

Dupiton v New York City Tr. Auth.

2018 NY Slip Op 33234(U)

November 26, 2018

Supreme Court, Queens County

Docket Number: 706229/2016

Judge: Ernest F. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ERNEST F. HART** IAS PART 6
Justice

RULX DUPITON, JR.,

Plaintiff(s),

-against-

NEW YORK CITY TRANSIT AUTHORITY, MTA
BUS COMPANY, METROPOLITAN TRANSIT
AUTHORITY, and THE CITY OF NEW YORK,

Defendant(s).

JUSTICE ERNEST F. HART

Index No.: 706229/2016

Motion Date:
July 9, 2018

Cal. Nos.: 15, 16 & 17

Mot. Seq. Nos.: **2, 3 & 4**

The following papers read on this motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for an Order, *inter alia*, vacating the Note of Issue, and compelling Plaintiff to complete discovery, and extending the time to move for summary judgment until 120 days from the date of completion of all outstanding discovery (Sequence No. 2); on the motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing the Complaint on the grounds that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law (Sequence No. 3); and on the motion by Plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff on the issue of liability (Sequence. No. 4).

Sequence No. 2

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits HC 1-5
Answering Affidavits-Exhibits..... EF 11
Replying Affidavits.....

Sequence No. 3

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	HC 1-3
Answering Affidavits-Exhibits.....	EF 36-43
Replying Affidavits.....	HC 4-5

Sequence No. 4

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	EF 12-25
Answering Affidavits-Exhibits.....	HC 1-3
Replying Affidavits.....	EF 44-45

Upon the foregoing papers, it is ordered that the motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for an Order, *inter alia*, vacating the Note of Issue, and compelling Plaintiff to complete discovery, and extending the time to move for summary judgment until 120 days from the date of completion of all outstanding discovery (Sequence No. 2); on the motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing the Complaint on the grounds that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law (Sequence No. 3); and on the motion by Plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff on the issue of liability (Sequence. No. 4), are determined as follows:

Plaintiff commenced the above action to recover for personal injuries allegedly sustained on or about March 24, 2015 as a result of a motor vehicle accident between Plaintiff and a NYCTA bus. The accident occurred on Hillside Avenue at or near its intersection with 209th Street, Queens County.

Plaintiff filed a Notice of Claim on or about May 13, 2015. Plaintiff commenced this action by the filing of a Summons and Verified Complaint on May 26, 2016. Issue was joined by the service of a Verified Answer with discovery demands by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSPORTATION AUTHORITY S/H/A METROPOLITAN TRANSIT AUTHORITY on or about June 20, 2016. Discovery demands and responses were served, and depositions went forward. On May 23,

2017, Plaintiff discontinued his claims against THE CITY OF NEW YORK per a Stipulation of Discontinuance filed on February 7, 2017. A Note of Issue was filed on December 13, 2017.

Now, upon motion, the Plaintiff argues that he is entitled to summary judgment on the issue of liability because Plaintiff's vehicle was rear-ended by a motor vehicle owned by the Defendants. As such, according to Plaintiff, there are no triable issues of fact for the jury.

Summary judgment is a drastic remedy, which deprives a litigant of his or her day in court, and should only be granted where there is no doubt as to the absence of triable issues. See Kolivas v. Kirchoff, 14 A.D.3d 493 (2d Dep't. 2005); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The Court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility but to determine whether such issues exist. See Scott v. Long Island Power Auth., 294 A.D.2d 348 (2d Dep't. 2002); Anyanwu v. Johnson, 276 A.D.2d 572 (2d Dep't. 2000). In viewing the evidence, the Court must accept the plaintiff's pleadings as true and the proof must be read in the light most favorable to the plaintiff, as the party opposing the motion. See Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

Plaintiff testified at his Municipal 50-h hearing that he was traveling eastbound on Hillside Avenue before the incident occurred. He testified that he was proceeding to make a right turn from Hillside Avenue. He further testified that his vehicle was half way through its turn and that he recalled the subject NYCTA bus was stopped. Plaintiff testified that he did not observe the bus approach his vehicle before the collision occurred.

The driver of the NYCTA bus and non-party, Nasir Mahmood, testified at his deposition that he was operating the NYCTA bus in the parking lane of Hillside Avenue. From 4:00 P.M. to 7:00 P.M., this subject parking lane is a designated bus lane. Mr. Mahmood recalled that the accident occurred between 4:30 P.M. and 5:00 P.M. Mr. Mahmood testified that the subject intersection was controlled by a traffic light was he remembered to be green at the time of the accident. He testified that the Plaintiff was traveling to the left of the bus and that at some point, a passenger in Plaintiff's vehicle raised their right hand to indicate that they were proceeding to make a right turn from the center lane. Mr. Mahmood testified that Plaintiff's car was about one car length ahead when Plaintiff proceeded to make that

turn. Upon observing Plaintiff attempting to make the turn, Mr. Mahmood attempted to stop the bus.

Upon review, the inconsistent deposition testimonies of the driver of defendants' vehicle and plaintiff raises issues of fact and precludes a finding of summary judgment in favor of Plaintiff on the issue of liability. Accordingly, the motion by Plaintiff for summary judgment on the issue of liability (Sequence No. 4) is **DENIED**.

As to the motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for an Order, *inter alia*, vacating the Note of Issue, and compelling Plaintiff to complete discovery, and extending the time to move for summary judgment until 120 days from the date of completion of all outstanding discovery (Sequence No. 2), it is

ORDERED that the within motion, insofar as same seeks to vacate Plaintiff's Note of Issue filed on December 13, 2017, is denied; and it is further

ORDERED that the application to preclude plaintiff from offering any evidence at trial referable to any subject on which discovery has not been provided, is denied, without prejudice to renewal in the event Plaintiff fails to provide fully executed, HIPAA-compliant authorizations for those providers set forth the Preliminary Conference Order and the Compliance Conference Order, dated April 24, 2017, within 20 days of service of the within order with notice of entry, to the extent not already provided, as well as, an executed 50-h hearing transcript, Verified Supplemental Bill of Particulars, and Plaintiff's vehicle repair bills, to the extent not already provided, within 20 days of service of the within order with notice of entry; and it is further

ORDERED that Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY shall serve Plaintiff with a copy of this order, together with notice of entry, within 15 days of the filing of this order by the Queens County Clerk.

With respect to the motion by Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, and METROPOLITAN TRANSIT AUTHORITY for summary judgment and dismissing Plaintiff's

complaint on the issue of damages (Sequence No. 3), said motion is respectfully **DENIED** as there is outstanding discovery with respect to medical records.

Dated: November 26, 2018

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ERNEST F. HART, J.S.C.