

Daley v Majid
2022 NY Slip Op 35078(U)
July 14, 2022
Supreme Court, Bronx County
Docket Number: Index No. 22465/2020E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DWIGHT I. DALEY,

Plaintiff,

-against-

Index No.: 22465/2020E

SALIM MAJID, and "JOHN DOE", said name being
fictitious and presently unknown, person intended
being the operator of vehicle with NYS license
plate #T736186C at the time and place of the
occurrence set forth in the complaint,
Defendants.

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HON. BEN R. BARBATO:

Plaintiff, DWIGHT I. DALEY, moves for partial summary judgment in his
favor, on liability, as against Defendant, SALIM MAJID, and for related relief.

This is an action to recover damages for alleged personal injuries sustained
by Plaintiff in a motor vehicle accident which occurred on, or about, September
14, 2019, at about 11:00 p.m., on the Major Deegan Expressway, on the ramp to
the Cross Bronx Expressway, in the Bronx, New York.

It is alleged that the car owned by Defendant MAJID struck the vehicle
operated by Plaintiff DALEY. However, Defendant MAJID denies that his car was
involved in the subject accident.

In support of the motion, the Plaintiff DALEY's submissions include the
pleadings, the Police Accident Report, and the deposition transcript of the
Plaintiff, dated October 21, 2021. In opposition, Defendant submits the Affidavit
of Defendant MAJID, dated December 3, 2019.

Discovery has not been completed, and the Note of Issue has not been filed. After this motion was submitted, this Court scheduled Defendant's deposition. (See Order, dated April 25, 2022).

Alleged Facts:

Plaintiff DALEY describes the accident, in his deposition testimony, as follows: On September 14, 2019, Plaintiff was driving a 2018 Toyota Corolla, with two passengers, his adult daughter (Savannah Daley), and his daughter's mother (Sophia Campbell). They were traveling on the Major Deegan Expressway, in the right lane. The accident occurred on the Exit ramp which led to the Cross Bronx Expressway. Plaintiff's entire vehicle was on the ramp. While Plaintiff's vehicle was fully stopped at the Stop sign, for a few seconds, his vehicle was struck in the rear by another car.

The Plaintiff felt the contact to the back of his vehicle. At the time of the impact, Plaintiff was looking straight ahead. Prior to the impact, he did not see the car which struck him. After the impact, the Plaintiff saw a dark-colored sedan when he glanced in the rear-view mirror; and he got a glimpse of the car as it was driving away.

Plaintiff remained inside his vehicle. The driver of the other car exited his car, came over to the Plaintiff's vehicle, and asked Plaintiff to pull over to the right. They were blocking traffic, and the motor vehicles behind them were honking their horns because they wanted to pass. When Plaintiff pulled over, the other car passed Plaintiff's vehicle on its left, and drove away from the scene of the accident before the police arrived.

Plaintiff alleges that his daughter, a passenger in his vehicle, took a photograph of the license plate number of the other car. The alleged photograph was not exchanged during discovery.

Because the photograph had not yet been provided, the parties agreed, at the deposition, that Plaintiff would be produced again for the continuation of the liability portion of his deposition. Defendant's Counsel had stated: "we are almost done with liability but I want the picture before I finish liability, and we were going to come back to finish the deposition at another time, we will break now". (See Plaintiff DALEY's deposition, dated October 21, 2021, p. 35-64). However, Plaintiff did not submit any other deposition transcript on this motion.

In opposition to Plaintiff's motion, Defendant MAJID, a cab driver, denies that his car struck Plaintiff's vehicle. Rather, he indicates that it was the vehicles ahead of him which were involved in a rear-end collision. He explains as follows:

"On 09/14/2019, I was driving livery plate # T736186C. I had one adult male passenger seated in the back. I was traveling north bound on 87I Major Deegan Expressway Ramp. 87I Major Deegan Expressway Ramp is a one way street with one active driving lane. As I approached the intersection of 87I Major Deegan Expressway Ramp & Exit 7 N on my way to 95 N, the Bronx, **there was an accident ahead of me.** I could not have passed. In a short while cars began piling up behind my vehicle. There was a lot of horns being honked. The driver of the vehicle directly in front of me exited his vehicle to inspect for damages. The driver of the vehicle in front of the vehicle directly in front of me did not exit his vehicle. A few drivers of the vehicles behind my vehicle approached the driver of the vehicle that appeared to have been rear ended and asked him to move his vehicle to allow the traffic to flow. The driver did move aside. As the driver of the vehicle that was rear ended moved aside, the driver of the vehicle that was directly in front of me sped off. Since the path was cleared for other

vehicles to pass, I continued on my way. I completed my fare and continued working. I was not involved in any accident with any of the vehicles ahead of me nor behind me. I do remember that the vehicle that was directly in front of my vehicle was an SUV". [emphasis added]

(Defendant MAJID'S Affidavit, dated December 3, 2019).

In the Police Accident Report, the accident is described as follows:

"AT TPO DRIVER OF VEHICLE 1 [DALEY] STATES THAT HE WAS TRAVELING NORTHBOUND ON THE MAJOR DEEGAN RAMP TO THE CROSS BRONX EXPRESSWAY (EXIT #) WHEN VEHICLE 2 STRUCK THE REAR OF VEHICLE 1 [DALEY]. DRIVER OF VEHICLE 2 THEN LEFT THE SCENE. VEHICLE 2's LICENSE PLATE RECORDED BY VEHICLE 1's [DALEY] PASSENGER. DRIVER OF VEHICLE 1 [DALEY] REMOVED TO JACOBI MEDICAL CENTER".

The only passenger who was listed, in the Police Accident Report, is Sophia Campbell. There is no mention of Savannah Daley.

Applicable Law/Analysis:

Vehicle and Traffic Law § 1129(a) "Following too closely", provides that: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

A "driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions" (*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]). However,

"As we have stated frequently, 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 (*Winegrad v New York Univ. Med.*

Center, 64 NY2d 851, 853; Zuckerman v City of New York, 49 NY2d 557, 562; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Center, *supra*, at p 853). 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" [emphasis added]

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Herein, Plaintiff DALEY has not made a *prima facie* showing of entitlement to summary judgment on the issue of the liability as against this Defendant, because Plaintiff, admittedly, does not have knowledge regarding key facts. He acknowledges that he could, merely, identify the other car as being a dark-colored sedan. In this regard, Plaintiff was asked the following questions, and gave the following answers:

"Q. So, when you got a glimpse of the car, what were you able to make out about the car?

A. It was a dark color car.

Q. Do you know what type, from your glimpse, what kind of car was?

A. It look like a sedan.

Q. Is that the best you could say about it?

A. Yeah".

(See Plaintiff DALEY's deposition, dated October 21, 2021, p. 56).

Plaintiff, inexplicably, does not submit the sworn testimony of the nonparty witness, his daughter, who allegedly photographed the other car's license plate; and Plaintiff does not produce the alleged photograph.

Even assuming, *arguendo*, that Plaintiff herein had make a *prima facie* showing of entitlement to judgment as a matter of law, summary judgment would still be denied, because there are issues of fact pertaining to whether Defendant's vehicle was the car involved in this accident.

A "plaintiff has not established entitlement to summary judgment on liability against ... defendant driver because of the conflicting and unresolved facts concerning the accident and which vehicle was responsible for the accident." (*See Oluwatayo v Dulinayan*, 142 AD3d 113, 119-20 [1st Dept 2016]).

In addition, the motion is premature, because discovery has not been completed, and essential facts may exist, which cannot yet be stated within the meaning of CPLR 3212 (f) "Facts unavailable to opposing party", which provides that:

"Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

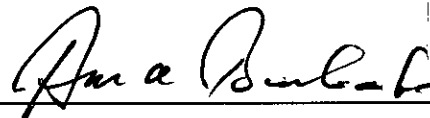
In this regard, for example, Defendant should have the opportunity to depose the nonparty witness, Plaintiff's daughter, who allegedly photographed the other car involved in the accident. Summary judgment is properly denied where a person, who is alleged to be a witness to the alleged negligent acts, has not yet been deposed. (*See Giandana v Providence Rest Nursing Home*, 8 NY3d 859, 860 [2007]).

The parties herein should have the “opportunity to develop the record regarding the factual basis of defendants' [allegations,] ... the applicability of which is generally an issue of fact.” (*Nelson v Bestway Coach Express*, 36 AD3d 488, 488 [1st Dept 2007]; see *Diaz v Jadan*, 116 AD3d 600 [1st Dept 2014]); see *Belziti v Langford*, 105 AD3d 649 [1st Dept 2013]; see *Yant v Mile Sq. Transp., Inc.*, 89 AD3d 492 [1st Dept 2011]).

Conclusion

Accordingly, Plaintiff DALEY's motion for partial summary judgment in his favor, on liability, as against Defendant, SALIM MAJID, and for related relief, is denied. This constitutes the decision and order of this court.

Dated: JUL 14 2022, 2022



HON. BEN R. BARBATO, J.S.C.