Peguero v Krulasik
2020 NY Slip Op 35486(U)
September 30, 2020
Supreme Court, Queens County
Docket Number: Index No. 709133/2019
Judge: Maurice E. Muir

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

HIPOLITO PENA PEGUERO,

Plaintiff,

-against-

MAREK KRULASIK,

Defendant.

IAS Part - 42

Index No.: 709133/2019

Motion Date: 9/10/20

Motion Cal. No. 31

Motion Seq. No. 1

The following electronically filed documents read on this motion by Hipolito Pena Peguero ("Mr. Peguero" or "plaintiff") for partial summary judgment, on the issue of liability, pursuant to CPLR § 3212, is hereby decided as follows:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 8 - 13
Affirmation in Opposition-Exhibits-Service.....	EF 16 - 17
Reply Affirmation-Exhibits-Service.....	EF 18 - 19

This is an action for damages for personal injuries allegedly sustained by Mr. Peguero in a two-vehicle, opposite-direction, sideswipe collision. The plaintiff alleges that on February 4, 2019, he was driving Eastbound at or near the intersection of Cooper Avenue and 80th Avenue, in the County of Queens, State of New York, when Marek Krulasik ("Mr. Krulasik" or "defendant") sideswiped and struck his front bumper ("subject accident"). As a result, he sustained personal injuries. On May 24, 2019, the plaintiff commenced the instant action; and on or about September 30, 2019, issue was joined.

Now, the plaintiff moves for partial summary judgment, pursuant to CPLR § 3212. In support of said motion, the plaintiff provides a sworn affidavit, which that "[a]s I was traveling Eastbound . . . at or near the intersection of Cooper Avenue and 80th Avenue, Defendant MAREK KRULASIK did sideswipe and strike [my] 2018 Nissan in the front bumper.

Furthermore, plaintiff argues that ". . . the police report indicates that Defendant . . . admitted that he was blinded by the sunlight while he was operating his vehicle past the stop sign at or near the intersection of Cooper Avenue and 80th Avenue and he did sideswipe the 2018 Nissan." In opposition, counsel for the defendant argues the ". . . instant Motion for Summary Judgment, on the issue of liability, is premature as no depositions have been conducted. Moreover, counsel argues that '. . . the police report, which is annexed to the plaintiff's Motion papers . . . is uncertified, and, therefore, inadmissible in support of his instant Motion for Summary Judgment." In reply, counsel for plaintiff argues that "CPLR 3212 only requires that issue be joined and plaintiff submit an affidavit, shifting the burden to Defendant to provide a non-negligent reason for causing the accident. Defendant is the only one who can exonerate himself." Moreover, the plaintiff notes that the defendant failed to submit an affidavit in opposition to the instant motion.

It is well settled law that to be entitled to the drastic remedy of summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case. (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion the role of the court is to make a determination as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exist, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. St. Claire's Hospital*, 82 NY2d 738 [1993]).

Furthermore, "[a] plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Poon*

v. Nisanov, 162 AD3d 804 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312 [2018] ("[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault")).

Here, the court finds that plaintiff has met his burden for entitlement to summary judgment on the issue of liability based on the submission of his affidavit, which was not controverted by any sworn testimony from defendant. However, the uncertified police report is inadmissible evidence. In fact, the Appellate Division, Second Department, recently reaffirmed that ". . . absent a proper foundation, a party's admission contained in an uncertified police accident report is inadmissible." (*see*, *Yassin v. Blackman*, 2020 NY Slip Op 05090 [2d Dept 2020]; *see also Memenza v. Cole*, 131 AD3d 1020 [2d Dept 2015]). In opposition to the plaintiff's *prima facie* showing, the defendant failed to raise a triable issue of fact. Furthermore, defense counsel's affirmation in opposition 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]).

Contrary to the defendant's contentions, the plaintiff's motion for summary judgment is not premature, as the defendant 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, Second Department, 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]; *see also Hill v. Ackall*, 71 AD3d 829 [2d Dept 2010]; *Niyazov v. Hunter EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR § 3212, is granted on the issue of liability only; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendant and the clerk of this court on or before November 30, 2020.

The foregoing constitutes the decision and order of the court.

Dated: September 30, 2020
Long Island City, NY

MAURICE E. MUIR, J.S.C.

FILED

10/1/2020
9:27 AM

COUNTY CLERK
QUEENS COUNTY