

Calle v Gallagher
2024 NY Slip Op 35476(U)
April 10, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615959/2023
Judge: Alison J. Napolitano
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ORIGINAL

SHORT FORM ORDER

INDEX No. 615959/2023

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 74 - SUFFOLK COUNTY**PRESENT:**Hon. ALISON J. NAPOLITANO
Justice of the Supreme CourtMOTION DATE 2-3-2024
SUBMIT DATE 4-8-2024
Mot. Seq. # 01 - MG-----X
LUZ MARIA CALLE,

Plaintiff,

-against-

CHRISTOPHER ANTON JOSEPH
GALLAGHER,Defendant.
-----X**PANETTA AMINOV, P.C.***Attys. for Plaintiff*

670 Main Street

Islip, New York 11751

LAW OFFICE OF JOHN TROP.*Attys. for Defendant*

1055 Franklin Avenue, Suite 204

Garden City, New York 11530

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 17 - 21; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 23 - 25; Replying Affidavits and supporting papers 26 - 27; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

The plaintiff, Luz Maria Calle, seeks an order pursuant to CPLR §3212 granting summary judgment on the issue of liability and striking the defendant's affirmative defenses and cross-claims as to any comparative negligence. The defendant opposes this application.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

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To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR §3212 (b); *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The plaintiff commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on October 27, 2022 at approximately 3:15PM. The plaintiff alleges that she was operating a vehicle at the intersection of two roadways within a shopping center parking lot located at 700-60 Patchogue, E. Patchogue Yaphank Road, Town of Medford, Suffolk County, New York. The plaintiff claims that the defendant, Christopher Anton Joseph Gallagher, was operating his vehicle traveling northbound through the intersection. The plaintiff states that Gallagher had a stop sign and therefore had the duty to stop and yield the right of way to traffic in front of him. The plaintiff explains that she was driving westbound and did not have a stop sign in her direction of travel. She further states that “as [she] entered the intersection, defendant, now on [her] left, failed to stop at his stop sign and struck the front left of [her] vehicle”. The plaintiff further claims that “the impact to [her] vehicle occurred after [she] already entered the intersection”. The plaintiff goes on to further explain that the impact was sudden and unexpected with no warning signs of impending impact and that the defendant seemingly ignored the stop sign and darted into the intersection leaving the plaintiff no opportunity to take evasive measures to avoid the impact.

In opposition, the defendant submitted an attorney affirmation in opposition with no exhibits or defendant affidavit attached. The defendant’s attorney argues that the motion for summary judgment as to liability should be denied as there are existing questions of fact and, in the same breath, argues

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that the motion should also be denied as depositions have not occurred, and the defendant needs to conduct these depositions to determine if questions of fact exist as to the issue of liability.

The Court in *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519, 520, 813 NYS2d 120 (App Div 2d Dep't 2006), held that

The defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that the plaintiff violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of the defendants' vehicle as it legally proceeded with the right of way (see *Moreback v Mesquita*, 17 AD3d 420, 793 NYS2d 148 [2005]; *Torro v Schiller*, 8 AD3d 364, 777 NYS2d 915 [2004]; *Casaregola v Farkouh*, 1 AD3d 306, 767 NYS2d 57 [2003]; *Rieman v Smith*, 302 AD2d 510, 755 NYS2d 256 [2003]; *Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 [2002]; *Agin v Rehfeldt*, 284 AD2d 352, 726 NYS2d 131 [2001]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2000]). As the defendants' vehicle had the right of way, Lam was entitled to anticipate that the plaintiff would obey the traffic laws which required him to yield to the defendants' vehicle (see *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2005]; *Moreback v Mesquita*, supra; *Russo v Scibetti*, supra; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, 277 AD2d 312, 715 NYS2d 750 [2000]; *Cenovski v Lee*, 266 AD2d 424, 698 NYS2d 868 [1999])... he was negligent as a matter of law in failing to see that which he should have seen through the proper use of his senses (see *Bongiovi v Hoffman*, supra; *Spatola v Gelco Corp.*, 5 AD3d 469, 773 NYS2d 101 [2004]; *Breslin v Rudden*, 291 AD2d 471, 738 NYS2d 674 [2002]; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, supra; *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [1997]; see also *Weigand v United Traction Co.*, 221 NY 39, 116 NE 345 [1917]).

The Court of Appeals has held the standard by which an opponent can defeat a summary judgment motion. In the case *Zuckerman v. New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597-98, 404 N.E.2d 718, 720 (1980) the court states that "normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate

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acceptable excuse for his failure to meet the strict requirement of tender in admissible form (e.g., *Phillips v Kantor & Co.*, 31 NY2d 307; *Indig v Finkelstein*, 23 NY2d 728; also CPLR §3212, subd [f]). We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord v Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282; *Fried v Bower & Gardner*, 46 NY2d 765, 767; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290).

The *Zuckerman* Court goes on to state that the bare affirmation of the attorney in opposition who demonstrated no personal knowledge of the accident is “without evidentiary value and thus unavailing (citing *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 500; *Israelson v Rubin*, 20 AD2d 668, affd 14 NY2d 887; *Lamberta v Long Is. R. R.*, 51 AD2d 730). [The attorney’s] speculation as to what would ‘doubtless’ appear at the trial is patently inadequate to establish the existence of a factual issue requiring a trial”.

Here, the plaintiff has established her prima facie entitlement to judgment as a matter of law. The defendant was then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, the defendant failed to rebut the prima facie showing and did not submit an affidavit in opposition from defendant, Christopher Anton Joseph Gallagher, or a witness with personal knowledge of the events giving rise to the cause of action or defense. The attorney’s affirmation in opposition, much like the affirmation discussed in *Zuckerman*, proposes mere speculation and is devoid of any evidentiary value to support a finding of triable issues of fact.

Furthermore, in view of the fact that defendant Gallagher had personal knowledge of the relevant facts underlying the accident, his purported need to conduct discovery does not warrant denial of the motion (see *Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368, 815 NYS2d 736 [2d Dept 2006]).

Therefore, this motion by plaintiff for an order awarding summary judgment in her favor on the issue of liability and dismissing the defendant’s affirmative defenses of comparative negligence and any cross claims, is granted in all respects; and it is further

ORDERED that the attorneys for the parties shall proceed to discovery on the issue of damages; and it is further

ORDERED that upon the completion of discovery and the filing of a Note of Issue, this action shall proceed to trial on the issue of damages; and it is further

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ORDERED, that the plaintiff and defendant's attorneys shall appear on **June 17, 2024 at 9:30 a.m.** in part 74, 3rd Floor, Courtroom 4 of the Arthur M. Cromarty Court Complex, 210 Center Drive, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted.

The foregoing constitutes the decision and Order of this Court.

Dated: April 10, 2024



HON. ALISON J. NAPOLITANO
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION