

Santiago v All County Amusements, Inc.

2012 NY Slip Op 30488(U)

January 27, 2012

Sup Ct, Nassau County

Docket Number: 21430/09

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:
HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 3
NASSAU COUNTY

JOSEPH SANTIAGO,

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 10/7/11

ALL COUNTY AMUSEMENTS, INC., AND
KURT BAUMBASEN,

INDEX NO.: 21430/09

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by defendants All County Amusements, Inc. and Kurt Baumbush s/h/a Baumbasen for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint against them is determined as follows.

There is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on October 19, 2008. The accident occurred on Sunrise Highway at/or near its nearest intersection with Oakland Avenue in Wantagh, New York. After the accident, a police officer arrived and plaintiff submitted to a breathalyzer test, which he passed.

It is undisputed that plaintiff, an unlicensed driver, was driving his mother's car when the front portion of his vehicle came into contact with the passenger side of defendant's vehicle and that plaintiff declined medical attention except for being briefly examined in the back of an ambulance. It is further undisputed that seven days later, on October 26, 2008, plaintiff first sought medical attention at New Island Hospital Emergency Department, and he was thereafter admitted to Nassau University Medical Center on October 27, 2008 where he remained until December 22, 2008.

The police accident report states as follows:

"Vehicle #1 was in collision with Vehicle #2. Vehicle #2 was in

the process of completing a legal U-turn when Vehicle #1 failed to allow the intersection to clear prior to entering such. Vehicle #2 removed from scene by operator. Operator refused medical aid at scene.”

Defendants move for summary judgment dismissing the complaint on the grounds that the evidence shows that plaintiff’s own failure to yield to traffic with right-of-way is negligent as a matter of law; and plaintiff cannot prove the injuries claimed were caused by the collision rather than by his own culpable conduct in failing to seek timely medical attention. In support thereof, defendants rely upon the following: the pleadings; the deposition testimony of non-party witness, Rosemarie Santiago, plaintiff’s mother; non-party witness Police Officer Thomas Judge; a MV-104A Police Accident Report, photographs of the tractor Mr. Baumbush was driving and three photographs of the intersection; affidavit of Kurt Baumbush; and affidavit of Marc J. Shapiro, M.D.

In his affidavit, Dr. Shapiro states, in pertinent part, as follows:

“Mr. Santiago was involved in a traumatic automobile impact on October 19, 2008. The first medical care he sought was at New Island Hospital on October 26, 2008. At the accident scene Mr. Santiago indicated that he felt satisfactory, therefore declined hospital evaluation. By the time he signed into New Island Hospital his situation had changed dramatically. X-ray studies of the pelvis and chest revealed no fractures or lesions but because of Mr. Santiago’s complex medical past with having had four cardiac stents and an abnormal EKG, among other conditions, he was transferred from New Island Hospital to Nassau County Medical Center for higher level care.

Plaintiff’s Bill of Particulars, ¶ 15, lists the injuries Mr. Santiago attributes to the collision. Plaintiff’s list is taken from the Nassau County Medical Center’s records, however almost all of the conditions/injuries identified were due to complications from his delay in seeking timely treatment and some were pre-existing. During the time Mr. Santiago remained at home without medical

evaluation or treatment, he became septic, which was due to the delay in seeking treatment. He developed several infectious conditions (all identified in the plaintiff's Bill of Particulars); mediastinitis, plumonary empyema, severe sepsis, respiratory failure, open chest wall defect, anterior mediastinitis, septic shock. It is my opinion within a reasonable degree of medical certainty that these conditions were due to the delay in seeking treatment and would not have occurred but for Mr. Santiago's poor choice in foregoing evaluation and treatment.

Mr. Santiago's Bill of Particulars also identifies complications that in my opinion are secondary to the infectious state he developed from his delay; open wound of the chest and the need for open chest surgery and are due to having been left untreated and are therefore secondary to the delay in treatment.

It is my opinion within a reasonable degree of medical certainty that the very most Mr. Santiago has recovered and that my findings of a chest wall deformity and limitation of his right arm are due to the delay because a thoractomy and subsequent chest wall deformity would not have needed to be performed, and his right arm limitation is related to the surgery undertaken in the chest, all of which was avoidable had timely care been accepted by Mr. Santiago."

In opposition to the motion, plaintiff asserts that issues of fact exist that preclude the granting of summary judgment including "whether defendant was negligent in executing a u-turn at a location where the road was not large enough to accommodate his vehicle . . ." (§ 24 of Mr. Pomara's Affirmation). Plaintiff further asserts that defendant was driving an 18 wheel tractor trailer with an amusement park ride on the trailer whereas defendant contends that he was driving a 10 wheel tractor (without trailer) when he was struck broadside into the passenger side of the tractor.

In support thereof, plaintiff submit his own affidavit and attacks the affidavits submitted by Mr. Baumbush and Dr. Shapiro and the deposition testimony of Police

Officer Judge. In sum, plaintiff argues that since there are conflicting versions of how this accident happened based on the affidavit of Mr. Santiago, the affidavit and deposition of Mr. Baumbush and the deposition of Police Officer Judge, credibility issues exist which need to be assessed by a jury. (*Id.* at ¶ 22).

On a motion for summary judgment, it is incumbent upon the movant to 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25 [1989]). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept 1993]). Moreover, summary judgment is often inappropriate in negligence actions (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]), even where the relevant facts are uncontested, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Davis v Federated Department Stores, Inc.*, 227 AD2d 514 [2nd Dept 1996]).

Viewing the evidence in the light most favorable to the non-moving party, plaintiff herein (*Stukas v Streiter*, 83 AD3d 18 [2nd Dept 2011]; *Judice v DeAngelo*, 272 AD2d 583 [2nd Dept 2000]; *Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2nd Dept 2005]), we conclude that issues of fact exist here which preclude summary judgment. Accordingly, the motion is **denied**.

This constitutes the Order of the Court.

Dated: *Jan 27, 2012*

[Handwritten Signature]

J.S.C.

ENTERED

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