

**Castillo v Slupecki**

2018 NY Slip Op 33494(U)

October 12, 2018

Supreme Court, Bronx County

Docket Number: 306093/2013

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
MADINA R. CASTILLO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 306093/2013

MIECZYSLAW SLUPECKI,

Defendant.

-----X

John R. Higgitt, J.

Upon plaintiff's January 10, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; defendant's affirmation in opposition and the affidavit submitted therewith; plaintiff's affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject motor vehicle accident and to preclude defendant from offering evidence at trial is granted in part.

Plaintiff moves for partial summary judgment on the issue of defendant's liability for causing the subject accident. In support of the motion, plaintiff submits her affidavit in which she avers that she was crossing the street in the crosswalk with the light in her favor when she was struck by defendant's vehicle as it turned left. Plaintiff avers she checked for traffic in both directions before entering the crosswalk. This was sufficient to meet plaintiff's prima facie burden on the motion (*see Evart v Terzi*, 150 AD3d 514 [1st Dept 2017]).

In opposition, defendant argues that there is a question of fact as to plaintiff's comparative negligence, as defendant avers that plaintiff was not in the crosswalk at the time of the accident. Defendant's "affidavit," however, was not in admissible form. The document was not sworn, and it did not contain sufficient indication that it was "administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs" (CPLR 2309[b]; *cf. Collins v AA Trucking Renting Corp.*, 209 AD2d 363 [1st Dept 1994]). Defendant merely recited what he "remembered" and does not appear to have signed his statement in the presence of the notary. Even if the affidavit is considered, defendant does not raise an issue of fact as to his own negligence. Notably, "a

plaintiff's comparative negligence is no longer a complete defense to be pleaded and proven by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages and should be pleaded and proven by the defendant" (*Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]).

Plaintiff also moves to preclude defendant from offering evidence at trial on the issue of liability for his failure to appear for deposition. The motion was not accompanied by an affidavit of good faith. Any motion relating to disclosure must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR § 202.7[a][2]). Failure to do so is, standing alone, sufficient ground to deny the motion (*see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]). The required good faith affirmation will be excused, however, where it is demonstrated that such conferral would be futile (*see Scaba v Scaba*, 99 AD3d 610 [1st Dept 2012]; *Baulieu v Ardsley Assoc. L.P.*, 84 AD3d 666 [1st Dept 2011]). Defense counsel concedes that defendant has returned to Poland permanently and will not be produced for deposition.

The court notes that plaintiff did not seek (and the court has not considered) dismissal of defendant's affirmative defense of comparative fault (*see* CPLR 2214[a]).

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject motor vehicle accident is granted; and it is further

ORDERED, that the aspect of plaintiff's motion to preclude defendant from offering evidence at trial as to liability is granted to the extent that defendant is precluded from offering testimony and evidence at trial as to his own liability; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: October 12, 2018

  
John R. Higgitt, A.J.S.C.