

**McAteer v Jaguar Credit Corp.**

2007 NY Slip Op 30260(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0111036

Judge: Deborah A. Kaplan

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SCANNED ON 3/22/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

THOMAS McATEER and IRENE McATEER

INDEX NO. 111036-2005

MOTION DATE 1/31/07

- v -

MOTION SEQ. NO. 003

MOTION CAL. NO. 86

JAGUAR CREDIT CORPORATION and KAREN SPOLLEN  
JAGUAR CREDIT CORPORATION

-v-

MICHAEL O'HALLORAN

The following papers, numbered 1 to 7 were read on this motion by the plaintiff for summary judgment on the issue of liability and defendant's cross motion for dismissal of the complaint for failure to respond to discovery demands.

**FILED**  
MAR 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED  
1,2  
3,4,5,6  
7

Cross-Motion:  Yes  No

As he was crossing East 86<sup>th</sup> Street at the intersection of First Avenue in Manhattan on February 1, 2004, with his wife Irene McAteer, at approximately 7:55 a.m., the plaintiff Thomas McAteer, was struck by a vehicle operated by Karen Spollen, leased by third-party defendant Michael O'Halleran and owned by defendant Jaguar Credit Corporation. He commenced the instant action for personal injuries allegedly sustained in the accident, including but not limited to two fractures of his left foot. The plaintiff underwent surgery and other treatment. There is no dispute that he suffered serious injuries as defined by Insurance Law §5102 (d). Ms. McAteer, who was not injured, is suing for loss of services, consortium etc. The plaintiffs now move, pursuant to CPLR §3212, for summary judgment on the issue of liability as against defendant's Spollen and Jaguar Credit Corporation. Defendants Jaguar Credit Corporation, Karen Spollen and Michael O'Halleran all oppose the motion for summary judgment. Defendant Karen Spollen cross-moves for dismissal of the complaint alleging that the plaintiff's have failed to respond to her discovery demands.

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 plaintiffs proffer their complaint and the deposition testimony of both Thomas McAteer and Karen Spollen. McAteer's deposition testimony establishes that he was crossing East 86<sup>th</sup> Street, within the designated pedestrian crosswalk and in accordance with the pedestrian traffic signal. He indicates that he looked for on-coming traffic before entering the crosswalk from the sidewalk, and seeing none proceeded across. He avers that he did not see the car driven by Spollen until the time of impact, when his left foot was run over. He indicates that after the impact, his wife screamed and Ms. Spollen immediately stopped her vehicle and then drove both McAteers to Lennox Hill Hospital where he was treated.

Once the plaintiffs met their 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 defendants in opposition to the instant motion, offer the deposition testimony of Karen Spollen in which she claims that prior to the accident, she was traveling eastbound on East 86<sup>th</sup> Street, within the speed limit and proceeding with a green light in her favor. She did not see the McAteers as she entered the intersection, and in fact did not realize she had struck plaintiff until after the impact. She also avers that the plaintiff did not exercise care in checking for on-coming vehicles as it was her rear tire that struck the plaintiff, not the front of her car.

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 Spollen 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, there are disputed issues of fact as to who had the right of way and when the plaintiff entered the crosswalk. Accordingly, the defendants have presented issues of fact to be resolved by a jury.

The defendant's motion to dismiss the complaint for failure to comply with discovery demands is denied as moot in accordance with the prior Order of this Court (Tingling, J.) dated January 9, 2007, which granted the relief sought on default. In light of that Order, which dismissed the complaint against Spollen, only Jaguar Credit Corporation and Michael O'Halleran remain as defendants herein.

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

ORDERED that the defendant's motion for dismissal of the complaint is denied as moot, and it is further

ORDERED that the parties are directed to appear for a pretrial conference on April 5, 2007, Part 22, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

**FILED**  
MAR 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Enter:

Dated: March 13, 2007

  
Deborah A. Kaplan  
**DEBORAH A. KAPLAN**  
J.S.C. J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DEPOSITION   
Check if appropriate: DO NOT POST