

Merlino v Dadex Inc.
2024 NY Slip Op 35094(U)
August 5, 2024
Supreme Court, Richmond County
Docket Number: Index No. 151158/2020
Judge: Wayne M. Ozzi
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At an IAS Part 23 of the Supreme Court of the State of New York, held in and for the County of Richmond at 26 Central Avenue, Staten Island, New York 10301 on the 5th day of August 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
LINA MERLINO,
Plaintiff,

DECISION AND ORDER

Index No.: 151158/2020
Motion Seq No 001

-against-

DADEX INC., DIAMOND LIMOUSINE NY INC.,
DIAMOND LIMO LLC, LIMO DIAMOND LLC and
EMMANUEL RENDOLPHE CHARPENTIER,
Defendant.

The following papers were read and considered regarding the above described motions, which were submitted on July 25, 2024: NYSCEF Doc Nos. 45-58.

Defendants move for summary judgment; to vacate the note of issue and to lift the preclusion order entered in this case. The motion is denied in all respects.

The defense moves to vacate the Note of Issue and lift the preclusion order, thereby allowing a deposition of Defendant Charpentier, who recently has been located by defense counsel. This case involves a pedestrian who, it is alleged, fell and was injured while trying to avoid being hit by a vehicle driven by Defendant Charpentier. On January 26, 2024, the Court entered a preclusion order, which had been discussed previously at a conference earlier in January. The Order barred Defendants from presenting evidence or testimony at any trial of this matter if Defendant Charpentier did not appear at deposition set for January 30, 2024, due to the repeated failure to produce Charpentier, the driver of the vehicle in this matter, for deposition. The deposition did not go forward and the Note of Issue was filed on April 12, 2024.

As the defense notes, the matter was stayed for a lengthy period, due to insurance carrier liquidation proceedings. A proposed preliminary conference order was submitted by the parties after the stay was lifted. It was entered in this case on March 1, 2023. It scheduled Defendant Charpentier's deposition for April 25, 2023. This deposition was then rescheduled in various compliance orders for May 17, 2023, October 1, 2023 and finally, for January 30, 2024, but Charpentier could not be located by his own counsel.

While defense counsel indicates that it has now located Defendant Charpentier, counsel does not provide satisfactory detail on why he could not be located at earlier points in the proceedings. It does not, for example, state whether or when an investigator was retained, what specific steps were taken, and why they could not have been taken earlier to locate him in a more timely manner. Parenthetically, Charpentier, as a party defendant, has an obligation, in a practical or common sense, and not necessarily in a legal sense, to maintain communication with his counsel. In the Court's experience, lack of communication by one's client has been a frequent and recurring reason to seek withdrawal from representation by counsel, in general.

The Court finds that the foregoing is insufficient to vacate the note and lift the preclusion order. Pursuant to 22 NYCRR 202.21(e), a motion to vacate a note of issue and certificate of readiness must be made within 20 days of the service of the note of issue and certificate of readiness. Here the motion was filed roughly two months later. As the Second Department stated in *Reardon v. Macy's, Inc.*, 191 A.D.3d 712, 714, 141 N.Y.S.3d 100 (2021), where a party's motion to vacate a note of issue is timely, "the party is required only to demonstrate why the case is not ready for trial." (internal quotes and citations omitted). (See also 22 NYCRR 202.21(e)). However, where the motion is not timely, the party seeking relief must meet the "more difficult standard" of 22 NYCRR 202.21(d) which "requires the movant to demonstrate unusual or unanticipated circumstances and substantial prejudice." *Ibid.* Defendants had ample opportunity to find the Defendant Charpentier, and do not adequately explain the change in circumstances that led to only locating him long after the note was filed. The Court finds that the liquidation stay which ended in 2022 and any stale information it may have engendered regarding the Defendant's address, as the defense alleges occurred, are insufficient reasons for the delay in locating him until mid-2024, particularly when the parties knew that a preclusion order may issue for the repeated failures to produce him for deposition. There are no "unusual or unanticipated circumstances" established here. The Court similarly declines to lift the preclusion order which was entered after the defense repeatedly failed to produce the Defendant Charpentier for deposition. See CPLR § 3126, authorizing preclusion as a remedy for discovery failures.

In light of the above, and Charpentier's failure to communicate with his own counsel, he cannot now be heard to complain that he is being denied an opportunity to submit to a deposition, and to complain that discovery is not complete.

Defendants also move for summary judgment and argue that the case should be dismissed because there is no dispute that the vehicle did not strike the Plaintiff before she fell. Therefore, they argue that they are entitled to summary judgment as a matter of law. Plaintiff similarly does not allege that the car hit her before she fell. At her deposition, Plaintiff testified to the following when asked whether the car made contact with her. "No, but it was on top of me. I couldn't believe it." Plaintiff also testified, "It was so close to me, it was incredible. That's why I turned suddenly to try and avoid him." Plaintiff, an elderly person, alleges she fell to the ground upon turning and as a result sustained physical injuries.

The Court notes that neither party cites to any case authority that speaks to the issue of whether there must be a physical impact before a defendant driver may be liable for injuries. The

Court's research has located no such bright line rule precluding recovery as a matter of law in these circumstances. Indeed, in this State, recovery for personal injury has been permitted in the absence of physical impact where there were affirmative acts of negligence by a Defendant that were alleged to have been a cause of the injury. (*See, e.g., Battalla v. State of New York*, 10 NY 2d 237 (1961)(infant plaintiff injures himself as a result of becoming frightened after being improperly secured to a chair lift) and *Ansteth v. Buffalo Ry. Co.*, 145 NY 210, 213 (1895) (juvenile "stealing a ride" on a train became frightened when conductor approached with an outstretched hand, and believing the conductor was going to strike him, the boy fell to the tracks below)). It would be for a jury to determine whether the defendant's conduct was indeed negligent and whether such negligence was a proximate cause of the fall. (*Ramos v. Triboro Coach Corp.*, 31 A.D.3d 625, 819 N.Y.S.2d 82, 83 (2nd dept. 2006) (noting that summary judgment may not be appropriate in certain negligence cases as the issue of whether the reasonable care standard was violated often presents an issue of fact; see also, *Lowd v. Cal Kovens Constr. Corp.*, 546 So. 2d 1087). Thus, it is of no moment that there was no physical contact between the Charpentier vehicle and plaintiff.

As to the question of Charpentier's duty to plaintiff, that question is one for the Court's determination as a matter of law (see generally, *Pulka v. Edelman*, 40 NY 2d 781). It must be remembered that "the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." (*Palsgraf v. Long Island, R. Co.*, 248 NY 339, 344).

It goes without saying that defendant had a duty to operate his vehicle in a safe manner, with reasonable care, at a reasonably safe speed, to keep a proper lookout, and to see what should be seen by the proper use of one's senses. (NY Pattern Jury Instructions, §2:77). Whether defendant breached that duty is a question for the trial of fact.

In this regard, the well known standards for summary judgment bear noting. The function of the court on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist. (*Guadalupe v New York City Tr. Auth.*, 91 AD3d 716 (2d Dept 2012); *Kolivas v Kirchoff*, 14 AD3d 493 (2d Dept 2005)). Summary judgment is a drastic remedy and it should only be employed when there is no doubt as to the absence of triable issues. (*Andre v Pomeroy*, 35 NY2d 361 (1974); *Bonaventura v Galpin*, 119 AD3d 625 (2d Dept 2014)). The evidence must be viewed in the light most favorable to the non-moving party in determining a motion for summary judgment. (*Pearson v Dix McBride, LLC*, 63 AD3d 895 (2d Dept 2009)). The proponent of a summary judgment motion bears the burden of demonstrating the absence of any material issues of fact, and the failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986)).

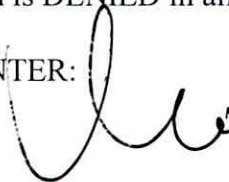
The 2020 affidavit of Defendant Charpentier, if considered by the Court, would not change this outcome because the Court has concluded that the fact that there was no contact with the vehicle is not determinative of this motion, or of the liability issue. In the affidavit, Charpentier states he stopped and did not hit Plaintiff. He further states that Plaintiff was not in the cross-walk, while Plaintiff testified that she was in the cross-walk. Whether the Plaintiff

crossed in or outside of the cross walk may well be relevant to a jury's determination of whether Defendants were negligent. (See NY VTL 1151, which gives the right of way in favor of pedestrians crossing a roadway while within a crosswalk.) These differing assertions on the cross-walk issue also support the denial of summary judgment since they present a disputed issue of material fact, even beyond the other reasons cited by the Court in denying the motion. Finally, the Court notes that there are issues with the affidavit itself: it is not authenticated; Plaintiff claims it was never provided in discovery; and the notarization is undated. Therefore, alternatively, it should not be considered in support of this motion as it is not in admissible form. (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 390 N.E.2d 298 (1979)).

For the foregoing reasons, the Defense's motion is DENIED in all respects.

DATED: August 5, 2024

ENTER:



HON. WAYNE M. OZZI, JSC