Nasta v Bauer
2013 NY Slip Op 33008(U)
December 3, 2013
Sup Ct, New York County
Docket Number: 802/12
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NICHOLAS P. NASTA and JOANN NASTA,

Plaintiffs,

-against-

KENNETH A. BAUER; PENSKE TRUCK LEASING CO.; and ACE HARDWARE CORP., d/b/a ACE HARDWARE,

Defendants.

DECISION and ORDER
INDEX NO. 802-12
RJI NO. 01-13-110177

Supreme Court Albany County All Purpose Term, November 12, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Nicholas P. Nasta (hereinafter "Plaintiff"), with his wive derivatively, commenced this personal injury action to recover the damages he allegedly sustained when the vehicle Kenneth A. Bauer (hereinafter "Defendant") was operating struck, from behind, the vehicle Plaintiff was driving. Issue was joined, discovery is complete, and a note of issue has been filed.

Plaintiff now moves for summary judgment on the issue of Defendant's liability and to strike three affirmative defenses from Defendant's answer. Defendant opposes the motion. Because triable issues of fact remain, Plaintiff's motion is denied.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]).

"[T]he movant bears the threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law." (Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769 [3d Dept 2004]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). Upon such showing, the burden shifts to the non-movant to establish, by admissible proof, the existence of a genuine issue of material fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

First, Plaintiff duly established Defendant's prima facie negligence.

It is well settled that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision." (Gutierrez v Trillium USA, LLC, __AD3d__ [2d Dept 2013], quoting Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept 2012]; Tutrani v. County of Suffolk, 10 NY3d 906 [2008]; Jaycox v Hardesty, 305 AD2d 720 [3d Dept 2003]).

Here, Plaintiff established that Defendant's vehicle struck his stopped or stopping vehicle

from behind. Plaintiff submitted excerpts of both his and Defendant's depositions.[1] The excerpts show that Defendant was driving a tractor-trailer behind Plaintiff, who was driving his pickup truck. Both were traveling west on Route 7 in Albany County, near its intersection with Route 87. Numerous other vehicles were stopped or stopping on Route 7's right westbound lane, to enter onto Route 87. Plaintiff too stopped, or was stopping, behind the other vehicles on Route 7's right westbound lane when Defendant's tractor-trailer hit him from behind. With this proof, Plaintiff made a prima facie showing of Defendant's negligence.

With the burden shifted, Defendant "provide[d] a nonnegligent explanation for the collision" with excerpts from the parties' depositions. (Appollonia v Bonse, 92 AD3d 1170, 1171 [3d Dept 2012]; Tripp v GELCO Corp., 260 AD2d 925 [3d Dept 1999]). Defendant testified that as he was traveling westbound in Route 7's right lane, with flies buzzing around his face, he was applying the tractor trailers' brakes and checking his mirrors. He stated that, just prior to the subject accident, Plaintiff suddenly entered into his lane. Plaintiff similarly testified that he was in the right lane for "[j]ust a couple seconds" before the collision. Moreover, according to Defendant, all of the traffic, including Plaintiff, "was backing up off the exit [for Route 87] quickly." Plaintiff's sudden entry into Defendant's lane of travel and the traffic's quick "backing up," when viewed in a light most favorable to Defendant, raises triable issues of fact concerning Defendant's liability. (Markesinis v Jaquez, 106 AD3d 961 [2d Dept 2013]; Abbott v Picture Cars E., Inc., 78 AD3d 869 [2d Dept 2010]; Menelas v Yearwood-Bobb, 100

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[1] Although the excerpts were unsigned, Plaintiff's submission of his own deposition transcript was admissible (Pavane v Marte, 109 AD3d 970 [2d Dept 2013]; Rodriguez v Ryder Truck, Inc., 91 AD3d 935, 936 [2d Dept 2012]) and Defendant's attorney explicitly consented to this Court's consideration of Defendant's unsigned deposition excerpts.

AD3d 603 [2d Dept 2012]).

Accordingly, Plaintiff's motion for summary judgment on Defendant's liability is denied.

With triable issues of fact remaining on negligence, this record does not support Plaintiff's motion for summary judgment dismissing Defendant's contributory negligence affirmative defense. Similarly, the issues of fact also preclude summary judgment dismissing Defendant's affirmative defense that claims his liability is fifty percent or less. These issues of comparative negligence and percentage of liability are for a jury to decide. (Gaeta v Carter, 6 AD3d 576 [2d Dept 2004]; Gutierrez v Trillium USA, LLC, supra).

Lastly, Plaintiff failed to demonstrate his entitlement to summary judgment dismissing Defendant's "seatbelt non-use" affirmative defense. Plaintiff offered no admissible proof that he was wearing his seatbelt at the time of the subject accident. He offered no affidavit to establish such fact, and his deposition excerpts are silent on his seatbelt use. Plaintiff instead wrongly relies on a police accident report and a NYS Department of Motor Vehicles form. These unexplained and unsworn documents constitute inadmissible hearsay. (Ulster County v CSI, Inc., 95 AD3d 1634 [3d Dept 2012]; Batista v Santiago, 25 AD3d 326 [1st Dept 2006]; Siemucha v Garrison, __AD3d__ [4th Dept 2013]). As such, Plaintiff failed to meet his prima facie burden on this portion of his motion.

Accordingly, Plaintiff's motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 3, 2013
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 21, 2013, Affirmation of David Kohn, dated October 21, 2013, with Exhibits "A" - "G".
2. Affidavit of Mark Donohue, dated November 4, 2013, with attached Exhibits "A" - "C".