Donis v Lozado
2020 NY Slip Op 34428(U)
December 21, 2020
Supreme Court, Queens County
Docket Number: 705021/2019
Judge: Maurice E. Muir

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

IAS Part - 42

HILDA FABIAN DONIS,

Plaintiff,

-against-

LUIS LOZADO AND Z RIDE INC.,

Defendants.

Index No.: 705021/2019

Motion Date: 12/10/20

Motion Cal. No. 4

Motion Seq. No. 2

The following electronically filed documents read on this motion by Luis Lozado ("Mr. Lozado") and Z Ride Inc. ("Z Ride") (collectively, the "defendants") for an order: a) granting leave to renew and reargue plaintiff's motion for summary judgment, pursuant to CPLR §§§ 2221(b), 2221(e), and 2103; b) vacating the September 22, 2020 Order, pursuant to CPLR § 5015(a)(1); and c) restoring this case to the calendar for trial.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits.....	EF 16 - 23
Affirmation in Opposition.....	EF 25
Reply Affirmation.....	EF 26

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action for damages for personal injuries allegedly sustained by Hilda Fabian Donis ("Ms. Donis" or "plaintiff") due to a motor vehicle collision. Specifically, the plaintiff alleges that on September 24, 2018, while crossing the street, she was struck by a motor vehicle owned by Z Ride and operated by Mr. Lozado at the intersection of Lewis Avenue and 99th Street, in the County of Queens, city and state of New York. As such, on March 21, 2019, the plaintiff commenced the instant action. On April 11, 2019, issue was joined, wherein the

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defendants interposed an answer, which included eight (8) affirmative (e.g., contributory negligence, assumption of risk and comparative negligence, etc.). On November 14, 2019, the court issued a preliminary conference order ("PCO"), which instructed the parties to conduct examinations before trial ("EBT") on or before January 15, 2020; and to conduct plaintiff's physical examination ("IME") forty-five (45) days thereafter. On or about February 11, 2020, the plaintiff moved for summary judgment on the issue of liability, pursuant to CPLR § 3212, which was submitted on August 26, 2020. On September 15, 2020, the court granted the plaintiff's motion for summary judgment without opposition, wherein the court held that the plaintiff demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendant's vehicle admittedly failed to yield the right-of-way and struck her. Moreover, the court noted that Mr. Lozado failed to submit his own affidavit or an affidavit from a person with personal knowledge of the facts controverting the plaintiff's affidavit. Thereafter, on September 22, 2020, the clerk of the court entered a judgment in favor of the plaintiff and against the defendants.

Thereafter, on October 14, 2020, the defendants filed the instant motion seeking to renew and re-argue plaintiff's motion for summary judgment, pursuant to CPLR § 2221(e) and to vacate the September 22, 2020 Order, pursuant to CPLR § 5015(a)(1). In support of the instant motion, counsel for the defendants argues that "[d]efendants were working to obtain Defendant LUIS LOZADO's affidavit during the unprecedented public health pandemic, therefore a further extension on plaintiff's motion was warranted and necessary to properly oppose the motion." Moreover, counsel argues that "[p]laintiff would simply have this Court believe their version of events without appearing for deposition and cross-examination. The facts of this case have not been established via depositions, and Plaintiff's version of events is purely self-serving and subjective. Thus, moving for summary judgment this early in the action is premature." In opposition, counsel for the plaintiff argues that ". . . [i]n an effort to demonstrate a meritorious defense to Plaintiff's prima facie case of negligence, Defendants rely solely upon an unsworn, self-serving statement in an MV-104 report." In reliance on *Chen v. Heart Transit, Inc.*, 143 AD3d 945 [2d Dept 2016], counsel for the plaintiff argues that "[t]he unsworn, self-serving statement in [an] MV104 . . . [is] insufficient as a matter of law to raise a triable issue of fact." In reply, counsel for the defendants reiterates that "[p]laintiff moved for summary judgment prematurely with only his own self-serving affidavit, wishing the court to simply believe his version of events without cross-examination, without assessment of his credibility, and without

the conduction of any discovery related to this accident. Plaintiff never appeared for EBTs or IMEs and claims "serious injuries."

APPLICABLE LAW

It is well settled law that in order to vacate defendant's default in opposing the plaintiff's motion for summary judgment, the defendant is required to demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the summary judgment motion (*see* CPLR § 5015(a)(1); *Onyenwe v. Hamernick,* 185 AD3d 1044 [2d Dept 2020]; HSBC Bank USA, National Association v. Wider, 101 AD3d 683 [2d Dept 2012]; *see also 210 E. St., LLC v. Rahman*, 178 AD3d 888 [2d Dept 2019]; *Mollica v. Ruzza*, 151 AD3d 714 [2d Dept 2017]; *Remote Meter Tech. of NY, Inc. v. Aris Realty Corp.*, 83 AD3d 1030 [2d Dept 2011]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court, and in exercising that discretion, the court may accept law office failure as an excuse (*see* CPLR § 2005) where the claim of law office failure is supported by a "detailed and credible" explanation of the default or defaults at issue (*Ki Tae Kim v. Bishop*, 156 AD3d 776 [2d Dept 2017]; *see Kondrotas-Williams v. Westbridge Enters., Inc.,* 170 AD3d 983 [2d Dept 2019]). Inasmuch as the defendants failed to demonstrate a reasonable excuse for their default, the court need not consider whether they offered a potentially meritorious opposition to the plaintiff's motion for summary judgment (*see Turko v. Daffy's, Inc.* 111 AD3d 615 [2d Dept 2013]). Even assuming arguendo that the defendants stated a reasonable excuse for their failure to oppose the plaintiff's motion for summary judgment, they stilled failed to articulate a meritorious defense. In fact, Mr. Lozado failed to submit his own affidavit or an affidavit from a person with personal knowledge of the facts in support of the instant motion to reargue.

It is well settled that a motion to reargue is not based upon any new facts. The purpose of reargument is to convince the court that it overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision (CPLR § 2221[d]; *Fuessel v. Chin*, 179 AD3d 899 [2d Dept 2020]; *Deutsche Bank Nat. Trust Co. v. Ramirez*, 117 AD3d 674 [2d Dept 2014]; *Bolos v. Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]). A motion to reargue is not to be used as a means by which the unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v. Kassis,* 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovanniello v. Carolina Wholesale Off. Mach. Co.,*

Inc., 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v. Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v. X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). Furthermore, a motion to reargue is addressed to the sound discretion of the court. (*see MAAD Constr., Inc. v. Cavallino Risk Mgt. Inc.*, 178 AD3d 816 [2d Dept 2019]; *HSBC Bank USA, N.A. v. Halls,* 98 AD3d 718 [2d Dept 2012]).

DISCUSSION

From the onset, the court notes that the defendants' motion to renew and/or reargue is timely. (*Tafolla v. Aldrich Management Co., LLC*, 172 AD3d 778 [2d Dept 2019]). Notwithstanding the same, the court finds that the defendants failed to articulate either a reasonable excuse for their default or a potentially meritorious opposition to plaintiff's summary judgment motion. Moreover, the defendants have not presented any evidence that the court overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision. Moreover, the defendants failed to establish its motion to renew based upon new facts not offered on the original motion. (*Armstrong v. Armstrong*, 162 AD3d 621 [2d Dept 2018]). As previously discussed, the plaintiff submitted her own uncontroverted affidavit, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendant's vehicle failed to yield the right-of-way and struck her. Moreover, Mr. Lozado admitted to the police that he struck her as he was making a right turn. This evidence is sufficient to establish plaintiff's *prima facie* entitlement to judgment as a matter of law on the issue of liability (*see Hai Ying Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Lazarre v. Gragston*, 164 AD3d 574 [2d Dept 2018]; *Gaston v. Vertsberger*, 176 AD3d 919 [2d Dept 2019]; *Wray v. Gallella*, 172 AD3d 1446 [2d Dept 2019]). Moreover, Mr. Lozado failed to submit his own affidavit or an affidavit from a person with personal knowledge of the facts. As such, he failed to articulate a meritorious opposition to plaintiff's summary judgment motion. Furthermore, the affirmation of defense counsel has no probative value. It is well settled law that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value and cannot defeat a motion for summary judgment. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept

2006]; *Amato v. Fast Repair, Inc.*, 15 AD3d 429 [2d Dept 2005]; *Roche v. Hearst Corp.*, 53 NY2d 767 [1981]).

Lastly, contrary to the defense counsel's contentions, the plaintiff's motion for summary judgment was not premature, as the defendants failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion is exclusively within the knowledge and control of the plaintiff. (*Harrinarain v. Sisters of St. Joseph*, 173 AD3d 983 [2d Dept 2019]; *Theresa Striano Revocable Trust v. Hoffman*, 71 AD3d 993 [2d Dept 2010]). As the Appellate Division has repeatedly held "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion." (*Kimyagarov v. Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept 2007]; *Martinez v. Kuhl*, 165 AD3d 774 [2d Dept 2018]; *Niyazov v. Hunter EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]).

Accordingly, it is hereby

ORDERED that defendants' motion to reargue the order, dated September 15, 2020, pursuant to CPLR § 2221(d), is denied; and it is further,

ORDERED that defendants' motion to renew the order, dated September 15, 2020, pursuant to CPLR § 2221(e), is denied; and it is further,

ORDERED that defendants' motion to vacate the order, dated September 15, 2020, pursuant to CPLR § 5015(a)(1) is denied; and it is further,

ORDERED that defendants' motion to restore is granted only to the extent that this action shall be restored to the calendar for a trial on damages only; and it is further,

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants on or before February 15, 2021.

The foregoing constitutes the Decision and Order of the court.

Dated: December 21, 2020
Long Island City, NY

MAURICE E. MUIR, J.S.C.

FILED

12/22/2020
11:49 AM

COUNTY CLERK
QUEENS COUNTY