Rodriguez v Steelman
2019 NY Slip Op 31400(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 162792/2015
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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MICHELLE RODRIGUEZ,

Plaintiff,

- v -

PAUL STEELMAN, ISLAND TRANSPORTATION CORP.

Defendant.

INDEX NO. 162792/2015

MOTION DATE 01/31/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is ORDERED that defendants' motion for an Order to dismiss plaintiff's Complaint on the grounds that there is no genuine issue of fact is denied. This matter stems from a motor vehicle incident which occurred on October 21, 2013, on the Cross Bronx Expressway at or near Boston Road in the County of Bronx, State of New York when a vehicle operated by defendant Paul M. Steelman and owned by defendant Island Transportation Corp. allegedly moved from the middle lane into the right lane and struck plaintiff Michelle Rodriguez's vehicle resulting in her serious injury.

Pursuant to CPLR 3212 "[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] citing *Friends of Animals v Assoc. Fur Mfrs.*, 46 NY23 1065, 1067-1068 [1979]). "On the other

hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b))" (*id.*).

Here, defendants allege that plaintiff was at fault for the accident at issue. Defendants aver that plaintiff's vehicle moved out of the right lane and struck defendants vehicle causing the accident. Further, defendants submit the deposition of plaintiff, an October 21, 2013, Criminal Court of the City of New York Bronx County report, October 21, 2013, police accident report, and October 21, 2013, Emergency Admission Records from Lincoln Medical and Mental Health Center (Mot, Exh C, E, F, & G).

Defendants claim that the records and deposition demonstrate plaintiff's fault for the accident at issue. Notably, defendants point to plaintiff's statement to the reporting officer at the scene of the accident, "yeah I f**ed up, but I only had two drinks" (*id.*, Exh F). Defendants note that hospital records demonstrate that a blood test taken at the hospital showed that plaintiff had a blood alcohol level of .082 after the accident (*id.*, Exh E). Further, defendants point to the hospital record Progress Note which states that "patient states that in order to avoid hitting truck on freeway this morning, she side-swiped truck and hit median" (*id.*) Defendants refer to plaintiff's deposition in which she admitted to having been arrested and charged with "driving under the influence" (*id.*, Exh C at 84, ¶ 9-22). Plaintiff was later informed by her attorney that her blood alcohol test indicated that she had been over the legal limit for driving and plaintiff eventually pled guilty to "disorderly conduct" and not "driving under the influence" (*id.*, at 87, 89, ¶ 4-7).

In opposition, plaintiff states that defendants' motion must be denied as it relies on inadmissible evidence. Plaintiff claims that with the exception of the pleadings and transcripts of the parties, defendants do not proffer evidentiary proof in admissible form sufficient to obtain

summary judgment. Plaintiff notes that defendants' inclusion of an incomplete criminal action file does not eliminate questions of fact as to the negligence of defendant. Further, that the toxicology affidavit fails to establish plaintiff as the sole proximate cause of the accident at issue, as it is based on inadmissible hearsay.

Plaintiff successfully argues that the hospital records containing plaintiff's alleged statement that she side swiped the truck is inadmissible hearsay. Here, "[a] party admission exception to the hearsay rule does not apply. Any statement in the medical records allegedly attributable to Plaintiff does not qualify as an admission unless the [individual] who recorded it were to testify that it was the [Plaintiff]'s statement' (*Mikel v Flatbush Gen. Hosp.*, 49 AD2d 581, 582 [2d Dept 1975]).

Defendants have not had the hospital employee that recorded plaintiff's alleged statement testify as to the validity of the statement. Further, to be admissible as an exception to the hearsay rule, a party admission made in medical records must be germane to the treatment of said party (*Benavides v City of New York*, 115 AD3d 518 [2014] [finding that whether a plaintiff jumped from a fence or pushed from a fence was "neither germane to treatment or diagnosis]). Here, whether plaintiff side swiped defendants' truck or not is neither germane to treatment or diagnosis of plaintiff's alleged injuries. Thus, plaintiff's statements in the hospital records are inadmissible to support defendants' motion for summary judgment.

Lastly, that plaintiff's blood alcohol level was over the legal limit or that plaintiff stated during deposition and to the police that she had consumed alcohol before the accident at issue is insufficient for a finding that plaintiff was solely at fault for the accident at issue. Defendants' motion does not eliminate issues of fact as to the conduct of defendant driver. Defendants fail to demonstrate that defendant Steelman acted, pursuant to VTL § 1146, reasonably under the

circumstances of the accident and failed to see that which he should have seen through the proper use of his senses (*Santana v De Jesus*, 110 AD3d 561 [2013]). Plaintiff testified that she was in the right lane the entire time leading up to the accident (Mot, Exh C at 50). Defendant Steelman testified in contrast to plaintiff's testimony that he was operating his vehicle in the middle lane when plaintiff's vehicle struck his vehicle (Mot, Exh D at 28). Thus, issues of fact exist as to the occurrence of the accident and the negligence of both plaintiff and defendant driver.

Accordingly, it is

ORDERED that defendants' motion for an Order to dismiss plaintiff's Complaint on the grounds that there is no genuine issue of fact is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/14/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE