Martino v Bernard
2018 NY Slip Op 34343(U)
December 7, 2018
Supreme Court, Nassau County
Docket Number: Index No. 608987/2016
Judge: Steven M. Jaeger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35

X

MARJORIE MARTINO,

Plaintiff, **Index No.: 608987/2016**

-against- **Mot Seq. No.: 04,05 & 06**
Motion Date: 11/19/2018

YVES R. BERNARD, CARLOS G. HERNANDEZ, VERONICA A. BAILY and EAN HOLDINGS LLC.,

Defendants

X

Papers submitted:

Notice of Motion, Affirmation & Exhibits	x
Affirmation in Opposition & Exhibits	x
Reply Affirmation	x
Notice of Motion, Affirmation & Exhibits	x
Affirmation in Opposition	x
Notice of Motion, Affirmation & Exhibits	x
Affirmation in Opposition & Exhibits	x
Affirmation	x

The motion (004) by the defendants, Yves R. Bernard and Carlos G. Hernandez ("Bernard" and "Hernandez" collectively "co-defendants"), for an Order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint and cross-claims against them, is determined as provided herein.

The motion (005) by the defendant, Veronia A. Baily i/s/h/a Veronica A. Baily ("Baily"), for an Order, pursuant to CPLR §2221, granting him reargument and/or renewal of the Court Order, dated July 12, 2018, and upon reargument and/or renewal, vacating the Order granting plaintiff's and defendants' motions to preclude Baily from offering any evidence at trial, and upon renewal and/or reargument and accepting and considering Baily's affirmation in opposition, denying the plaintiff 's and co-defendants' motions to preclude Baily from offering any evidence at trial in this action, is determined as provided herein.

The motion (006) by plaintiff, Marjorie Martino ("plaintiff"), for an Order, pursuant to CPLR §3212, granting summary judgment against defendant Baily on the issue of liability, is determined as provided herein.

The plaintiff commenced this action for injuries she alleges to have sustained in a motor vehicle accident on June 7, 2016 when she was a front seat passenger in a 2013 BMW X5 vehicle (SUV), operated by Bernard and owned by Hernandez, that was in a collision with the 2015 Freightliner box truck, operated by Baily and owed by EAN Holdings LLC[1] (EAN). At the time of the accident, both vehicles were on Flatlands Avenue in Brooklyn facing, (or heading) towards the Flatbush Avenue intersection.

The plaintiff and co-defendants previously moved to strike the answer or preclude defendant Baily for his failure to appear for his oral deposition. Justice Peck, by Order dated July 12, 2018, granted those unopposed motions, to the extent of precluding Baily from offering any evidence at trial in this action, and directing defendant, Hernandez to attend a deposition.

Now on these motions, the plaintiff and Bernard assert they are entitled to summary judgment against Baily, as the vehicle they were in was stopped, parked when it was struck by the vehicle operated by Baily. They further assert that is undisputed and cannot be contested by Baily as he is precluded from presenting any evidence in this action.

At her deposition, the plaintiff testified she was a passenger in the BMW vehicle operated by Bernard and owned by Hernandez, which was stopped, parked on Flatlands Ave, in the middle of the block, facing Flatbush Ave., when the accident occurred. Defendant, Bernard testified that he was in the driver's seat of the BMW which was stopped, parked about one foot from the curb on Flatlands Ave., facing towards Flatbush Ave. As he was parked in the BMW, with the engine off, the Freightliner truck swerved to its right striking causing the passenger side of the truck to strike the drivers side and front of the BMW vehicle.

[1] The action against defendant EAN Holdings LLC has been discontinued.

Leave to renew or reargue is governed by Civil Practice Law and Rules § 2221, which provides as follows, in pertinent part:

> **Rule 2221. Motion affecting prior order**
>
> (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it....

Defendant, Baily's motion to renew and/or reargue the Order of Justice George R. Peck, dated July 12, 2018, has been reassigned due to death of Justice Peck.

"A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion' " (*Castillo v Motor Veh. Acc. Indem. Corp.*, 161 AD3d 937,938 [2nd Dept 2018], quoting CPLR §2221[d]l2l). "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Mudgett v. Long.Is. R.R.*, 81 AD3d 614,614 [2nd Dept 201l] [internal quotation marks omitted]).

A motion for renewal is based on new facts which were not submitted to the court on the original motion (*Landmark Capital Partners, LLC v Greaves*,164 AD3d 573 [2nd Dept 2018]; *Capital One Bank v Phillips*,16l AD3d 1035, 1036 [2d Dept 2018]). "Where a party moves for renewal based upon facts known at the time of the original motion, it is within the sound discretion of the court to grant renewal. In such cases, however, the moving party must show a reasonable justification for the failure to submit the facts on the original motion (citation omitted)" (*Saccomagno v City of New York*, 29 AD3d 979,980 [2nd Dept 2006]).

On the motion to renew and/or reargue, defendant, Baily, asserts that the motion by co-defendants, Bernard and Hernandez, to preclude, should not have been adjourned as their attorney consented to an adjournment which was conveyed to the Court. Counsel for Baily also asserts that due to the inability to contact the plaintiff's attorney, to adjourn

her motion, despite numerous and repeated attempts to do so, which was also conveyed to the Court, an Affirmation in Opposition, dated June 28, 2018, was filed with the Court and served on the parties on June 28, 2018. Baily argues that, despite seeking an adjournment of the motions and submitting an Affirmation in Opposition, the motions were submitted and decided without considering defendant's opposition to the motions.

This Court is not privy to any communications defendant Baily may have had with Justice Peck's chambers regarding the prior motions. Based upon the papers submitted on these motions and Justice Peck's Order, dated July 12, 2018, it appears that the Affirmation in Opposition, submitted on behalf of defendant Baily, was not considered on the plaintiff's and co-defendants' motions to strike and/or preclude. Accordingly, defendant, Baily's motion to reargue is granted.

It is well settled that "the penalty of preclusion is extreme and should only be imposed when the failure to disclose has been willful or contumacious" (*Kingsley v Kantor*, 265 AD2d 529,530 [2nd Dept 1999]; *Nicolette v Ozram Transportation, 1nc.*, 286 AD2d,719 [2nd Dept 2001]). "As public policy strongly favors the resolution of actions on the merits whenever possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious" (*Desiderio v Geico Gen. Ins. Co.*, 153 AD3d 1322, 1322 [2nd Dept 2017]; quoting *Henry v Datson*, 140 AD3d 1120, 1122 [2nd Dept 2016]). "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse (citations omitted)" (*Mears v Long*, 149 AD3d 823, 823-24 [2nd Dept 2017]).

Accordingly, upon reagument, the Order of Justice Peck, dated July 18, 2018 ,is vacated and the plaintiff's and co-defendants' motions to strike, preclude or compel, are granted to the extent that Veronia A. Baily i/s/h/a Veronica A. Baily shall appear for oral deposition on or before January 25, 2019, or he shall be precluded from offering evidence at trial.

On the motion by defendants, Bernard and Hernandez, for summary judgment dismissing the complaint and cross-claims against them, and on plaintiff's motion for summary judgment on the issue of liability against defendant, Baily, it is well settled that

a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2nd Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v. Farrell Lines, Inc.*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v. City of New York*, supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2nd Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver St. Assocs.*, 191 AD2d 631 [2nd Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, supra).

Summary judgment is the "procedural equivalent of a trial" *(Falk v Goodman*, 7 NY2d 87, 91 [1959]), and, as such, it is a "drastic remedy" which should not be granted where there is any doubt as to the existence of a triable and "bona fide" issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223,231 [1978]). Ultimately, the purpose of the motion is to sift out evidentiary facts and determine from them whether an issue of fact exists *(Suffolk County Dep't of Social Servs. Ex rel. Michael v. v James M.*, 83 NY2d 178 [1994]). As such, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Stukas v Streiter*, 83

AD3d 18, 22 [2nd Dept 2011]; *Pearson v Dix McBride*, 63 AD3d 895 [2nd Dept. 2009]).

Here the plaintiff has clearly established that, as a passenger in a motor vehicle, she did not cause or contribute to the accident, between the two (2) vehicles, and no evidence has been provided to establish any contributory negligence on her part. The defendants, Bernard and Hernandez, have also made a *prima facie* showing that the vehicle operated by Bernard and owned by Hernandez, was stopped / parked with the engine off at the time of the accident. However, defendant Veronia Baily's Affidavit in opposition, wherein he asserts, that he was operating the Freightliner truck on Flatlands Ave., heading towards Flatbush Ave., pulling over to the right, when the BMW pulled away from the curb causing the front driver's side of the BMW vehicle to strike the passenger side of his truck, sufficiently raises a triable issue of fact regarding the happening of the accident. Accordingly, based upon the evidence presented, on these motions, a triable issue of fact exists as to whether the BMW vehicle was actually stopped or moving at the time the accident occurred, and whether it caused or contributed to the accident. Thus, a triable issue of fact exists as to whether defendant, Bernard, caused or contributed to the accident and, if so, each defendant's amount of comparative fault.

Therefore, it is hereby

ORDERED, that the motion (005) by defendant, Veronia A. Baily i/s/h/a Veronica A. Baily, for reargument and/or renewal of the motions to compel or preclude, is granted to the extent that reargument is granted and upon reargument, the Order of preclusion, dated July 12, 2018, is vacated and Veronia A. Baily is directed to appear for oral deposition on or before January 25, 2019, or he shall be precluded from offering evidence at trial. This portion of the Order shall be self executing without further order of this Court. It is further

ORDERED, that the motion (004) by defendants, Yves R. Bernard and Carlos G. Hernandez, for an Order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint and cross-claims against them, is denied. It is further

ORDERED, that the motion (006) by plaintiff, Marjorie Martino, for an Order, pursuant to CPLR §3212, granting summary judgment against defendant Baily on the issue of liability, is denied. It is further,

ORDERED, that all parties are directed to appear for a Certification Conference,

before Justice Jaeger, Part 35, at 9:30 am on January 31, 2019.

All matters not decided herein are denied.

This constitutes the decision and Order of the Court.

Dated: December 7, 2018
Mineola, NY

Hon. Steven M. Jaeger, AJSC

ENTERED

DEC 12 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE