

McCollough v Forger
2024 NY Slip Op 35627(U)
April 16, 2024
Supreme Court, Nassau County
Docket Number: Index No. 611787/2023
Judge: Thomas Rademaker
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**SUPREME COURT- STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL/IAS PART12**

PRESENT:

Hon. Thomas Rademaker, J.S.C.

CARLTON MCCOLLOUGH,

Plaintiff,

Index No: 611787/2023

-against-

Motion Seq. No.: 003

Motion Submitted: 4/16/2024

**DAVID SALOMON FORGER and ALCAPP
GLASS & MIRROR COMPANY, LTD,**

DECISION AND ORDER

Defendants.

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.1
Affirmations in Opposition.....2

The Plaintiff moves pursuant to CPLR §3212, for an Order which seeks, *inter alia*, summary judgment against Defendant with respect to the liability. The Defendant opposes this motion.

This action arises out of a rear-ended motor vehicle collision that occurred on April 19, 2023, at approximately 11:00 am on Glen Cove Road near its intersection with Cedar Swamp Road in Oyster Bay, New York. The Plaintiff contends that he sustained a rear ended impact from the Defendant's vehicle, which was owned by the Defendant ALCapp Glass & Mirror Company, LTD and operated by Defendant David Salmon Forger. The above captioned Plaintiff was the operator of

Plaintiff's motor vehicle and had two passengers, Christopher McCollough and Gwendolyn Langston, who brought actions against the named defendants under separate index numbers.

The Plaintiff commenced this action through the filing and serving of a Summons and Complaint upon the Defendant, with said Summons and Complaint being filed with the Court on July 26, 2023. The Defendants filed their Answer with the Court on August 22, 2023. A Preliminary Conference was held on December 14, 2023, but at this juncture discovery has not been completed.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept, 1992]), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

A motion for summary judgment is premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence, more speculation will not suffice. (See *Bevens v. Tarrant Mfg., Co, Inc.* 48 AD3d 939 [3rd Dept 2008]) “A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” (*Elliot v. County of Nassau*, 53 AD3d 561, 563 [2nd Dept 2008] quoting *Amico v Melville Volunteer Fire Co., Inc.* 39 AD3d 784, 785 [2nd Dept 2007], citing *Urcan v. Cocarelli*, 234 AD2d 537 [2nd Dept 1996])

CPLR 3212[F] provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

However, a rear end collision is a sufficient basis to create a prima facie case of liability on the part of a defendant and impose a duty of explanation with respect to the operator of the offending vehicle, (*Mead v. Marino*, 2015 AD2d 669; *Young v. City of New York*, 113 AD2d 833). The Plaintiff has submitted sufficient evidence to establish a prima facie case for liability, which includes the affidavit from the plaintiff and a police accident report with demonstrate that the Plaintiff sustained a rear impact .

In contrast, the Defendant did not submit admissible evidence to rebut the Plaintiff’s prima facie case, but instead argues that summary judgment is “premature” without his deposition testimony. Here, pre-discovery summary judgment is not premature as the Defendants have failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify

opposition to the motions were exclusively within the knowledge and control of the plaintiffs .
(Rodriguez v Farrell, 115 AD3d 929, 931 [2d Dept 2014])

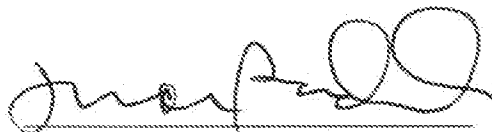
Upon a careful review of the papers submitted in support the Plaintiff's motion, along with their respective annexed exhibits, it has been established that the Defendant has failed to rebut the Plaintiff's *prima facie* case for the Defendants' liability, and accordingly it is

ORDERED, that the Plaintiffs' motion for summary judgement in favor of the Plaintiffs and against the Defendants solely with respect to liability is **GRANTED**, and that the Defendants' affirmative defenses of assumption of risk and culpable conduct are **DISMISSED**, and it is further

ORDERED, that this matter shall continue with respect to damages, including but not limited to the Plaintiffs' obligations to plead and prove that they have sustained serious personal injury within the meaning of Article 51 of the New York State Insurance Law.

This constitutes the Decision and Order of the Court.

Dated: April 16, 2024
Mineola, N.Y.



Hon. Thomas Rademaker, J. S. C.

ENTERED

Apr 18 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE