

Oppenheim v Transcare N.Y., Inc

2007 NY Slip Op 30668(U)

April 6, 2007

Supreme Court, New York County

Docket Number: 0112603/2004

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

JANET OPPENHEIM

INDEX NO. 112603-2004

MOTION DATE 2/21/07

MOTION SEQ. NO. 003

MOTION CAL. NO. 89

- v -

TRANSCARE NEW YORK, INC.,
and CHARMAYNE A. HALLEY

The following papers, numbered 1 to 3 were read on this motion by the plaintiff for summary judgment on the issue of liability, or in the alternative to strike defendant's answer for failure to comply with discovery demands. The plaintiff also moves for a trial preference.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ..	<u>1,2</u>
Answering Affidavits --- Exhibits (Memo) _____	<u>3,4,5,6</u>
Replying Affidavits (Reply Memo) _____	<u>7</u>

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

As she was crossing at the intersection of Second Avenue and East 33^d Street in Manhattan on August 11, 2004, at approximately 8:50 a.m., the plaintiff Janet Oppenheim, was struck by an ambulette operated by Charmayne A. Halley and owned by defendant Transcare New York, Inc. She commenced the instant action for personal injuries allegedly sustained in the accident, including but not limited to multiple acute intracranial hemorrhages, brain damage with cognitive deficits, facial and pelvic fractures requiring surgery as well as injury to her left ankle. There is no dispute that plaintiff suffered a serious injury within the meaning of Insurance Law §5102(d). The plaintiff now moves, pursuant to CPLR §3212, for summary judgment on the issue of liability as against defendant's Halley and Transcare New York, Inc. Defendants both oppose the motion for summary judgment. Plaintiff also moves, in the alternative to strike the defendant's answer for failure to respond to interrogatories concerning her alleged past criminal record should her motion for summary judgment be denied as well as for a trial preference due to her advanced age.

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 deposition testimony, as well as the deposition testimony of defendant Halley, Jeffrey Pitonza, the Operations Director for Transcare, as well as various medical reports, Transcare Incident Reports and correspondence between the parties concerning discovery disputes. Oppenheims's deposition testimony establishes that she was crossing Second Avenue, within the designated pedestrian crosswalk and in accordance with the pedestrian traffic signal. She indicates that she looked for on-coming traffic before entering the crosswalk from the sidewalk, and seeing none proceeded across. She avers that he did not see the ambulette driven by Halley, which was turning onto Second Avenue from East 33rd Street until the time of impact, when she was struck.

Once the plaintiff 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 defendants in opposition to the instant motion, rely on the plaintiff's offerings and include correspondence and other documents which they purport satisfies any outstanding discovery requests. They argue that their vehicle was making a lawful left turn onto Second Avenue and did not see the plaintiff as she entered the intersection, and in fact their driver did not realize she had struck plaintiff until after the impact. They also aver that the plaintiff did not exercise care in checking for on-coming vehicles.

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 Halley also has a common-law duty to see that which she should have seen through the proper use of her 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 indicated that she checked before leaving the curb, and traveling across Second Avenue in the pedestrian crosswalk and with the light and saw no vehicles. Accordingly, the defendants have not presented any issues of fact to be resolved by a jury on the issue of liability.

The defendant's motion to dismiss the complaint for failure to comply with discovery demands is denied as moot in accordance with the instant decision.

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

ORDERED that the plaintiff's motion for a trial preference based on age pursuant to CPLR§ 3403(4) is granted without opposition, and it is further

ORDERED that the parties are directed to appear for a pretrial conference on May 3, 2007, Part 22, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Enter:

Dated: April 6, 2007

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

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