Fraser v Fratto
2016 NY Slip Op 30449(U)
February 5, 2016
Supreme Court, Bronx County
Docket Number: 303930/13
Judge: Howard H. Sherman
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[* 1] FILED Feb 16 2016 Bronx County Clerk

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

NORMAN FRASER,

Plaintiff,

-against-

THOMAS J. FRATTO, CARMELA FRATTO, LLOYD H. FOSTER and STEPHANIE L. FOSTER,

Defendants.
--X

Index No.: 303930/13

DECISION/ORDER

Howard H. Sherman
J.S.C.

Facts and Procedural History

In this action, plaintiff seeks recovery for injuries allegedly sustained on February 1, 2013 in a two-vehicle collision that occurred on the westbound I-287 (RFK Bridge Roadway) at or near 125th Street and Second Avenue. At the time, plaintiff was a passenger in a vehicle being driven by defendant Lloyd H. Foster that came into contact with a vehicle being driven by Thomas J. Fratto.

This action was commenced in June 2013, and issue was joined in the following month with the service of the answer of defendants Thomas J. Fratto and Carmelita Fratto ("the Fratto defendants"), and in August, co-defendants Lloyd H. Foster and Stephanie L. Foster ("the Foster defendants") interposed their answer.

As pertinent here, both answers interposed cross-claims and asserted affirmative defenses alleging plaintiff's causative culpable conduct.

Motion and Contentions of the Parties

Plaintiff now moves for an award of summary judgment on the issue of liability as against both defendants as he was a passenger and is free of any culpable conduct in the subject accident.

The motion is supported by plaintiff's deposition testimony and a copy of the police accident report.[1]

In opposition, the Foster defendants maintain that the motion should be denied because there is a possibility that a jury could find that Lloyd Foster was not liable for the accident. Defendants also argue that there are triable issues of fact precluding dispositive relief on the issue of liability. A copy of the transcript of Lloyd Foster's deposition is annexed to the papers in opposition.

The Fratto defendants also oppose the motion arguing that they should be allowed to contest the issue of liability as against the co-defendants as there are issues of fact as to which driver is responsible for the accident.

In reply, plaintiff argues that defendants fail to rebut his showing that he bears no liability for the accident, and he further contends that the contention that co-defendant Fratto is solely responsible for the collision is unresolved as each defendant driver testified that the other driver swerved into his lane.[2]

Discussion

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]). Upon consideration of the motion, "the evidence must be construed in a light most favorable to the party opposing the motion (Weiss v Garfield, 21 AD 2d 156.)" Matter of Benincasa v Garrubbo, 141 AD 2d 636, 637-638; 529 NYS 2d 797 [2nd Dept. 1988]; see also, Fundamental Portfolio Advisors,

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[1] As the copy is uncertified, it is not admissible for consideration on the motion.

[2] A copy of Fratto's deposition is annexed to the reply papers.

Inc. v Tocqueville Asset Mgt., LP, 7 NY 3d 96, 850 NE 2d 653, 817 NYS 2d 606 [2006]).

This "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]).

Failure to demonstrate the absence of any material issues of fact requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see, Alvarez v Prospect Hospital, 68 NY 2d 320, 324 [19986]; see also, Smalls v AJI Industries, Inc. 10 NY 3d 733, 735 [2008]; Vega v Restani Constr. Corp., 18 NY 3d 499; 965 NE 2d 240 [2012]).

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, Peskin v New York City Transit Auth. 304 AD 2d 634, 757 NYS 2d 594 [2nd Dept. 2003]; Torres v Indus. Container, 305 ad 2D 136, 760 nys 2D 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 AD 3d 578, 876 NYS 2d 38 [1st Dept. 2009]).

Once such a prima facie 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].

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]).

Conclusions

With respect to that branch of the motion seeking an award of summary judgment on the issue of liability as against defendants while it is settled that the "right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence" among the defendants (Johnson v Phillips, 261 AD 2d 269, 272, 690 NYS 2d 545 [1st Dept. 1999], citing authority of Silberman v Surrey Cadillac Limousine Serv., 109 AD 2d 833, 834, 486 NYS 2d 357 [2nd Dept. 1985], the deposition testimony here consisting of starkly different accounts of the side-swipe collision does not permit for such

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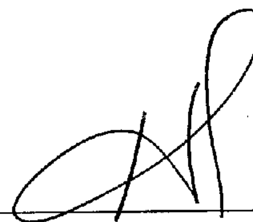
a finding (compare, Perry v Dumont, 77 AD 3d 466 690 NYS 2d 545 [1st Dept. 2010], Delgado v Martinez Family Auto, 113 AD 3d 426, 979 NYS 2d 277 [1st Dept. 2014]).

Since it is undisputed that plaintiff was a passenger, and no evidence is submitted to rebut his showing that as a matter of law he was free of negligence, entitled to a finding of culpable conduct on the issue of liability (see, Mello v Narco Cab Corp., 105 AD 3d 634, 963 NYS 2d 581 [1st Dept. 2013]), and the respective affirmative defenses alleging plaintiff's causative negligence are dismissed.

Accordingly, it is

ORDERED that the motion of the plaintiff be and hereby is granted solely to the extent of finding no culpable conduct by plaintiff on the issue of liability, and the affirmative defenses of defendants alleging same are dismissed.

This constitutes the decision and order of this court.



Dated: February 5, 2016
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