

Bellantoni v Saunders
2022 NY Slip Op 32105(U)
April 4, 2022
Supreme Court, Westchester County
Docket Number: Index No. 64432/2019
Judge: James W. Hubert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHELLE BELLANTONI,

Index No. 64432/2019

Plaintiff,

-against-

DECISION and ORDER
Motion Seq. #1 & 2

MARK SAUNDERS, ROTO-ROOTER
SERVICES COMPANY, INC.,
RR PLUMBING SERVICES, CORPORATION
and CHEMED CORPORATION,

Defendants.

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Hubert, J.S.C.

In this personal injury action, Plaintiff, MICHELLE BELLANTONI, has moved for an Order, pursuant to CPLR § 3212, granting Plaintiff partial summary judgment on the issue of liability against the Defendants MARK SAUNDERS (Saunders), ROTO-ROOTER SERVICES COMPANY, INC. (Roto-Rooter), RR PLUMBING SERVICES, CORPORATION and CHEMED CORPORATION. Defendant, CHEMED CORPORATION (Chemed), has cross-moved for summary judgment on the grounds that they are not liable for Plaintiff's injuries, together with opposition to Plaintiff's request for summary judgment. Plaintiff has submitted reply papers, however, does not oppose Chemed's cross-motion for summary judgment. Upon the foregoing papers and exhibits annexed thereto, Plaintiff's motion is denied, and Defendant Chemed's cross motion is granted.

In this action, it is alleged that on January 3, 2019, Plaintiff sustained injuries at approximately 5:20 p.m. when the motor vehicle she was operating was struck in the rear by a Roto-Rooter van driven by Defendant Saunders. The motor vehicle accident occurred in front of 550 Mamaroneck Avenue, in Harrison, New York.

Plaintiff commenced an action against the Defendants on September 16, 2019. On November 1, 2019, Defendants filed an answer. Plaintiff was deposed twice, on November 1, 2020, and January 26, 2021. It appears the November 2020 deposition focused on liability, while at the January 2021, Plaintiff testified about her damages. Defendant Saunders was deposed on December 14, 2020. This motion was filed after the conclusion of depositions.

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 (*see Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]). The initial burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985]).

In a negligence action, where Plaintiff seeks summary judgment on the issue of liability, he or she “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” (*Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 A.D.3d 1033, 1033–1034, 83 N.Y.S.3d 74 [2d Dep’t 2018]; see *Rodriguez v. City of New York*, 31 N.Y.3d 312, 321–322, 76 N.Y.S.3d 898 [2018]).

Plaintiff has failed to support the motion for summary judgment with evidentiary proof in admissible form to demonstrate her claim of negligence. The motion is not substantiated by a person with actual knowledge of the facts constituting the claim. Here, the complaint that was

filed is not verified by Plaintiff, only the beginning of Defendant Saunders deposition was submitted (pages 1-20), and Plaintiff's January 2021 deposition on damages was provided to the Court to review. These exhibits fail to factually set forth how the accident occurred. Moreover, the affidavit of Dina Budano (Plaintiff's co-worker), and the police report are insufficient to establish *prima facie* there does not exist material issues of fact. The Budano affidavit states her vehicle was behind the Roto-Rooter van and describes the van prior to the accident.

With respect to the cross-motion, Defendant Chemed seeks summary judgment on the grounds that it is the parent company for Defendant Roto Rotor. Chemed contends they are not involved in the day-to-day operations of Roto-Rooter and does not employ or supervise Roto-Rooter's employees, including the Defendant Saunders, who was involved in this accident. Finally, Roto-Rooter has ultimate decision-making authority over timekeeping and compensation for the employees, including Defendant Saunders. Chemed's cross motion is supported by Robbie Robison, risk manager at Roto Rooter, who explains the operation of companies. Plaintiff does not oppose Chemed's cross-motion.

Accordingly, it is hereby:

ORDERED, that the Plaintiff's motion for granting summary judgment on the issue of liability against the Defendants is denied; and it is further

ORDERED, that the Defendant, CHEMED CORPORATION'S, cross-motion seeking summary judgment as against the Plaintiff is granted, and the complaint is dismissed and severed as to Defendant CHEMED CORPORATION; and it is further

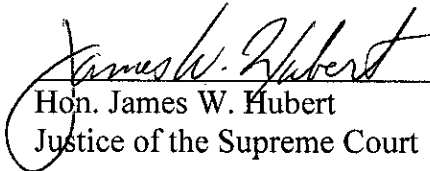
ORDERED, that Plaintiff shall serve a copy of this Decision & Order with notice of entry upon the Defendants within thirty days of the date that this Order is uploaded onto the

NYSCEF system.

The foregoing constitutes the Decision & Order of the Court.

Dated: White Plains, New York

April 7, 2022



Hon. James W. Hubert
Justice of the Supreme Court