

Tatis v Triborough Constr. Servs. Inc.
2023 NY Slip Op 35218(U)
October 18, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27597/2018E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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SILVESTRE TATIS,

Plaintiff,

-against-

TRIBOROUGH CONSTRUCTION SERVICES INC.,
LEAVITT MANOR CONDOMINIUM
ASSOCIATION, INC., and FARRINGTON
REALTY LLC,

DECISION & ORDER

Index No. 27597/2018E

Motion Sequence No. 11

Defendants.

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TRIBOROUGH CONSTRUCTION SERVICES, INC.
and FARRINGTON REALTY LLC,

Defendants/Third-Party Plaintiffs,

-against-

DEDER CONSTRUCTION, LLC and
THE SAFETY GROUP LTD,

Third-Party Defendants.

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GUZMAN, J.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on March 2, 2018, at approximately 4:26 p.m., as he was driving eastbound on 35th Avenue near the intersection with Farrington Street in Queens, New York. Plaintiff, who was driving a Ford Econoline cargo van at the time of the accident, testified at his deposition that he was slowing or stopped in traffic on 35th Avenue when construction debris suddenly started falling on and near his vehicle. Plaintiff testified that he felt three heavy impacts, one of which broke the passenger side window directly behind him, and an aluminum beam fell into the window and struck him in the neck and right shoulder. *See* NYSCEF Doc. 261 at 45-46. Photographs taken at the scene reflect construction materials on the roadway, including wooden and PVC planks and 4 x 8 plywood sheathing. The entire incident was also captured on video camera, which was preserved and exchanged during discovery.

At the time of Plaintiff's alleged accident, a construction project was underway at 35th Avenue and Farrington Street. Farrington Realty LLC ("Farrington") was the owner of the premises. Triborough Construction Services, Inc. ("Triborough") was the general contractor. Deder Construction, LLC was a subcontractor. The Safety Group Ltd. was responsible for providing a site safety manager for the construction project pursuant to a contract with Triborough. By stipulation dated June 27, 2019, Plaintiff discontinued this action as to Leavitt Manor Condominium. A default judgment was entered against Deder Construction LLC.

On this motion, Triborough Construction moves for summary judgment pursuant to CPLR § 3212 dismissing all claims against it on the grounds that there is no admissible evidence to substantiate Plaintiff's claim that any falling materials came into contact with his body or otherwise caused him to suffer personal injuries based on the video footage of incident. Farrington cross-moves for summary judgment on the same grounds, and also contends that it did not control the construction work or have any knowledge of any prior similar accidents or complaints involving debris falling from the construction site.

This is the second round of summary judgment motions filed in this case. On January 28, 2021, Plaintiff also moved for partial summary judgment on the issue of liability against Triborough and Farrington. Plaintiff contended that three summonses issued to Triborough by the New York City Department of Buildings following the accident constitutes *prima facie* proof of negligence. The summonses were based on violation of Chapter 33 of the New York City Construction Code, governing storage and safeguarding of material and equipment during construction or demolition, for failing to safeguard and maintain the worksite to protect the public and property and failing to secure materials against dislodgement by wind or accidental impact. In opposition, Triborough and Farrington submitted, *inter alia*, a report from Robert T. Lynch of DJS Associates dated April 13, 2021, which performed a forensic analysis of the surveillance video. The analysis included correcting the video aspect ratio, correcting the lens distortion, and adjusting the color curves. The video was also magnified 300% and analyzed frame by frame. Adobe After Effects software was then used to track the falling objects in the video. DJS was able to identify and track the pieces of plywood and the metal beam as they fell, and concluded that one piece of plywood can be seen striking the roof of Plaintiff's van and landing on the street. A metal beam is also seen falling to the ground and landing behind Plaintiff's van, without striking it. The report therefore concludes, *inter alia*, that "there is no

physical evidence to support Plaintiff's testimony that a metal beam entered his van and struck his shoulder." See NYSCEF Doc. 173. In reply, Plaintiff argued that the manipulation of the footage by "rewrapping" or "changing the file container according to the codec used for compression" should be the subject of a *Frye* hearing. By Decision and Order dated June 14, 2021, the Court (Kenneth L. Thompson, Jr., J.) found, in effect, that issues of fact and credibility with respect to the happening of the alleged accident precluded a finding of summary judgment in Plaintiff's favor. See NYSCEF Doc. 179.

In support of the motion now before the Court, Triborough has again submitted the April 13, 2021 report from DJS, in addition to the unaltered video footage of the alleged accident, a copy of the Plaintiff's deposition testimony, photographs of the scene of the incident, and an affidavit from Mark Cole, an employee of Triborough who responded to the scene immediately after the incident. See NYSCEF Docs. 254-267.

The video footage shows that it was a cloudy, rainy, and windy day. The quality of the video footage is marginal. The camera angle is pointed towards the front of Plaintiff's white van, which can be seen stopped in traffic on the roadway with vehicles in front of him. Vehicles have headlights and windshields wipers on. The front and passenger side of Plaintiff's van is closest to the video camera; the driver's side of the length of his vehicle cannot be seen. Suddenly, construction debris falls from overhead, in and around his van. It is difficult to pinpoint where the materials fall, and as noted, the driver's side of the vehicle is not in view. Plaintiff pulls his van over to the side of the street, and he is seen exiting his van momentarily and then getting back inside. See NYSCEF Doc. 265.

It is well established that it is not the function of the court to weigh evidence or assess the credibility of witnesses at the summary judgment stage, but rather to identify material triable issues of fact. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505, 243, 942 N.Y.S.2d 13,16 (2012). Nevertheless, "there are rare instances where credibility may be determined as a matter of law." *Carthen v. Sherman*, 169 A.D.3d 416, 94 N.Y.S.3d 34 (1st Dep't 2019); see also, e.g., *MRI Broadway Rental v. United States Min. Prods. Co.*, 242 A.D.2d 440, 443, 662 N.Y.S.2d 114 (1st Dep't 1997) *aff'd* 92 N.Y.2d 421, 681 N.Y.S.2d 783 (1998) (stating that a court is not required to "shut its eyes" to the patent falsity of a defense). Thus, where a plaintiff's deposition testimony is belied by video surveillance footage or is otherwise demonstrably false or incredible as a matter of law, the court may award summary judgment in a defendant's favor. See

Schneider v Gap, Inc., 208 A.D.3d 606, 607, 172 N.Y.S.3d 725 (2d Dept 2022) (reversing trial court's order denying summary judgment for defendants where video footage of plaintiff's accident established that she tripped over her own feet, and "contrary to the plaintiff's contention, her deposition testimony that she stepped backwards and slipped on a security tag is belied by the video surveillance footage"); *see also*, *Carthen v. Sherman*, 169 A.D.3d 416, 94 N.Y.S.3d 34 (1st Dep't 2019) (evidence may be deemed incredible as a matter of law when it "is demonstrably false . . . [or] contradicts every other piece of evidence in the record").

Here, however, due to the angle of the video camera and the quality of the video footage, the Court cannot conclude, as Defendants suggest, that the video is "definitive," or that Plaintiff's deposition testimony is demonstrably false or incredible as a matter of law. It is for the trier of fact to determine whether the video footage contradicts Plaintiff's account as to the happening of the accident, or whether the video is determinative of any facts at all. *Gonzalez v. Daly IV Hous. Dev. Fund Co., Inc.*, 214 A.D.3d 501, 185 N.Y.S.3d 121 (1st Dep't 2023).

With respect to the expert report of DJS, the Court notes that the "enhanced" video has not been submitted on this motion, but only the report itself. Although the report contains still pictures from the video, the quality of these pictures is poor and inconclusive. Whether or not the report is admissible and disproves Plaintiff's claim is best left for trial of this matter.

Finally, as noted above, Triborough has also submitted an affidavit from Mark Cole, an employee of Triborough who responded to the scene immediately after the incident. Cole states that it is undisputed that construction materials struck Plaintiff's vehicle, thereby breaking a window. He observed a dent on the roof of Plaintiff's van, and a piece of plywood in the vicinity of the vehicle, but did not observe any materials inside of Plaintiff's vehicle. Cole further states that Plaintiff did not mention to him that any materials had entered his vehicle or that he had been injured. According to Cole, he and Plaintiff left the area together to go to a body shop to assess the damage to the vehicle, and that only after returning to the scene did Plaintiff call an ambulance. *See* NYSCEF Doc. 267. Again, neither this affidavit, nor the other proof submitted by Plaintiff, eliminate all triable issues of fact with respect to the happening of the accident; they raise issues of credibility to be determined by the trier of fact.

In any event, Plaintiff has raised a triable issue of fact in opposition to the motion by submitting, *inter alia*, an affidavit from Saul Nunez, an emergency medical technician who

responded to an emergency call at or near the location of Plaintiff's alleged accident.¹ Nunez states that upon arrival, he observed construction debris lodged inside a motor vehicle which he later learned was owned by Plaintiff, and that Plaintiff was seated in the driver's seat with the construction debris in contact against his body. *See* NYSCEF Doc. 283. Triborough counters that EMS did not arrive at the scene until more than one hour after the incident, suggesting, in effect, that the accident was staged.

Because summary judgment is a "drastic remedy," it should only be employed "when there is *no doubt* as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). "Resolving questions of credibility, determining the accuracy of witnesses and reconciling the testimony of witnesses are for the trier of fact." *Kahan v Spira*, 88 A.D.3d 964, 932 N.Y.S.2d 76 (2d Dep't 2011).

With respect to Farrington's cross-motion, the Court finds that the summary and conclusory affidavit of George Xu, the managing member of Farrington (NYSCEF Doc. 273), is insufficient to eliminate all triable issues of fact as to any duty of care owed by Farrington. *See Gurmendi v Perry St. Dev. Corp.*, 93 A.D.3d 635, 939 N.Y.S.2d 549 (2d Dep't 2012). Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion filed by Defendant Triborough Construction Services Inc. for an Order granting summary judgment dismissing Plaintiff's complaint is DENIED; and it is further

ORDERED AND ADJUDGED that the cross-motion filed by Farrington Realty LLC for summary judgment dismissing Plaintiff's complaint is DENIED; and it is further

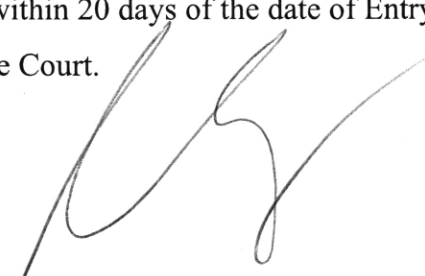
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¹ In an improper "Further Affirmation" in opposition to both motions for summary judgment, Plaintiff argues that the summary judgment motions are untimely based on an Order dated July 26, 2022, issued by the Hon. Julia I. Rodriguez, who ruled that "the time to file any motion(s) for summary judgment starts to accrue 90 days after the date of entry of this Order. Counsel should consult the Court Rules of Hon. Kenneth Thompson [the assigned IAS judge] for the specific time limitations for summary judgment motions." *See* NYSCEF Doc. 297. Notice of entry was entered on July 28, 2022. Plaintiff states that the time to file summary judgment therefore expired on October 28, 2022. However, the Order did not set a 90-day deadline; rather, the 120 day time frame for filing summary judgment motions accrued 90 days later, on October 26, 2022. Thus, the instant motions are timely.

ORDERED AND ADJUDGED that Triborough Construction Services Inc. is directed to serve a copy of this Decision & Order with Notice of Entry within 20 days of the date of Entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
October 18, 2023



HON. WILMA GUZMAN, J.S.C.