

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD TERM, PART 19

Justice

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DHARMA DEONARAIN and SUSHILA
DEONARAIN,

Index No: 16734/06
Motion Date: 6/20/07
Motion Cal. No: 10

Plaintiffs,

-against-

ALWYN BASCOMBE,

Defendant.
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The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR §3212, granting summary judgment on the issue of liability, and an immediate trial on the issue of damages.

| | PAPERS NUMBERED |
|---|--------------------|
| Notice of Motion-Affidavits-Exhibits. | 1 - 6 |
| Affirmation in Opposition-Affidavit. | 7 - 8 |
| Reply Affirmation-Affidavit. | 9 - 10 |

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

Plaintiffs Dharma Deonarain and Sushila Deonarain ("plaintiffs") commenced this action on July 30, 2006 to recover damages for personal injuries they claim to have sustained on July 30, 2004, when their motor vehicle collided with a motor vehicle operated and owned by Alwyn Bascombe ("defendant"). At the time of the accident, plaintiffs' vehicle, operated by plaintiff Dharma Deonarain with plaintiff Sushila Deonarain in the front passenger seat, was traveling down the one lane road of 130th Street in South Ozone Park, New York. Plaintiffs allege that defendant failed to observe their vehicle approaching, and struck plaintiffs' vehicle on the passenger side, when defendant moved his vehicle from a parked spot into moving traffic. As a result, plaintiffs seek an order granting summary judgment on the issue of liability.

Plaintiffs' motion for summary judgment on the issue of liability is granted. A party moving for summary judgment 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." Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1987). A driver with the right of way is "entitled to anticipate that the defendant would obey traffic laws requiring him to yield." Rossani v. Rana, 8 AD3d 548, 549 (2nd Dept. 2004). A plaintiff may establish a driver's liability as a matter of law, if the accident occurs because the driver has "failed to see that which through the proper use of her senses she should have seen." Bolta v. Lohan, 242 AD2d 356, 356 (2nd Dept. 1997); see Lubitz v. Village of Scarsdale, *supra*; Spatola v. Gelco Corp., 5 AD3d 469, 470 (2nd Dept. 2004). Plaintiffs have established that defendant was negligent as a matter of law, since plaintiffs have shown that defendant failed to yield the right of way as he was coming out of a parking space and entering moving traffic. See VTL §1162; Lubitz v. Village of Scarsdale, 31 AD3d 618, 619 (2nd Dept. 2006); Odumbo v. Perera, 27 AD3d 709, 709 (2nd Dept. 2006); Bongiovi v. Hoffman, 18 AD3d 686, 687 (2nd Dept. 2005). Since plaintiffs have made a prima facie case of negligence, they are entitled to summary judgment on the issue of liability.

Once the movant has made a prima facie showing of entitlement to summary judgment, the opposing party must present evidence in admissible form establishing the existence of a triable fact in order to defeat the motion; "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); see CPLR §3212(b); Fleming v. Graham, 34 AD3d 525, 526 (2nd Dept. 2006). Here, defendant has failed to submit an affidavit from a person with personal knowledge of the facts either denying plaintiffs' allegations or offering a non-negligent explanation for the accident. Piltser v. Donna Lee Management Corp., 29 AD3d 973, 974 (2nd Dept. 2006); Arbizu v. REM Transportation, Inc., 20 AD3d 375, 376 (2nd Dept. 2005). Furthermore, defendant has not presented an issue of triable fact. Although defendant has raised the possibility that there was negligence on plaintiff Dharma Deonarain's part, as well as the possibility that a vehicle other than the defendant's was involved in the accident, defendant has not provided any evidence for these contentions, and mere speculation is insufficient to defeat a motion for summary judgment. Ishak v. Guzman, 12 AD3d 409, 409 (2nd Dept. 2004).

Defendant further argues that plaintiff's motion should be denied pursuant to CPLR §3212(f), since there are facts unavailable to defendant that are needed to oppose plaintiff's motion. In order to postpone a decision for summary judgment under CPLR §3212(f), a party must show more than "a mere hope that it might be able to uncover some evidence during the discovery process." Companion Life Ins. Co. of New York v. All State Abstract Corp., 35 AD3d 519, 521 (2nd Dept. 2006); Piltser v. Donna Lee Management Corp., *supra*; Neryaev v. Solon, 6 AD3d 510, 510 (2nd Dept. 2004). However, defendant's affirmation only points to the mere possibility that evidence may exist to defeat plaintiffs' motion. Before a party may defeat a motion for summary judgment due to unconducted discovery, a party must show that they have made reasonable efforts to discover these facts and these facts would give rise to a triable issue. Gillinder v. Hemmes, 298 AD2d 493, 494 (2nd Dept. 2002). This action has been pending for almost a year before plaintiff's motion was made, and defendant has failed to avail himself of any opportunities to obtain disclosure of such facts. See

Household Bank (SB), N.A. v. Mitchell, 12 AD3d 568, 569 (2nd Dept. 2004); Hanneford Circus, Inc. v. Cabar Circus Promotions, Ltd., 201 AD2d 456, 457 (2nd Dept. 1994).

Accordingly, plaintiffs' motion for summary judgment on the issue of liability and immediate trial to determine damages, pursuant to CPLR §3212, is granted. A trial shall be held on damages, which shall include a determination as to the issue of serious injury, following the completion of discovery and the filing of a note of issue, if necessary.

Dated: August 6, 2007

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J.S.C.