

Baker v Brady
2024 NY Slip Op 35657(U)
November 12, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 614825/2024
Judge: Alison J. Napolitano
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

INDEX No. 614825/2024
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 10-1-2024
SUBMIT DATE 10-28-2024
Mot. Seq. # 01 - MG-----X
SHIRLEY BAKER,

Plaintiff,

-against-

MEGAN BRADY and JOHN DOE,

Defendants.
-----X**GRUENBERG KELLY DELLA***Attys. for Plaintiff*

700 Koehler Avenue

Ronkonkoma, New York 11779

SCAHILL LAW GROUP, P.C.*Attys. for Defendants*

1065 Stewart Avenue, Suite 210

Bethpage, New York 11714

Upon the following papers read on this motion for Summary Judgment; e-filed on the NYSCEF system as documents 14 - 22 & 23 - 24; it is,

The plaintiff, Shirley Baker, seeks an order pursuant to CPLR §3212 granting summary judgment on the issue of liability and dismissing defendant Megan Brady's third and sixth affirmative defenses. Defendant, Megan Brady, 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]). 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

Baker v. Brady, et al.
Index No. 614825/2024
Page No. 2

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).

In support of this motion, the plaintiff submitted an attorney affirmation; statement of material facts; an affirmation from plaintiff; a copy of the pleadings; a copy of the plaintiff's bill of particulars; and a certified copy of the police accident report.

The plaintiff commenced this action to recover damages for personal injuries sustained as a result of an alleged motor vehicle accident that occurred on June 19, 2023 at approximately 12:20 PM. The plaintiff alleges that she was operating a vehicle heading southbound on Straight Path in the travel lane in the vicinity of the intersection with 16th Street, in the Town of Babylon, Suffolk County, New York. The plaintiff states that she was the seat-belted owner/operator of her 2014 Lexus and was maintaining her lane of travel when suddenly and without warning, her vehicle was stuck by a vehicle owned by defendant Megan Brady. Ms. Baker describes, in her affirmation, that Ms. Brady's vehicle was traveling in the right lane and, without warning, turned left into the passenger side of the plaintiff's vehicle. The plaintiff further states that the impact of the accident caused her Lexus to be propelled across the intersection in a left direction.

In opposition, defendant Megan Brady submitted an attorney affirmation in opposition with no exhibits or defendant affidavit attached. Megan Brady's attorney argues that the motion for summary judgment as to liability should be denied as being premature and further argues it should be denied as there are existing questions of fact.

Baker v. Brady, et al.
Index No. 614825/2024
Page No. 3

Vehicle and Traffic Law §1128 (a) states that a “vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

The Court of Appeals has held the standard by which an opponent can defeat a summary judgment motion. In *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 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]). It has been 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-I-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 at issue sufficient to require a trial. In opposition to the motion, the defendant failed to rebut the prima facie showing and did not submit an affidavit in opposition from the defendant-operator, Megan Brady, 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 Megan Brady had personal knowledge of the relevant facts underlying the accident, her 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]).

Baker v. Brady, et al.
Index No. 614825/2024
Page No. 4

Therefore, this motion by plaintiff for an order awarding summary judgment in her favor on the issue of liability and dismissing defendant Brady's third and sixth affirmative defenses 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

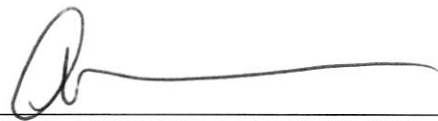
ORDERED that upon the completion of discovery and the filing of a Note of Issue, this action shall proceed to trial on the issue of damages; and it is further

ORDERED, that the plaintiff's and defendant's attorneys shall appear on **February 5, 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 proposed order uploaded by the plaintiff has been marked "not signed".

The foregoing constitutes the decision and Order of this Court.

Dated: November 12, 2024



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

____ FINAL DISPOSITION X NON-FINAL DISPOSITION