

**Quiroz v Gallery**

2018 NY Slip Op 34200(U)

October 25, 2018

Supreme Court, Westchester County

Docket Number: Index No. 51478/2017

Judge: Helen M. Blackwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
MICHAEL QUIROZ,

Plaintiff,

DECISION and  
ORDER

-against-

INDEX NO.:  
51478/2017

SCOTT GALLERY,

Defendant.  
-----X

BLACKWOOD, A.J.S.C.

The following papers (e-filed documents 29-40, 47-60) were read on the E-filed motion by defendant SCOTT GALLERY, for an order granting summary judgment dismissing the action against him:

Papers

Notice of Motion, Affirmation in Support (Exhibits A-I)

Affirmation in Opposition, Memorandum of Law (Exhibits 1-9)

Reply Affirmation (Exhibits A & B)

Upon reading the foregoing papers it is

ORDERED that the branch of the motion which seeks an order granting summary judgment dismissing the action against SCOTT GALLERY is denied in its entirety; and it is further

ORDERED that the parties are directed to appear on November 27, 2018, at 9:15 am in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King Boulevard, White Plains, New York, prepared to conduct a settlement conference

MICHAEL QUIROZ ("Plaintiff") filed a summons and verified complaint against SCOTT GALLERY ("Defendant") on February 1, 2017, relating to an automobile accident. It is undisputed that the accident occurred at approximately 7:00 pm on February 2, 2014, in the vicinity of 9 Broad Avenue in Ossining, New York. The defendant was driving his vehicle behind the plaintiff's vehicle. The defendant had a flashing blue-light on his dashboard, which he used when responding to emergencies as a volunteer firefighter. As the plaintiff slowed his vehicle in order to make a left turn into a driveway, the defendant's vehicle struck the plaintiff's vehicle in the driver's side door. As a result, the plaintiff alleges to have suffered injuries, including a sprain of the cervical, thoracic and lumbar spine.

On February 22, 2017, defendant filed a verified answer, which included nine affirmative defenses. On January 11, 2018, the defendant filed an Order to Show Cause seeking to amend his verified answer pursuant to section 3025(b) of the Civil Practice Law and Rules ("CPLR") to include the affirmative defense of Statutory Immunity pursuant to General Municipal Law §205-b since he was a volunteer firefighter on his way to an emergency at the time of the accident. This court granted the defendant's application, finding that the deposition of defendant included testimony indicating that he was a volunteer firefighter on his way to an emergency at the time of the accident, thereby giving notice to plaintiff of the possible defense.

Now, the defendant moves for summary judgment, arguing that there are no issues of fact as to whether or not he is insulated from liability for the motor vehicle accident since he was in the course of his duties as a volunteer firefighter at the time of the accident pursuant to GML §205-b. GML §205-b protects a person from being "liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance" (GML §205-b). The defendant points out that there has been no allegations that he



acted with willful negligence or malfeasance and therefore, he cannot be found liable for the accident.

CPLR 3212 requires that a summary judgment motion be granted “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212[b]). Here, the defendant relies upon his own deposition testimony to establish that he was on his way to an emergency call at the time of the accident, and therefore, was acting in the performance of his duty as a volunteer firefighter for the Village of Ossining. He contends that since there are no triable issues of fact as to this defense, he has established his entitlement to the remedy of summary judgment (see Colletti v. Pereira, 61 A.D.3d 804 [2d Dept. 2009]).


In response, the plaintiff attempts to raise a triable issue of fact as to the defendant’s Statutory Immunity defense by providing to the court an unsigned, unsworn letter from the Clerk of Ossining. The letter was in response to the plaintiff’s Freedom of Information Law (“FOIL”) request looking for records in reference to “Fire & Emergency Calls 5-8 pm on February 2, 2014” (Affirmation in Opposition, Exhibit 9). The letter from the clerk indicates that no such records are “available for the following reason: After speaking with the Fire Chief Minicchio on 5/23/18, he confirmed that there weren’t any Fire & emergency calls made during that time on February 2, 2014” (id). The plaintiff argues that this letter establishes a triable issue of fact as to whether or not the defendant is protected by General Municipal Law §205-b for the purposes of this lawsuit.

While the defendant correctly argues that this unsigned and unsworn document has no probative value to his application for summary judgment, such argument is inconsequential. Rather, in determining this motion, the court is focused on that the fact that the defendant is

uniquely situated since he is the only party to know whether or not he was on his way to a fire on the evening of the accident. Indeed, “[s]ummary judgment is unavailable when, as here, the salient facts underlying the motion are solely within the knowledge of the moving party” (Santorio v. Diaz, 86 A.D.2d 926, 926 [3d Dept. 1982]). This pivotal fact, attested to only by the defendant, should be the subject of cross-examination at trial (see Frame v. Mack Markowitz, Inc., 125 A.D.2d 442 [2d Dept. 1986]). Furthermore, since the defendant failed to include this affirmative defense in his original answer, the plaintiff was not on notice to fully explore the matter during the deposition of the defendant. Therefore, the court finds that the defendant has not established his right to summary judgment and the motion is denied.

This constitutes the decision, and order of this Court.

Dated: White Plains, New York  
October 25, 2018

  
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HON. HELEN M. BLACKWOOD  
Acting Justice of the Supreme Court

Via E-filing to the attorneys of record