seat-belt.

The undersigned heard oral arguments with respect to this motion on June 8, 2022.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Plaintiff's Motion

On the issue of liability, plaintiff argues that the admissible evidence and the pleadings in this case demonstrate that the City Driver violated sections 1128 and 1163 of the Vehicle and Traffic Law ("VTL") when the Driver negligently changed lanes of traffic when it was not safe to do. Plaintiff further argues that plaintiff is free from any culpable conduct in the happening of the accident.

In support of his argument, plaintiff submitted his own sworn Affidavit, (NYSCEF Document #18), that provides, in part:

> 2. I was involved in a motor vehicle incident on January 1, 2020 at approximately 2:05 A.M.
>
> 3. The accident occurred on 12th Avenue near 37th Street in the County of New York.
>
> 4. The accident involved my vehicle and a vehicle that was operated by LOIMATA ALALAMUA and owned by THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT.
>
> 5. My vehicle came equipped with a dashboard camera which recorded the subject accident of January1, 2020. I reviewed the video of the accident and it is a fair and accurate depiction of the subject accident.
>
> 6. The video shows my vehicle travelling in the second lane from the right of 12th Avenue during the entire duration of the video up until the time **I was struck by the defendant's vehicle.**
>
> 7. The video shows my vehicle being struck by defendant's vehicle and the force of the impact causes my vehicle to be pushed to the right (emphasis added).

In opposition, the City argues that summary judgment should be denied, as the City Driver exercised the proper safety precautions and was not in violation of the VTL, as the turn signal was turned on as were the vehicle's flashing lights and the Driver only attempted to change lanes when it was reasonably safe to do so. The City contends that there are questions of fact as to whether plaintiff was traveling at an excessive rate of speed at the time of the incident and whether his attention was directed elsewhere, rather than observing the vehicular traffic conditions on the road before him. The City also argues that plaintiff's motion is premature, as no depositions have been conducted of any party.

In support of their argument, the City submits a sworn Affidavit by the City Driver, (NYSCEF Document #25), that states, in part:

> 2. On January 1, 2020, at approximately 2:05 am, while working, I was driving a NYPD tow truck heading south on 12th Avenue towards West 37th Street, in order to park the vehicle in a tow pound.
>
> 3. 12th Avenue, near its intersection with 37th Street, is a roadway with three (3) lanes of traffic. On the far-right side, there is a concrete median which separates the pedestrians and bikers from oncoming vehicular traffic.
>
> 4. As I drove southbound on 12th Avenue near the intersection at West 37th Street, I drove on the far-right lane with my strobe lights activated on top of the vehicle. I typically activate my strobe lights in order to alert other vehicles, bikers and pedestrians of my presence in the roadway. As I approached the tow pound, I slowed down, activated my right turn signal, checked my rearview mirror, and changed to the middle lane in order to make a wide turn into the pound. I usually make a wide turn into the tow pound at this location to avoid hitting the concrete median in the roadway that separates the pedestrians and bikers from vehicular traffic. Once in the middle lane, I observed no vehicles behind the truck at that time. **As I attempted to turn into the tow pound, a BMW sedan suddenly made impact with my right passenger door**. I never saw the vehicle behind me until the point of impact. Since I did not see the vehicle behind me, prior to the incident, I was unable to avoid the collision (emphasis added).

Given the disparate accounts, and the fact that there has been neither a preliminary conference nor any discovery in this case, this court finds that summary judgment is inappropriate at this time. Accordingly, the motion is denied with leave to refile upon the completion of appropriate discovery.

With respect to affirmative defenses, the City's Amended Answer (NYSCEF Document #27) sets forth the following:

AFFIRMATIVE DEFENSE(S)

6. Plaintiff(s)' culpable conduct caused or contributed, in whole or in part, to his/her/their injuries and or damages.

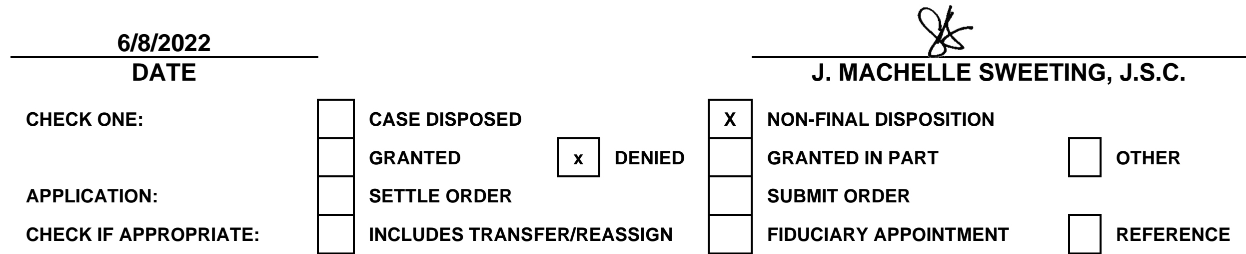
7. At all times mentioned in the complaint, plaintiff(s) knew or should have known in the exercise of due/reasonable care of the risks and dangers incident to engaging in the activity alleged. Plaintiff(s) voluntarily performed and engaged in the alleged activity and assumed the risk of the injuries and/or damages claimed. Plaintiff(s) failed to use all required, proper, appropriate and reasonable safety devices and/or equipment and failed to take all proper, appropriate and reasonable steps to assure his/her/their safety. Plaintiff(s)' primary assumption of risk solely caused his/her/their injuries and/or damage and defendant(s) owed no duty to the plaintiff(s) with respect to the risk assumed. Plaintiff(s)' express assumption of risk solely caused his/her/their injuries and/or damage and defendant(s) owed no duty to the plaintiff(s) with respect to the risk assumed. Plaintiff(s)' implied assumption of risk caused or contributed, in whole or in part to his/her/their injuries. In any action for injuries arising from the use of a vehicle in, or upon which plaintiff(s) were riding; it will be claimed that the injuries and/or damages sustained were caused by the failure of the plaintiff(s) to use available seat-belts and/or other safety devices.

With respect to plaintiff's request that the City's affirmative defenses of comparative fault, culpable conduct, assumption of risk, and failure to wear a seat-belt be stricken, this branch of the motion is also denied at this time as premature. Whether plaintiff was traveling in an excessive rate of speed at the time of the incident and whether his attention was directed elsewhere are facts that are exclusively within the knowledge of the plaintiff. Therefore, the City is entitled to depose plaintiff on these issues.

For all of the aforementioned reasons it is hereby:

ORDERED that plaintiff's motion for summary judgment on the issue of liability as against defendants is DENIED, without prejudice, with leave to re-file upon the completion of relevant discovery; and it is further

ORDERED that plaintiff's request to have stricken defendants' affirmative defenses of comparative fault, culpable conduct, assumption of risk, and failure to wear a seat-belt, is DENIED, without prejudice, with leave to re-file upon the completion of relevant discovery.



6/8/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[x] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE