

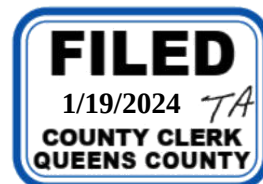
Thorne v Reynolds
2024 NY Slip Op 35221(U)
January 16, 2024
Supreme Court, Queens County
Docket Number: Index No. 703215/2023
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20

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DEVON THORNE,

Index No.: 703215/2023

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 9.20.2023

DAMON T. REYNOLDS, ONECALL HOLDINGS, INC., Motion Cal. No.: 45
USIC LOCATING SERVICES, LLC and RECONN
HOLDING, LLC,Defendants.
-----X

The papers bearing NYSCEF Doc. Nos. 24-39 were read on the motion filed by the plaintiff, Devon Thorne (the "Plaintiff"), for summary judgment against the defendants, Damon T. Reynolds ("Reynolds"), Onecall Holdings, Inc. ("Onecall"), USIC Locating Services, LLC ("USIC") and Reconn Holdings, LLC (collectively, the "Defendants").

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident (the "Accident"). In essence, the Plaintiff alleges that the vehicle in which he was a passenger was rear-ended by the vehicle operated by Reynolds.

Presently before the Court is the Plaintiff's motion for an Order granting him summary judgment on the issue of liability against the Defendants. For the following reasons, the motion is granted in part and denied in part.

I. Factual Background

The Accident occurred on September 16, 2022 at approximately 8:45 a.m. on the Cross County Parkway West in Mount Vernon, New York. Four vehicles were involved in the Accident. The Plaintiff was a passenger in the third vehicle, which was operated by non-party Darren Nicholas Charles. The fourth or rear vehicle was operated by Reynolds.

The Defendants admit, through the answer filed by Reynolds and the answer filed by Reconn i/s/h as USIC and Onecall, respectively, that Reynolds was operating said vehicle within the scope of his employment and with the consent of Reconn. The owners and operators of the other vehicles involved in the Accident are not parties to this cause.

In support of this motion, the Plaintiff submits an affidavit in which he avers that the vehicle he was in was stopped when it was struck in the rear by the vehicle operated by Reynolds.

The Defendants do not submit an affidavit in opposition. Instead, an affirmation from their counsel is filed.

II. Discussion

The familiar principles applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

Vehicle and Traffic Law §1129 [a] states 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 of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle. Thus, a rear-end collision with a stopped or stopping vehicle establishes a *prima*

facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Quintanilla v Mark*, 210 AD3d 713-714 [2d Dept 2022] [internal quotation marks, brackets and citations omitted]).

The Plaintiff establishes *prima facie* entitlement to summary judgment against Reynolds by establishing Reynolds rear-ended the stopped vehicle that the Plaintiff was in (*see Tenezaca v State*, 220 AD3d 959, 961 [2d Dept 2023]; *Genao v Cassetta*, 214 AD3d 626, 627 [2d Dept 2023]). The Plaintiff also establishes *prima facie* entitlement to summary against Recon, the entity that employed Reynolds at the time of the Accident and that consented to his use of the vehicle at issue, for these same reasons and under the doctrine of respondeat superior.

Reynolds and Recon fail to raise any triable issues of fact because neither submits an affidavit in opposition. The attorney affirmation submitted in opposition fails to raise any triable issues of fact because it has “no probative value in opposition to a summary judgment motion” (*Commissioners of the State Ins. Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]).

The discovery-related opposition argument is without merit. In *Quintanilla v Mark*, 210 AD3d 714-715, the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts ... [internal quotation marks, brackets and citations omitted]).

Here, Reynolds has personal knowledge of the facts because he was the operator of the rear vehicle. Thus, outstanding discovery does not warrant denial of this motion (*see id.*; *Elfe v Roman*, 219 AD3d 1304 [2d Dept 2023]).

Furthermore, “[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006] [citations omitted]).

However, the Plaintiff fails to establish *prima facie* entitlement to summary judgment against Onecall and USIC. While it is true that owners of a motor vehicle are vicariously liable for

injuries resulting from the negligence use or operation of their vehicle (*see* Vehicle and Traffic Law § 388), the Plaintiff fails to establish how One Call and USIC are vicariously liable for Reynolds' operation of the vehicle involved in the Accident.

The Plaintiff's failure to make a *prima facie* showing of entitlement to judgment as a matter of law against Onecall and USIC requires the denial of this motion as against them irrespective of the sufficiency of the opposition papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

In sum, the Plaintiff's motion for summary judgment is granted against defendants Reynolds and Reconn, only. The Court notes that although the Plaintiff is granted summary judgment on the issue of liability, Reynolds and Reconn are entitled to discovery on the issue of damages (*see Barr v Raffae*, 96 AD2d 800 [1st Dept 1983]), and the Plaintiff is not relieved of the burden of establishing that he suffered a serious injury within the meaning of Insurance Law § 5102 [d] (*see Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]). The Plaintiff shall file a note of issue after the completion of discovery on the issues of liability and damages as to USIC and Onecall and the completion of discovery on the issue of damages as to Reynolds and Reconn.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted summary judgment on the issue of liability against defendants Reynolds and Reconn, only; and it is further,

ORDERED, that the Plaintiff's motion is otherwise denied; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendants via NYSCEF by March 18, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
January 16, 2024



MOJGAN C. LANCMAN, J.S.C.

