

Wallace v Duplar
2022 NY Slip Op 35199(U)
September 27, 2022
Supreme Court, Bronx County
Docket Number: Index No. 29275/2020EC
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

-----X
JAMES WALLACE,

Index №. 29275/2020E

Plaintiff,

Action No. 1

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

PETERSON DUPLAR and BENEFIELD
MUNROE,

Defendants.

-----X
DUPLAR PETERSON,

Index №. 524043/2020

Action No. 2

Plaintiff,

-against-

BENFIELD MUNROE,

Defendant.

-----X
The following were read on this motion (Seq #3) for **SUMMARY JUDGEMENT** submitted on June 20, 2023.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 35-41
Answering Affidavit and Exhibits	NYSCEF No(s). 43-47
Reply Affidavit and Exhibits	NYSCEF No(s). 48-49

Upon the foregoing papers, the plaintiff James Wallace moves for partial summary judgment on the issue of liability, dismissal of defendant Benfield Munroe's affirmative defenses of culpable conduct on the part of plaintiff, striking defendant Benfield Munroe's answer for failure to appear for a deposition, and setting this matter down for an assessment of damages before a jury. Defendant Benfield Munroe opposes the motion. Upon review and consideration of the papers herein, the motion is decided accordance with this order.

This is a negligence action to recover damages for the personal injuries that plaintiff James Wallace allegedly sustained in a motor vehicle accident that took place on October 24, 2019, at the intersection of Avenue D and East 26th Street in Kings County, New York. Plaintiff alleges he was a passenger in the vehicle owned and operated by defendant Duplar Peterson when the vehicle operated by defendant Benfield Munroe made contact with the driver's side of Duplar Peterson's vehicle.

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. (*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.

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, [1 st Dept 1990].) Furthermore, when issue of credibility is 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]). In this case, there's questions of fact as to the liability of both defendant drivers which preclude dispositive relief.

In support of his motion, Plaintiff submits a copy of his deposition and a copy of the deposition of defendant Dunlar Peterson. Plaintiff does not specify how the subject accident occurred.

In opposition, defendant Benfield Munroe submits an attorney affirmation, a copy of the defendant Benfield Munroe's pleadings, and copies of emails regarding the scheduling of Benfield Munroe's deposition. However, the defendant failed to annex an affidavit from a party with personal knowledge of the facts asserted in the complaint, and it is well settled law that "a complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215". See, Feffer v Malpeso, 210 A.D.2d 60 (1st Dept 1994). "A complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215 . . . a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity". See, Beltre v. Babu, 32 A.D.3d 722 (1st Dept 2006); St. Paul Fire & Marine Ins. Co. v. A.L. Eastmond & Sons, Inc., 244 A.D.2d 294 (1st Dept 1997).

Thus, Plaintiff established his *prima facie* burden that as a passenger, he did not engage in any culpable conduct which contributed to the occurring of the accident (*see Medina v Rodriguez*, 92 AD3d 850, 850 [2d Dept 2012]; CPLR 3212[g]). However, neither defendant have met their burden in establishing entitlement to summary judgment on liability against any particular party

since the issue of which vehicle was responsible for the accident remains unresolved (see *Oluwalayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]).

Plaintiff's submission establishes *prima facie* entitlement to dismissal of Defendant Benfield Munroe's affirmative defenses alleging Plaintiffs culpable conduct. As the opposition only annexed an attorney affirmation as evidence, without any affidavits from a party with personal knowledge, they failed to raise an issue of fact. Thus, Plaintiff's branch of the motion seeking dismissal of the affirmative defense raised by Defendant Benfield Munroe alleging culpable conduct on the part of the Plaintiff is granted.

Regarding the Plaintiff's motion to strike defendant Benfield Munroe's answer for failure to appear for a deposition. This Court notes that defendant annexed a series of emails exchanged with Plaintiff regarding the scheduling of Benfield Munroe's deposition, and Plaintiff includes, by incorporation in his attorney's affidavit, the compliance conference order regarding the originally scheduled EBTs. Nevertheless, the Court notes that the Plaintiff does not claim that any in-person or telephonic conferences took place prior to filing the motion as required by 22 NYCRR 202.20-f(b), nor was a conference with the Court sought by written application pursuant to directives set forth in Part 14 Rule III (B).

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 Part 14's Court Rules.

Please email the Bronx Supreme Civil Part 14 at BxSupCiv-IA14@NYCOURTS.GOV to request a discovery conference.

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted solely to the extent that summary judgment is granted to plaintiff as an innocent passenger, with an apportionment of liability by and between the defendants to be determined at trial, it is further

ORDERED, that defendant Benfield Munroe's affirmative defenses of culpable conduct on the part of plaintiff are dismissed, and it is further

ORDERED, that Plaintiff's motion to strike defendant Benfield Munroe's answer for failure to appear for a deposition is denied, it is further

ORDERED, that the parties are to appear for an in-person compliance conference on **November 2, 2023 at 9:30am.**

This constitutes the decision and order of the Court.

Dated: September 27, 2022**Hon.****BIANKA PEREZ, J.S.C.**1. CHECK
ONE.....☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL
ACTIVE2. MOTION
IS.....☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐
OTHER3. CHECK IF
APPROPRIATE.....☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE
APPEARANCE☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT