Alvarez v Bah
2024 NY Slip Op 32377(U)
July 8, 2024
Supreme Court, New York County
Docket Number: Index No. 155065/2023
Judge: James G. Clynes

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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ANTONIO ALVAREZ,

Plaintiff,

- v -

OUSMANE BAH, BRONX MERCHANT FUNDING SERVICES, LLC

Defendant.

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INDEX NO. 155065/2023

MOTION DATE 06/01/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 21, 22, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, the motion by Plaintiff for summary judgment pursuant to CPLR 3212 on the issue of liability and to dismiss Defendants' affirmative defenses alleging comparative fault (Second Affirmative Defense) is decided as follows.

Plaintiff seeks to recover for injuries allegedly sustained as a result of a November 29, 2023 motor vehicle accident between a vehicle owned by Defendant Bronx Merchant Funding Services, LLC, and operated by Defendant Ousmane Bach ("Defendant Driver") and a vehicle operated by Plaintiff on 145th Street Bridge at the intersection with Malcolm X Boulevard.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial

of the action or tender an acceptable excuse for his failure...to do [so]" (*Zuckerman v New York*, 49 NY2d 557, 560 [1980]).

In support of the motion, Plaintiff submits an affidavit, attorney affirmation, parties' pleadings, a report of motor vehicle accident ("MV104") police accident report, and Verified Bill of Particulars. Plaintiff partially relies on the MV-104 which states the vehicle operated by Defendant Driver rear ended the vehicle operated by Plaintiff and is signed by Plaintiff. While the MV104 form is signed, it does not include sworn testimony by the driver. Thus, the unsworn statements of the driver contained within the MV104 form are hearsay, are insufficient as a matter of law to raise a triable issue of fact and cannot be considered in opposition to a motion for summary judgment (*Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]). While the Court may consider the inadmissible evidence insofar as it is not the sole basis for opposition to summary judgment (*Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]).

In his affidavit, Plaintiff avers that he was operating his vehicle on 145th Street Bridge and brought his vehicle to a complete stop at the intersection with Malcolm X Boulevard and was completely stopped for three minutes when the vehicle operated by Defendant Driver made impact with the rear of Plaintiff's vehicle. Plaintiff avers that his vehicle is in good mechanical order, that he was wearing his seatbelt at all times, and that during the time the vehicle was stopped he did not remove his foot from the brake pedal, including when his vehicle was impacted from the rear. A rear-end collision establishes a prima facie case of negligence on the part of the driver of the rear vehicle and imposes a duty upon him or her to explain how the accident occurred (*Reyes v Gropper*, 212 AD3d 565 [1st Dept 2023]).

In opposition, Defendants rely only on attorney affirmation. New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion (*see GTF Marketying Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965,968 [1985]). Without more, such as an affidavit or testimony from a person with first-hand knowledge, Defendants' opposition fails to raise an issue of fact sufficient to preclude a determination of summary judgment in favor of Plaintiff and against Defendants.

Defendants contend that Plaintiff's motion is premature and that there is a question of fact as to Plaintiff's comparative negligence. However, Defendants failed to submit any evidence disputing Plaintiff's version of events such as an affidavit from Defendant Driver. It is well settled that a party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant (*Flores v City of NY*, 66 AD3d 599 [1st Dept 2009]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion (*Davis v Turner*, 132 AD3d 603 [1st Dept 2015]). There must be some evidentiary basis that the discovery may lead to evidentiary evidence. The evidence submitted by Plaintiff demonstrates that her vehicle was struck in the rear by Defendant's vehicle. Defendants' opposition fails to demonstrate that additional discovery might lead to relevant evidence in this regard.

In reply, Plaintiff affirms that Defendants did not provide an affidavit in opposition to the motion and failed to submit, in admissible form, a non-negligent explanation for the rear end collision with the vehicle operated by Plaintiff. Furthermore, Plaintiff's motion to dismiss Defendant's Affirmative Defense of comparative negligence is granted.

It is uncontested that Plaintiff was struck in the rear by a vehicle owned by Defendant Bronx Merchant Funding Services, LLC, and operated by Defendant Driver. Defendants' contention that Plaintiff's motion is premature is immaterial because Defendant Driver would have knowledge of any non-negligent explanation for the rear-end collision with Plaintiff's vehicle and as stated above, an attorney's affirmation is inadequate to oppose summary judgment (*Maynard v Vandyke*, 69 AD3d 515 [1st Dept 2010]; *GTF Marketing Inc.* 66 NY2d at 968). Plaintiff's motion for summary judgment is granted. Accordingly, it is

ORDERED that the motion by Plaintiff for summary judgment on the issue of liability and to dismiss Defendants' affirmative defenses alleging comparative fault (Second Affirmative Defense) is granted; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendant with Notice of Entry.

This constitutes the Decision and Order of the Court.

7/8/2024
DATE

JAMES G. CLYNES, J.S.C.

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