

Ryan v Jordan

2007 NY Slip Op 30774(U)

April 14, 2007

Supreme Court, Suffolk County

Docket Number: 0011143/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8/30/06
ADJ. DATE 11/8/06
Mot. Seq. # 002 - MG

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	:		
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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 20 - 21; Replying Affidavits and supporting papers 22 - 23; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff, John Ryan, for an order pursuant to CPLR 3212, granting him summary judgment in his favor on the issue of liability and setting this case down for an immediate determination of damages is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on July 12, 2003, as a result of a motor vehicle accident. The plaintiff was a pedestrian when he was struck by a vehicle owned and operated by defendant, Michael A. Jordan, at the intersection of Merrick Road and Maple Street, Town of Seaford, County of Nassau, New York. Plaintiff was caused to sustain serious injuries, including a fractured tibia and tear of the posterior horn of the medial meniscus. At the time of the accident, plaintiff was standing on the solid double yellow line in the middle of Merrick Road waiting to cross the street on his way to a block party on Maple Street.

Plaintiff now moves for summary judgment on the basis that the defendant was the sole proximate cause of the accident because he failed to see the plaintiff standing on the double yellow lines while executing his left turn. In support, plaintiff submits the pleadings, photographs of the accident site

and plaintiff's injuries, copies of the deposition transcripts of plaintiff and defendant and plaintiff's emergency room medical records.

Defendant opposes the motion on the grounds that the plaintiff was contributorily negligent in crossing the street where he chose to do so and waiting on the double yellow lines for traffic to pass before proceeding.

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]). The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1989]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

Plaintiff testified at his examination before trial that he was standing on Merrick Road on the solid double yellow lines waiting for the westbound traffic to subside in order for him to proceed across the street when he was struck by the defendant's vehicle. Plaintiff stated that about six vehicles had passed him prior to the accident's occurrence. Plaintiff explained that he was standing approximately two feet from the "break" in the double yellow lines because "there is no cross walk or traffic control devices" located at the intersection of Merrick Road and Maple Street. Plaintiff testified that he saw defendant's vehicle, which was about two feet from him, a "split second" out of his peripheral vision before the accident occurred. Plaintiff further testified that he never moved from the double yellow lines before the vehicle struck him and he was still standing on the double yellow lines after the vehicle struck him.

Defendant testified at his examination before trial that he was turning left onto Merrick Road from Maple Street at the time of the accident. Defendant stated that while he was parked in the parking lot of a convenience store, he observed the plaintiff walking on the west side of Maple Street, from south to north, approximately 100 feet from the corner. Defendant testified that after he exited the parking lot onto Maple Street that he "inched up" and stopped several times at the subject intersection, checking for eastbound and westbound oncoming traffic because there were no traffic control devices directing his flow of traffic. Defendant stated that when he check for oncoming traffic from the east and west, he could see approximately 200 to 400 feet down Merrick Road. Defendant stated that he never once the plaintiff while he waited for traffic to clear at the border of Merrick Road. Defendant testified that he does not recall hitting the plaintiff and only became aware of the impact after he heard the plaintiff shouting after he was one to two car lengths into the traffic pattern. Defendant further testified that when he saw the plaintiff, the plaintiff was standing erect with his hands on the hood of the car, parallel to the front left side of his vehicle.

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Based upon the foregoing, the plaintiff has met his burden in establishing his entitlement to judgment as a matter of law (*Winegrad v NYU Medical Ctr.*, *supra*; *Andre v Pomeroy*, *supra*; *see also, Berger v Seefried*, 254 AD2d 320, 678 NYS2d 641 [1998]). The plaintiff, here, was exercising vigilance and due care as well as yielding the right of way to automobile traffic while crossing the street at a point other than a marked crosswalk (*see, Vehicle and Traffic Law § 1152, Schmidt v S. M. Flickinger Co.*, 88 AD2d 1068, 452 NYS2d 767 [1982]; *House v Reimann*, 48 AD2d 469, 369 NYS2d 843 [1975]; *see also, Thoma v Ronai*, 189 AD2d 635, 592 NYS2d 333 [1993] *quoting Pecora v Mariquee*, 273 AD2d 705, 79 NYS2d 350 [1948]). It cannot be said that plaintiff was crossing the street at point in which vehicle operators would not expect pedestrian traffic (*see, House v Reimann, supra*), nor can it be said that the plaintiff standing completely still on the solid double yellow lines was a proximate cause of the subject accident (*Schmidt v S. M. Flickinger Co., supra*). Therefore, defendant, as an operator of a motor vehicle, was under a duty to see that which he should have seen, which included the plaintiff standing on the double yellow lines, approximately two feet from the intersection, waiting to cross the street (*Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [1997]; *Safran v Amato*, 155 AD2d 653, 548 NYS2d 244 [1989]; *see also, Vehicle and Traffic Law §110*). Moreover, defendant as a driver of a motor vehicle was under a duty of care to avoid colliding with the plaintiff, a pedestrian, as well as to not cross the solid double yellow lines as he was making a left turn (*see, Vehicle and Traffic Law §§ 1142, 1126*).

Accordingly, plaintiff's motion for summary judgment is granted. The plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Dated: MAR 14 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION