

Williams v TF Contr. Co., Inc.
2023 NY Slip Op 35174(U)
June 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 716443/2022
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY**

PRESENT: HON. PHILLIP HOM

PART 14

Justice

-----X

SHERWIN WILLIAMS,

INDEX NO. 716443/2022MOTION DATE 03/16/2023

Plaintiff,

MOTION SEQ. NO. 001

- V -

TF CONTRACTING CO., INC. and FRANK J. MASONE,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

TF CONTRACTING CO., INC.

Third Party Plaintiff,

-against-

LILJA RICH

Third Party Defendant.

-----X

FILED

6/21/2023

COUNTY CLERK
QUEENS COUNTY

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for

SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that Third-Party Defendant's motion for summary judgment is determined as follows:

Plaintiff Sherwin Williams ("Plaintiff") commenced this action against Defendants TF Contracting Co., Inc. ("TFC") and Frank J. Masone ("Frank") (collectively "Defendants") to recover for injuries sustained in a motor vehicle accident on November 28, 2020, while he was riding as a passenger in a vehicle owned and operated by Third-Party Defendant Lilja Rich ("Rich").

TFC commenced a third-party action seeking contribution and indemnification for Rich's alleged negligence.

Rich moves for summary judgment dismissing the third-party complaint. TFC opposes.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v*

Prospect Hosp., 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

“A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law” (*Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 777 [2d Dept 2012]). “Moreover, under the common law, a driver is bound to see what is there to be seen through the proper use of his or her senses” (*Id.*).

In support, Rich submits the transcript of her examination before trial (“EBT”) (EF Doc 34), Plaintiff’s EBT transcript (EF Doc 35), and the EBT transcript of Thomas Masone (“Thomas”) (EF Doc 36).

Rich’s EBT testimony

Rich testified that on November 28, 2020, at approximately 11 a.m. she was driving her vehicle to the Tanger Outlets in Deer Park with Plaintiff as her passenger when the front and passenger’s side of TFC’s truck hit her vehicle. Rich stated that the accident occurred as she was making a right turn onto Commack Road from the right turn lane of the Long Island Expressway Service Road (the “Service Road”). Rich testified that the truck struck the rear driver’s side fender and rear bumper. Rich testified that there is only one turning lane on the Service Road. Rich stated that Defendants’ truck attempted to make a right turn from a lane meant for through-traffic which was to the left of the turning lane. Rich testified that the impact pushed her vehicle forward and to the right. Rich described the Service Road as a four or five lane road, all going in the same direction, with bumper-to-bumper traffic and described seeing a police officer directing traffic but did not see an accident or any reason for the police to detour traffic. Rich stated that the impact dented her vehicle.

Rich described the weather as sunny, but brisk. Rich stated that she was wearing her glasses at the time of the accident.

Plaintiff’s EBT testimony

Plaintiff testified that he was a passenger in Rich’s vehicle at the time of the accident. Plaintiff stated that Rich was exiting the Long Island Expressway at Exit 51 or 52. Plaintiff stated that Rich was in the right-most lane for approximately one minute. Plaintiff testified that Rich stopped at a red light at the intersection of the Service Road and Commack Road prior to the accident. Plaintiff stated that he saw police officers across the intersection, directing traffic to the left. Plaintiff testified that when the light turned green, Rich made her turn but a truck to Rich’s left struck her vehicle. Plaintiff testified that the weather was sunny and bright, and the roads were dry. Plaintiff stated that, after the accident, Rich’s car was dented, and Defendants’ tire print was visible on Rich’s bumper.

Thomas's EBT testimony

Thomas testified that he is currently the sole shareholder in TFC; however, at the time of the accident, his now-deceased brother, Frank, was also a shareholder. Thomas stated that Frank passed away on May 28, 2021. Thomas testified that Frank was driving TFC's vehicle at the time of the accident. Thomas stated that he was not present at the time of the accident.

The police accident report

The police accident report states: "At above I/L traffic was being diverted to travel s/b on Commack Rd due to previous uninvolved MVA. [Rich] states she was attempting to make a right turn from the right lane onto Commack Rd from the [Service Road] when [Frank] did sideswipe her left rear end causing damage. [Frank] states he did not realize there was said side swipe, no damage to [Frank's vehicle]. No injuries."

In opposition, TFC submits its attorney's affirmation, which argues that Rich failed to see that which there was to be seen. The Court finds TFC fails to raise a triable issue of fact. Based on Rich's submissions, she was struck by TFC's vehicle which turned from a lane meant for through-traffic and struck the rear of Rich's vehicle. Thus, it is unclear how Rich could have avoided such an accident through the proper use of her senses. Therefore, Rich's motion is granted.

The Court notes that Frank passed away prior to Plaintiff commencing this action. Thus, the instant matter is a legal nullity as against Frank (*see Fed. Natl. Mtge. Assoc. v Tudor*, 185 AD3d 905, 906 [2d Dept 2020], quoting *Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005] ["A party may not commence a legal action or proceeding against a dead person"]). "CPLR 3212 (b) permits the court to search the record where there is a pending motion for summary judgment, and then to award judgment where it is warranted in favor of a nonmoving party as to a cause of action that has been placed in issue by the papers" (*Santagata v Vinegar Hill Group, LLC*, 41 AD3d 576, 576 [2d Dept 2007]). As the cause of action against Frank is not presently before the Court, the Court does not grant summary judgment as against Frank; however, Plaintiff shall move to substitute Frank's estate within ninety (90) days of entry of this order or discontinue the instant action as against Frank. Failure to do so shall result in dismissal of Plaintiff's underlying action as against Frank for failure to prosecute (*see CPLR 3216*).

In accordance with the foregoing, it is hereby **ORDERED** that Third Party Defendant Lilja Rich's motion is granted; and it is further

ORDERED that the third-party complaint is dismissed; and it is further

ORDERED that Plaintiff shall substitute the Estate of Frank J. Masone or discontinue this action as against Defendant Frank J. Masone within ninety (90) days of entry of this order; and it is further

ORDERED that the caption shall be amended to remove the Third-Party action as follows:

-----X

SHERWIN WILLIAMS,

Plaintiff,

- v -

TF CONTRACTING CO., INC. and FRANK J. MASONE,

Defendants.

-----X

and it is further

ORDERED that Third Party Defendant shall serve a copy of this Order with Notice of Entry upon Plaintiff and Defendants within twenty (20) days of entry of this Order.

This constitutes the Decision and Order of the Court.

6/20/2023

DATE

CHECK ONE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

Phillip Hom
PHILLIP HOM, J.S.C.

FILED

6/21/2023

CH
COUNTY CLERK
QUEENS COUNTY