Napoli v Pourad
2013 NY Slip Op 30380(U)
February 7, 2013
Supreme Court, Queens County
Docket Number: 27736/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** **IAS PART 6**

MICHAEL C. NAPOLI,

Plaintiff,

-against-

DAYAN POURAD, et al.,

Defendants.

Index No. 27736/11

Motion Date January 11, 2013

Motion Cal. No. 109

Motion Sequence No. 2

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Upon the foregoing papers it is ordered that this motion by plaintiff seeking leave to reargue this court's order dated September 21, 2012 and entered on October 1, 2012, which order denied plaintiff's motion for summary judgment pursuant to CPLR 3212 against the defendants on the issue of liability, and upon reargument, granting plaintiff's motion for summary judgment on the issue of liability is hereby granted.

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (*Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). In the instant case, movant demonstrated that the Court did overlook or misapprehended the relevant facts or misapply controlling principles of law.

In a decision/order dated September 21, 2012, this court held in relevant part:

As it is undisputed that the parties

> have not completed discovery, and that discovery remains outstanding, including examinations before trial of all parties, the motion for summary judgment is denied without prejudice as it is premature . . . Accordingly, the motion for summary judgment is hereby denied "with leave to renew when discovery . . . is complete" (*see*, *Ramos*, *supra*).

After careful review and consideration, the motion to reargue is granted and upon reargument the court hereby vacates its decision/order dated September 21, 2012 solely to the extent set forth hereinafter and issues the following in its place:

Upon the foregoing papers it is ordered that this motion by plaintiff for summary judgment pursuant to CPLR 3212 against defendants on the issue of liability is denied.

This action arises out of a two-vehicle accident occurring on July 1, 2011 in Queens County, New York. It is undisputed that a vehicle operated by defendant, Dayan Pourad contacted a vehicle operated by plaintiff and that at the time of the accident, defendant Pourad was employed by defendant Road Masters Leasing Corp.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue of fact (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see*, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be

genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Plaintiff established a prima facie case that there are no triable issues of fact. In support of the motion, plaintiff presents, inter alia: an affidavit of plaintiff himself, wherein he avers that: "[o]n July 1, 2011, [he] was involved in an accident on Woodhaven Blvd. and Metropolitan Ave. in Rego Park, New York. [He] was driving in the far right hand lane northbound on Woodhaven Blvd. and planned on making a right hand turn onto Metropolitan Avenue. As [he] approached the intersection, a car driven by the defendant Dayan Pourad suddenly and without any sort of warning cut in front of [his] car from the middle lane to turn into the Gulf Station located at that corner. [He] immediately slammed on my brakes but couldn't avoid the contact which took place a split second later. The left front side of [his] car had contact with the right side of the car being driven by the defendant Dayan Pourad. . . .The accident clearly occurred when the defendant Dayan Pourad made a turn across lanes for moving traffic by making a right turn from the middle lane directly into my path. [He] had no time to avoid the accident or take any other steps to avoid it"; and a copy of the police report.

None of the defendants have raised a triable issue of fact in opposition. In opposition to the motion, defendants submit: an affidavit of defendant Dayan Pourad himself wherein he avers that: at the time of the accident, he was working for defendant Road Masters Leasing Corp., he was 16 years old at the time of the accident and had a learner's permit which required him to be supervised by a licensed adult while operating a vehicle, and on the date of the accident, non-party Georges Mata agreed to supervise him and he believes Mr. Mata was distracted and failed to properly supervise him and such failure contributed to the collision. It is well-established law that: "[t]he holder of a learner's permit may only operate a motor vehicle while under the immediate supervision and control of a duly licensed driver (*see*, Vehicle and Traffic Law § 501[5][a][ii], formerly § 501[4][b]). The licensed driver is under a duty to use general or reasonable care in the instruction and supervision of the learner-driver, but the negligence of the learner-driver is not imputable to the licensed driver" (*Savone v. Donges*, 122 AD2d 34 [2d Dept 1986][internal citations omitted]). Defendants additionally submit an affidavit of Farzin Pourad, who avers that: he is the manager of defendant Liberty Motor Cars, Inc. and a principal of

defendant Road Masters Leasing Corp., on the date of the accident, he requested Georges Mata to accompany and supervise his son, defendant Dayan Pourad, who had a learner's permit, to a service station and he believes Mr. Mata's failure to supervise his son contributed to the collision.

Defendants' argument that the motion is premature since the depositions of the parties have not yet been held is unavailing.

CPLR 3212(f) states:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

In the instant case, defendants have failed to demonstrate that facts essential to opposition may exist but cannot then be stated. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion" (*Plotkin v. Franklin*, 179 AD2d 746 [2d Dept 1992] [internal citations omitted]). Defendants merely state that depositions will reveal that Georges Mata, whom the court notes is not a party being sued by plaintiff, was negligent in his obligation to supervise defendant operator Pourad, that the depositions will demonstrate that Mr. Mata contributed to the collision, and that defendants can then file a third-party summons and complaint impleading Mr. Mata. It is well-established law that: "[d]isclosure in advance of a summons and complaint is available only when there is a demonstration that the party bringing such a petition has a meritorious cause of action and the material sought is material and necessary to the actionable wrong" (*Liberty Imports, Inc. v. Bourguet*, 146 AD2d 535 [2d Dept 1989]). At this point in time, Mr. Mata's conduct is speculative and defendants have failed to set forth facts that may occur during discovery that would impute liability to plaintiff or Mata. It is well-established law that: "[d]isclosure in advance of a summons and complaint is available only when there is a demonstration that the party bringing such a petition has a meritorious cause of action and the material sought is material and necessary to

the actionable wrong" (*Liberty Imports, Inc. v. Bourguet*, 146 AD2d 535 [2d Dept 1989]).

Accordingly, as there are no triable issues of fact, plaintiff's motion for summary judgment is granted.

The remainder of this court's decision dated September 21, 2012 which decided the defendants' cross motion to consolidate remains in full force and effect.

This constitutes the decision and order of the Court.

Dated: February 7, 2013 ....

Howard G. Lane, J.S.C.