

Jacobowitz v Salvation Army

2007 NY Slip Op 30754(U)

April 10, 2007

Supreme Court, Kings County

Docket Number: 0022016/2005

Judge: Bernadette Bayne

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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 10th day of April 2007.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

ROBYN JACOBOWITZ,

Plaintiff,

- against -

THE SALVATION ARMY and ROGER COLEMAN,

Defendants.

DECISION AND ORDER

Index No. 22016/05

The following papers numbered 1 to 6 read on this motion:

Papers Numbered

Notice of Motion/
Affidavits (Affirmations) Annexed _____

_____ 1 _____

Affirmations in Opposition _____

_____ 2 _____

Reply Affirmations _____

_____ 3 _____

Plaintiff in the instant action was involved in an automobile accident with a vehicle owned by defendant The Salvation Army and operated by defendant Roger Coleman in the

intersection of the Long Island Expressway Service Road and Route 231, a/k/a Deer Park Avenue, in the town of Huntington, located in Suffolk County, New York on January 3, 2004. Plaintiff moves for summary judgment on the issue of liability, pursuant to CPLR § 3212, on the grounds that the defendants violated VTL § 1111(d)(1) by proceeding through the intersection where the within accident occurred against a red traffic signal, and as such, are negligent as a matter of law. Plaintiff further contends that the defendants' negligence was the sole proximate cause of the subject accident.

Defendants contend, that despite the fact that they were unable to produce the defendant driver for deposition, the plaintiff's testimony raises questions of fact as to what she saw before the accident occurred and whether her actions were reasonable under the circumstances, and that as such, summary judgement is not warranted.

Summary judgment standard

The proponent of 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 from the case. See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenburg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must

determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

It is well settled in New York State that the presence of traffic-control signals at intersections does not excuse the use of reasonable care and caution on the part of motorists, Adams v Berkun, 2 NYS2d 98, (1938). The conduct of both drivers approaching an intersection controlled by a traffic light must be consistent with reasonable care under the circumstances by exercising forbearance and caution regardless of the light, Leach v Patroon Cab Corp., 27 AD2d 769, 277 NYS2d 58, (3d Dept., 1967).

Nevertheless, generally speaking, the fact that a motorist approaching an intersection has the signal in his favor absolves the motorist from any charge of negligence in connection with a collision with another vehicle proceeding at right angles across the intersection. See Foley v State 265 AD 682, 41 NYS2d 256, (1943); Crowley v Fifth Ave. Coach Co., 249 AD 408, 292 NYS 473, affd 276 NY 496, 12 NE2d 175 (1937); Irving v Shaw, 247 AD 783, 286 NYS 588, (1936); Town v State, 49 NYS2d 924, (Court of Claims, 1944). A motorist who disregards an unfavorable signal and collides with another vehicle crossing the intersection at right angles to his path is guilty of negligence. See Ferraro v Garden City Park Fire Comm'rs, 259 AD 121, 18

NYS2d 194, (1940); Luciani v Five Boroughs Truckmens Service Ass'n, 240 AD 70, 269 NYS 200, (1934); Larmer v Boyd, 202 AD2d 982, 609 NYS2d 489, (4th Dept., 1994).

However, pursuant to the doctrine of comparative negligence a driver who proceeds in the face of a green light may be found partially responsible for an ensuing accident if he does not use reasonable care, and he may be guilty of negligence in proceeding across the intersection without making sufficient observation of traffic conditions, or without slowing down, resulting in a collision with another vehicle. See Costalas v New York, 143 AD2d 573, 532 NYS2d 868, (1st Dept, 1998); Smith v Stanton, 244 AD 804, 279 NYS 386, (1935); Plunkett v Heath, 1 NYS2d 778, (1938); LaForge v All American Car Rental, Inc., 155 AD2d 873, 548 NYS2d 954, (1989, 4th Dept., 1989); Rennie v Barbarosa Transport, Ltd., 151 AD2d 379, 543 NYS2d 429, (1st Dept., 1989); Foussadier v Bartolo, 13 Misc 2d 461, 177 NYS2d 140, (1958).

Thus a driver with a green light who observes, or in the exercise of ordinary prudence should have observed, another vehicle in the intersection or so near as to render it likely that a collision would occur must take such action to avoid a collision as an ordinarily prudent person would have done under the circumstances. See Cassidy v Valenti, 211 AD2d 876, 621 NYS2d 405, (3rd Dept., 1995); Walker v Dartmouth Plan Leasing Corp., 180 AD2d 952, 580 NYS2d 535, (3rd Dept., 1992).

Moreover, a motorist may be guilty of negligence in entering an intersection with a favorable signal but without giving other motorists who entered the intersection when the signal was in their favor an opportunity to clear the crossing. A motorist having a green light in his favor is still required to use reasonable care under the circumstances. If he observes another vehicle in the intersection, or so near as to render it likely that a collision will occur unless he

reduces his speed or stops, or if the circumstances and conditions are such that in the exercise of ordinary prudence he should have made such an observation, he may not proceed without using such care to avoid the collision as a reasonably prudent person would have used under the circumstances. See Shea v Judson, 283 NY 393, 28 NE2d 885, (1940); Vinci v Charney, 192 Misc 302, 80 NYS2d 521, (1948).

In the instant case, plaintiff's motion for summary judgment fails to make a *prima facie* showing of entitlement to judgment as a matter of law. In support of her motion, plaintiff submits an attorney's affirmation, copies of the summons and complaint, verified answer and bill of particulars, as well as copies of her deposition testimony and the deposition testimony of the defendant vehicle's owner. In her reply papers, plaintiff also attaches a copy of the Police MV104A accident report, which contains, amongst other information, statements attributed to the plaintiff and the defendant-driver, as well as a purported witness statement.

Plaintiff wrongly contends that the defendant driver's failure to testify at deposition, combined with the witness statement and her deposition testimony that the defendant-driver passed through a red traffic signal, entitles her to summary judgement as a matter of law on the issue of liability.

Despite the fact that the defendant driver did not testify at deposition, numerous questions of fact remain that preclude the granting of summary judgement to the plaintiff on the issue of liability. There are contradictions within the plaintiff's deposition testimony, as well as contradictions between the statements and information contained in the Police MV104A accident report that raise questions of fact not only as to what color the light was when the accident happened, but also to how fast the plaintiff was traveling at the time of the accident, the points of

contact between the vehicles, and ultimately, whether the plaintiff's actions were reasonable under the conditions and circumstances then and there existing.

At her deposition, [Exhibit D of plaintiff's motion papers], plaintiff testified that she was able to see the intersection where the accident occurred approximately ½ mile before she reached the intersection, and that at that time the traffic light for traffic traveling in her direction was red. [See plaintiff EBT p12, lines 18-25, cont. p13, lines 2-7] Plaintiff further testified that when she was approximately ¼ mile from the intersection where the accident occurred, she saw the light turn green for traffic traveling in her direction. [See plaintiff EBT p13, lines 13-20] Plaintiff also testified that her highest rate of speed as she approached the intersection where the accident occurred was 40mph and that she maintained that same speed up until the moment of the impact. [See plaintiff EBT p.12, lines 5-8 and p13, lines 21-24] Additionally, plaintiff testified that when she saw the other vehicle, prior to the impact occurring, she "did nothing" with the steering wheel of her car. [See plaintiff EBT p16, lines 11-14. Plaintiff also stated that the damage to her vehicle was on the right side of the car, not to her driver's door, but to the "right front end...and also in the back of my car...the right back." [See plaintiff's EBT p14, lines 14-22]

A review of the Police MV104A accident report [Exhibit A of plaintiff's reply papers] indicates that the Plaintiff stated to the responding Police Officer that she "was stopped at a red light, W/B on the N/ Service Road at the intersection of Rt 231. The light turned green, she proceeded into the intersection and was struck by vehicle #2."

The contradictions between the plaintiff's deposition testimony and the statements that she made to the responding police officer raise numerous questions of fact including, but not limited to, questions about the color of the light, the location of her car relative to the intersection

when she first saw the light and the speed at which her vehicle was traveling when the accident occurred. Further review of the MV104A accident report indicates that the plaintiff's car sustained damage to its' entire *left side*, and the point of impact was in the area of the driver's side car doors. This also directly contradicts plaintiff's deposition testimony that the damage was not to the doors, but was more towards the front, and, even more confusingly, that the damage was on the *right side* of her car.

Plaintiff's testimony that she maintained the same speed up until the moment that the accident happened, as well as her testimony that she did nothing with the steering wheel of her car when she saw the defendant's vehicle prior to the impact, raise factual questions as to whether the plaintiff's actions were reasonable under the circumstances. In addition to the aforementioned, the credibility issues raised by the inconsistencies in the plaintiff's statements to the police at the scene and then later at her deposition certainly raise questions of fact that are properly left for a jury to consider.

Regarding the "witness statement" contained in the MV104A accident report, the court finds that the statement is unreliable and not worthy of consideration. While a motion for summary judgment must be supported by evidentiary facts, they need not necessarily be in the form used at trial. CPLR § 3212 does not provide an exclusive list of what items can be used in support of a motion for summary judgment but, rather, states that affidavits and "other available proof, such as depositions and written admissions" are adequate. Therefore, it would follow that any item of proof as reliable as an affidavit should be considered on a summary judgment motion, State v. Metz, 241 A.D.2d 192, 199, 671 N.Y.S.2d 79 (1st Dep't 1998). In this instance, the fact that the witness statement is not attributed to anyone, [the report lists the witness's name

as “unknown”], in addition to the fact that the plaintiff never took a non-party deposition of the witness, or even obtained a sworn statement or affidavit from the witness, makes the statement neither compelling, nor worthy of belief. The prejudice to the defendant in considering such an unreliable, hearsay witness statement far outweighs any probative value that it may have.

Given the discrepancies in the account of the accident that were submitted in support of the plaintiff's motion, particularly as to where the plaintiff was when she first saw the defendant, the plaintiff's speed and the points of contact, the plaintiff failed to make out a prima facie case that the defendant driver violated Vehicle and Traffic Law § 1111 (d) (1) and was thereby the sole proximate cause of the accident (see generally Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; cf. Borges v Zukowski, 22 AD3d 439 [2005]). Similarly, the plaintiff failed to make out a prima facie case that she was free from comparative negligence (see Cox v Nunez, 23 AD3d 427 [2005]). Since the plaintiff failed to establish her entitlement to judgment as a matter of law, we need not consider the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; ADC Orange, Inc. v Coyote Acres, Inc., 20 AD3d 493, 495 [2005], affd 7 NY3d 484 [2006]).

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff for summary judgment on the issue of liability in the instant action, pursuant to CPLR § 3212, on the grounds that defendants' negligence was the sole proximate cause of the accident, is denied.

This constitutes the Decision and Order of the Court.

E N T E R

A handwritten signature in blue ink, reading "Bernadette Bayne", is written over a solid black horizontal line.

HON. BERNADETTE BAYNE

J. S. C.