

Lewis v Border Cab Corp.

2007 NY Slip Op 30007(U)

February 28, 2007

Supreme Court, New York County

Docket Number: 0106112

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

BARBARA LEWIS

INDEX NO. 106112-2006

MOTION DATE 1/24/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 41

- v -

BORDER CAB CORP. and ALASSANE BAH

The following papers, numbered 1 to 3 were read on this motion by the plaintiff for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
MAR 12 2007

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

As she was crossing Second Avenue at the intersection of East 80th Street in Manhattan on January 27, 2006 at approximately 9:30 a.m., the plaintiff was struck by a taxi owned by defendant Border Cab Corp. and operated by defendant Alassane Bah. She commenced the instant action for personal injuries allegedly sustained in the accident, including but not limited to fractures of both of her ankles and her neck. The plaintiff underwent a series of surgeries, hospital and nursing home stays as well as physical therapy. There is no dispute that she suffered serious injuries as defined by Insurance Law §5102 (d). The plaintiff now moves, pursuant to CPLR §3212, for summary judgment on the issue of liability.

It is well settled that 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. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1986). In support of her motion, the plaintiff proffers her complaint and her own affidavit which establish that she was crossing Second Avenue, within the designated pedestrian crosswalk and in accordance with the pedestrian traffic signal. She also offers the transcript of the deposition testimony of defendant Bah as well as the sworn statements of two civilian witnesses who were present at the scene, each which corroborates her account, that as she was crossing with the light, in the crosswalk she was struck by the defendant's vehicle which was making a right hand turn onto Second Avenue from East 80th Street.

Once the plaintiff has met her burden, it became incumbent upon the defendants to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez

v Prospect Hospital, supra; Zuckerman v City of New York, supra. The defendant in opposition to the instant motion, offers his own deposition testimony in which he claims that after picking up a passenger near the intersection as he began his turn onto Second Avenue, he was blinded by sun glare, and as a result never saw the plaintiff until he struck her. He also avers that the plaintiff did not exercise care in checking for on-coming vehicles as she entered the crosswalk, and was far closer to the entrance of the crosswalk than claimed.

On summary judgment, the court's role is one of issue identification, not issue determination. It is undisputed that a pedestrian has the right of way when crossing within the crosswalk and with the light. See Pire v Otero 123 AD2d 611 (2d Dept 1986). The defendant driver Bah also has a common-law duty to see that which he should have seen through the proper use of his senses. Larsen v Spano --AD3d-- (2d Dept 2006), 2006 NY Slip Op. 10032. However, the law imposes a duty upon the pedestrian not to leave the curb or other place of safety and enter the path of the vehicle when it is so close that it is impractical for the driver to yield. Rudolph v Kahn, 4 AD3d 408 (3d Dept 2004). Here, the plaintiff's affidavit fails to indicate that she looked for on-coming traffic prior to stepping from the curb. Accordingly, the defendant has presented an issue of fact to be resolved by a jury.

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied, and it is further

ORDERED that the plaintiff's application for a trial preference based on age is granted without opposition, and it is further

ORDERED that the parties are directed to appear for a pretrial conference on April 6, 2007, Part 22, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.


FILED

MAR 12 2007

NEW YORK
COUNTY CLERK'S OFFICE,

Enter:

Dated: February 28, 2007



Deborah A. Kaplan, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DEBORAH A. KAPLAN
J.S.C.