

Diakrousis v Maganga
2007 NY Slip Op 30545(U)
March 30, 2007
Supreme Court, New York County
Docket Number: 0118232/2003
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. MARILYN SHAFER, JSC

PRESENT: _____
Justice

PART 8M

Diakrousis, m

INDEX NO. 118232103

MOTION DATE 12/5/06

MOTION SEQ. NO. 010

MOTION CAL. NO. 38

- v -

Peter maganga

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion decided
pursuant to attached term

FOR THE FOLLOWING REASON(S):

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
MARIA DIAKROUSIS,

Plaintiff,

-against-

Index No.: 118232/03

PETER MAGANGA, UNIVERSAL AM-CAN, LTD.,
CONNECT SPECIALIZED TRANSPORT, INC., JORGE
SOTO, GROCERY HAULERS, INC., C & S WHOLESALE
GROCERS, INC., THE CITY OF NEW YORK, and
SALEM TRUCK LEASING, INC.,

Defendants.

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Shafer, J.:

Plaintiff Maria Diakrousis moves for an order, pursuant to CPLR 2221, granting renewal and reargument of an order dated September 27, 2006 which, among other relief, granted summary judgment to defendants Grocery Haulers, Inc., Salem Truck Leasing, Inc. and Jorge Soto. Defendant/third party defendants Peter Maganga, Universal Am-Can, Ltd., and Connect Specialized Transport, Inc., join in support of plaintiff's motion. It is argued that this court should reverse its decision and deny summary judgment to these defendants, because an issue of fact exists as to whether the tractor trailer truck Soto was driving at the time of the accident was unlawfully and illegally double-parked north of the crosswalks on Broadway and obstructed the view of the driver of the truck that hit the plaintiff to the extent he could not see her attempting to cross the street.

For the following reasons, both reargument and renewal is granted, and summary judgment is denied as to these defendants.

FACTUAL ALLEGATIONS

This action arises out of a pedestrian-automobile accident which occurred on September 8, 2003 at a crosswalk located at 175th Street and Broadway, in New York, New York. Plaintiff was crossing the intersection when she was struck and run over by a tractor-trailer driven by Peter Maganga.

At the time of the accident, plaintiff was crossing Broadway from the northwest corner of 175th Street to the northeast corner (Diakrousis Dep., at 18-23). Upon arriving at the intersection of Broadway and West 175th Street, plaintiff stopped at the corner and waited until she saw the pedestrian light signal indicate that she could begin crossing (*id.*, at 30). Plaintiff testified that she noticed another truck parked on the corner of Broadway stopped with the cars while she was crossing (*id.*, at 97). However, plaintiff testified that this truck did not block the crosswalk, nor require her to walk around any part of it (*id.*, at 113-14). Plaintiff further testified that the truck was “parked with the rest of the cars” (*id.*, at 97), “stopped with the rest of the cars” (*id.*, at 112-13), and was located by the restaurant (*id.*, at 114).

Plaintiff testified that when the crosswalk indicated that she could begin crossing, she took two to three steps into the intersection and again checked the pedestrian crossing light (Diakrousis Dep., at 31). At this point, plaintiff saw the pedestrian light black out (*id.*, at 33). Plaintiff was unsure of how much time elapsed between the time she first saw the pedestrian walking symbol to the time in which the signal blacked out (*id.*). After plaintiff saw the traffic symbol black out, she took another two or three steps crossing Broadway (*id.*, at 34-35). Plaintiff had almost reached the middle of the street when a truck headed down Broadway, hit and ran over her legs (*id.*, at 95).

Defendant Peter Maganga was deposed and testified that his truck was stopped at a red traffic light at the intersection of West 175th Street shortly before the accident occurred (Maganga Dep., at 127). Maganga's truck was located about six feet from the crosswalk and no vehicles were in front of his truck (*id.*, at 130). Maganga testified that the closest vehicle to his truck was a tractor trailer driven by defendant Jorge Soto located two feet away, which was also stopped (*id.*, at 136). Maganga further testified that the cab of the truck to his right was located two or three feet closer to the crosswalk than his vehicle (*id.*, at 138-39).

Maganga testified that while stopped at the light, he looked to see if there was anyone crossing either side of the subject crosswalk and that he was not able to see the two corners of the intersection to his right because Soto's truck blocked his view (Maganga Dep., at 146-47). When the traffic light changed to green, Maganga looked at the mirrors in front of his tractor's cab and on its sides before he started to move forward (*id.*, at 148-49). Maganga stated that there was an area of one or two feet directly in front of his truck which he could not see due to a blind spot (*id.*, at 161-63, 202-03). Maganga testified that upon viewing that the roadway in front of him was clear, he began to move his truck until he noticed oncoming vehicles were flashing their lights at him (*id.*, at 204-08). Upon seeing the flashing lights of the approaching vehicles, Maganga stopped his vehicle immediately (*id.*, at 207-08).

Soto was also deposed. He testified that before he witnessed the accident, he had stopped on Broadway in preparation of going into the El Malecon restaurant located at the northwest corner of 175th Street and Broadway, to get lunch and bring it out to the truck to eat elsewhere (Soto Dep., at 60-62, 74). Soto testified that he had been to this restaurant for take-out two or three times previously, and that he double-parked his truck on the right side of Broadway in the

general area of where the restaurant was located (*id.*, at 117-19). On the day of the accident, he observed cars parked along the curb, to the right of his truck, at parking meters (*id.*, at 66, 67, 72), and did not observe any vacant parking spaces along the curb to his right (*id.*, at 96-97). Soto admitted that it was his intention, on the date of the accident, to double-park on Broadway, past or south of 175th Street (*id.*, at 121-22, 148).

Soto testified that at the point he stopped his truck on Broadway, there was a small "panel truck" stopped in front of him, and that he was waiting for this truck to move forward, so he could double-park in the place where the truck was located (Soto Dep., at 150). The panel truck was double-parked at a point south of the light (*id.*). Soto testified that his tractor was stopped for about 30 seconds to a minute prior to the accident (*id.*, at 141), and that he did not move his truck after the accident occurred (*id.*, at 74-75, 77).

Soto testified that he saw the accident through the side view mirror of his tractor (Soto Dep., at 74) after his tractor had passed both the north crosswalk, the traffic light, and the south crosswalk at the intersection of Broadway and 175th Street, while he was stopped waiting for the small truck which was double parked to move (*id.*, at 112-13, 132-33).

Soto was initially asked if any portion of the north crosswalk was blocked by either the tractor or trailer that he was operating when he came to a stop to which he answered, "I would believe so" (Soto Dep., at 115). At other points in his deposition, Soto stated that he did not know if any part of his trailer was in the north crosswalk where the accident took place (*id.*, at 126, 159). In addition, Soto was specifically asked why he did not double-park north of the intersection where the plaintiff was struck, closer to the restaurant. Soto testified that cars were double-parked on that side of the street so he could not park his vehicle and enter the restaurant

(*id.*, at 152-53). At a later point in his deposition when asked whether he was double parked at the time he witnessed the accident, Soto responded, "I was inside the truck double parked waiting to park" (*id.*, at 244).

Plaintiff also submits a photograph allegedly taken shortly after the accident, which shows the front of Soto's tractor in the south crosswalk of the intersection, and the trailer portion blocking 175th Street as well as a portion of the north crosswalk where the accident occurred (Kohl's Affirm, ex. A-c).

DISCUSSION

CPLR 2221 (d) (2) provides, in pertinent part that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." A motion to reargue is addressed to the sound discretion of the court. It does not rely on new proof; rather its purpose is to provide the movant with an opportunity to convince the court that it made a mistake in deciding a factual or legal issue. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979).

Plaintiff argues that the court overlooked, failed to consider or misapprehended that Soto admitted he was double-parked. Plaintiff argues that Soto could have passed the double-parked truck which Soto alleges was blocking his vehicle from proceeding down Broadway. As Soto testified that he could see the double-parked truck before the intersection, Soto potentially could have avoided being stuck behind this vehicle by passing the truck on the left. Since Soto testified that he pulled his truck directly behind the double-parked truck, plaintiff argues that a question of fact remains as to whether Soto was illegally standing or attempting to double park at this time.

In addition, plaintiff alleges that Maganga and Soto's testimony are inconsistent and raise issues of fact as to whether Soto was double-parked north of the intersection where plaintiff was struck and whether his truck obstructed Maganga's vision to the extent that he could not see plaintiff attempting to cross the street prior to the impact.

After reviewing the testimony of Soto, Maganga, and plaintiff, the court finds that a question of fact exists as to the location of Soto's truck during the accident. Soto's testimony places his truck past the traffic light and both crosswalks. Soto testified that he observed the accident in his side view mirror while he was waiting for 30-60 seconds for the double-parked panel truck to move out of the way of his vehicle (Soto Dep., at 74, 112-13, 132-33). This testimony is inconsistent with the photograph showing his truck blocking a portion of both crosswalks and that of Maganga who claimed that prior to the accident, Soto's truck was located to the right of his truck and was stopped at the red light north of the north crosswalk (Maganga Dep., 136-39). Soto's testimony is also inconsistent with that of plaintiff as she testified that Soto's vehicle was "parked" with the rest of the cars, by the restaurant, but was not blocking the crosswalk (Diakrousis Dep., at 97, 113-14). If Soto's trailer was blocking the north crosswalk, plaintiff would have had to cross behind his truck and walk outside of the crosswalk in order to cross the street. Soto's testimony that he stayed in the right-hand lane from the time he first turned onto Broadway and the time he came to a stop in the area of 175th Street from where he saw the accident (Soto Dep., at 92), is also inconsistent with his testimony later on when he claimed that he could not double-park in front of the El Malecon restaurant because there were cars double-parked on the north side of the intersection (*id.*, at 152-53).

Therefore, as the location of Soto's vehicle and the purpose for which he stopped remains

in dispute, summary judgment must be denied.

CPLR 2221 (e) (2) states, in pertinent part that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” A motion to renew “shall contain reasonable justification for the failure to present such facts on the prior motion” CPLR 2221 (e) (3). “A motion to renew should not be based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence on the original motion.”

Leonard Fuchs, Inc. v Laser Processing Corp., 222 AD2d 280, 280 (1st Dept 1995). “[R]enewal ‘is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.’” *Rubinstein v Goldman*, 225 AD2d 328, 328-329 (1st Dept), lv denied 88 NY2d 815 (1996), quoting *Matter of Beiny*, 132 AD2d 190, 210 (1st Dept 1987), appeal dismissed 71 NY2d 994 (1988).

In support of its motion to renew, plaintiff has attached an October 26, 2006 affidavit from Newton Ramirez and an October 12, 2006 affidavit from Evelyn Lopez, both of which present facts which dispute Soto’s testimony. Both the Ramirez and the Lopez affidavits allege that the Pathmark truck was double-parked when the incident occurred. Specifically, the Ramirez affidavit alleges that the Pathmark truck was located between Maganga’s truck and the cars that were parked along the curb on the west side of Broadway. In addition, Ramirez further alleges that there were no other vehicles in front of the truck which would have prevented it from moving forward on Broadway across 175th Street. Both affidavits also allege that, almost immediately after the accident, the Pathmark truck moved forward across 175th Street and came to a stop with the front of the tractor blocking the south crosswalk of Broadway and the tractor

portion of the truck was blocking 175th Street and extending into the north crosswalk, as depicted in the photograph (Kohl Affirm., ex A-c).

In an affirmation from plaintiff's counsel, it is alleged that plaintiff's counsel was first notified by the plaintiff's son in late spring or early summer of 2006 that Ramirez may have witnessed plaintiff's accident (Bossom Affirm., at ¶ 2). Plaintiff's counsel states that immediately upon learning of said witness, he made efforts to locate Ramirez and upon doing so, spoke to him on numerous occasions (*id.*, at ¶ 6). Initially, Ramirez indicated an unwillingness to get involved with the matter and Bossom affirms that by the time Ramirez agreed to cooperate on or about July 31, 2006, the summary judgment motion had already been marked final and fully submitted (*id.*). Neither Bossom nor plaintiff's son had knowledge of Lopez until July 31, 2006, when she introduced herself to Bossom while he was interviewing Ramirez at the accident scene. In letters dated August 3 and 8, 2006, Bossom revealed the identity of both Ramirez and Lopez to the defendant's counsel and believed he could not provide additional information to the court while the summary judgment was pending (*id.*, at ¶ 14).

The Soto defendants argue, as per *Matter of Cooke Center for Learning and Development* (19 AD3d 834 [3d Dept 2005]), that plaintiff had an absolute obligation to present the evidence to the court, after submission and during the time which the summary judgment motion was pending. *Cooke*, however, does not advocate the filing of unauthorized sur-reply papers post-submission of the original motion. Indeed, in that case, the new evidence was obtained after the court had ruled on the application. Here, plaintiff has established that it acted in a diligent manner with regard to obtaining information from Ramirez and Lopez, and has presented a reasonable excuse why the affidavits were not submitted so as to be heard with the

motion for summary judgment. The Ramirez and Lopez affidavits raise issues of fact as to the location of Soto's truck at the time of the accident and mandate that plaintiff's motion for renewal be granted and summary judgment be denied.

CONCLUSION AND ORDER

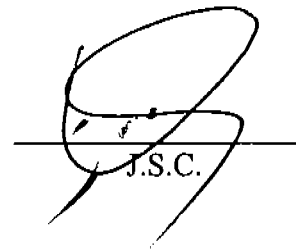
Accordingly, it is hereby

ORDERED that plaintiff Maria Diakrousis's motion to reargue and renew is granted; and it is further

ORDERED that the court reverses to its original decision and denies summary judgment as to defendants Jorge Soto, Grocery Haulers, Inc. and Salem Truck Leasing, Inc.

Dated: March 30, 2007

ENTER:



J.S.C.

HON. MARILYN SHAFER, JSC

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