Washington v Fuzailou
2016 NY Slip Op 30450(U)
February 18, 2016
Supreme Court, Bronx County
Docket Number: 304191/14
Judge: Howard H. Sherman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Seconda Washington

Plaintiff

-against-

Aleksandr Fuzailou

Defendant

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Decision and Order

Index No. 304191/14

Howard H. Sherman
J.S.C.

Facts and Procedural Background

In this action plaintiff Seconda Washington (" Washington ") seeks recovery for injuries alleged to have been sustained on July 6, 2014 when the bicycle he was riding on Coney Island Avenue in Kings County came into contact with a motor vehicle owned and then being operated by defendant Aleksandr Fuzailou ("Fuzailou").

This action was commenced in August 2014, and issue was joined with the service of defendant's answer in November. The answer asserts seven affirmative defenses including the causative culpable conduct of the plaintiff.

To date, no Note of Issue has been filed.

Motion and Contention of the Parties

Defendant now moves for an order awarding summary judgment on the issue of liability dismissing the complaint on the grounds that the record establishes that his vehicle was stopped when it was struck in the rear by plaintiff's bicycle. In support ,

defendant submits his affidavit and the deposition testimony of Police Officer Hammad Syed , and a copy of the police accident report prepared by Officer Hammad and authenticated at his deposition [HAMMAD EBT: 15]. Fuzailov attests that he had brought his vehicle to a stop in the right of two lanes on Coney Island Avenue when he saw a bicyclist in his rear-view mirror approaching from behind , and he observed that he was riding "without his hands on the handlebars" , and "holding a cellphone or some similar device in his hands and it appeared he was looking down at it and not at the road in front of him." Within five to ten seconds of this observation , plaintiff had struck the rear of defendant's stopped vehicle. Fuzailov also states that his vehicle did not strike any vehicle or object either before or after the accident .

In opposition, plaintiff contends that the motion must be denied as there are unresolved issues of fact, and Washington submits an affidavit in which he attests that defendant was proceeding in traffic to the left of his bicycle when "suddenly , and without warning, the defendant's vehicle moved to the right , pinning the handlebars of my bicycle between the right side of the Infiniti (the rear passenger door area) and a parked car, as well as striking my left leg." Plaintiff further states that this caused his bicycle to flip , "throwing both the bicycle and my body into the air [ ]" and causing him to strike portions of a parked vehicle. Washington states that there was nothing he could do to avoid the accident, nor did he ever speak to a police officer as to the circumstances of the accident. He also attests that details recorded in the police report of the accident are inaccurate, i.e.,

that he was riding without his hands on the handlebars; that he was using a cellphone prior to the incident; that he was following defendant's vehicle too closely, or at all. He also denies telling the police officer that defendant stopped short , and that he struck his vehicle.

In reply, defendant contends that plaintiff's version of the bicycle's impact with his vehicle is incredible as it would be impossible to be "pinned"between two cars, and also be "flip[ped]" onto the parked car . It is also argued that Washington's version of the circumstances of the accident is contradicted by both the physical evidence , asserting a point of impact to the vehicle's rear passenger door area, and not to the rear of the vehicle , as is reflected in the damage codes of the police report, and by plaintiff' s own contemporaneous statement at the accident scene, which is admissible as an admission against interest, confirming a rear-end collision with Fuzailou's vehicle precipitated by that driver's sudden stop.

Discussion and Conclusions

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as

the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart*, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt.

Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (*Wilson v. Sponable*, 81 AD2d 1, 5; Siegel , Practice Commentaries , McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " Johnannsdottir v. Kohn, 90 AD2d 842, 456 N.Y.S.2d 86 [2d Dept. 1982] , such a motion will be granted "where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (Morowitz v. Naughton, 150 AD2d 536 [2d Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 , 699 N.Y.S.2d 393 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

Upon review of the moving papers, and consideration of the applicable law, it is the finding of this court that the record here , consisting of the affidavits of the respective parties' providing starkly discrepant versions of the way the motor vehicle accident happened , present issues of fact as to liability requiring an assessment of credibility properly to be resolved by the triers of fact (see Talansky v Schulman, 2 AD3d 355, 357, 770 NYS2d 48 [1st Dept 2003]; Stewart v Ellison, 28 AD3d 252, 254, 813 NYS2d 397 [1st Dept 2006]; Susino v. Panzer, 127 A.D.3d 523, 7 N.Y.S.3d 120 [1st Dept. 2015]). The unresolved questions include whether or not plaintiff provided the responding police

officer with a contemporaneous description of a rear-end collision with a stopped vehicle thereby creating a presumption of his sole causative negligence , as the assertion of defendant's sudden stop , without more , would be insufficient to rebut the presumption of Washington's negligence (see, Santana v Tic-Tak Limo Corp., 106 AD3d 572, 966 NYS2d 30 [1st Dept 2013]; Corrigan v Porter Cab Corp., 101 AD3d 471, 472, 955 NYS2d 336 [1st Dept 2012]).

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This shall constitute the decision and order of this court.

Dated: February 18, 2016

Howard H. Sherman