

Aguilar v New York City Tr. Auth.

2007 NY Slip Op 33452(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0103132/2006

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

AGUILAR, GLORIA

INDEX No. 103132/06

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

NEW YORK CITY TRANSIT AUTHORITY, et. al.,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: _____ YES NO

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10-10-07

J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK, PART 21

-----X
 GLORIA AGUILAR and ARISTIDES AGUILAR,

Plaintiffs,

Index No.:103132/06

-against-

NEW YORK CITY TRANSIT AUTHORITY and
 ANDREW MONACO,

Defendants.
 -----X

HON. DONNA MILLS, J.S.C.:

In this action involving a pedestrian bus accident, plaintiffs Gloria and Aristides Aguilar move pursuant to CPLR 3212, for partial summary judgment against defendant bus driver, Andrew Monaco, and defendant owner, New York City Transit Authority (NYCTA), on the ground that there exists no questions of fact as to the defendants' liability. Defendants oppose the motion for summary judgment and contend that a question of fact exists as to whether plaintiff Gloria Aguilar contributed to the accident by walking into the subject bus as it was turning. Defendants argue that plaintiff was obligated to pay attention to her surroundings prior to crossing and allege that as she left the curb after the bus had turned into the crosswalk, she forfeited her right of way. Defendants also contend that a blind spot may have blocked the bus driver's view of plaintiff and contributed to the accident.

FACTUAL ALLEGATIONS

This action arises from a pedestrian bus accident which took place on November 4, 2005, at the intersection of West 50th Street and 10th Avenue in New York City. Plaintiff testified that she was on her way home from work, when she was walking along 50th Street toward 10th Avenue, with the intention of crossing 50th Street. When she arrived at the intersection, plaintiff

Avenue, with the intention of crossing 50th Street. When she arrived at the intersection, plaintiff waited for the pedestrian signal to change, and looked for vehicles to her left and right. Plaintiff testified that after seeing no vehicles approaching, she began to cross the intersection. Plaintiff had walked about ten to fifteen feet into the crosswalk when the left side of her body was struck by "the front of the bus, the right side" (Aguilar EBT, at 50). The bus proceeded to run over her legs, injuring her right leg and requiring her left leg to be amputated.

Plaintiff testified that at the time of the accident, she was carrying a book bag which included among other items, a CD player with headphones. Plaintiff testified that she was not wearing the headphones at the time of the accident and explained that immediately following being hit by the bus, a passerby opened her book bag and pulled out the CD player in an attempt to locate her husband's phone number.

The bus driver testified that on the day of the accident, he was driving an empty passenger bus and heading north on 10th Avenue, intending to turn right onto 50th Street. The bus driver stated that he did not recall observing any pedestrians as he approached the intersection nor did he see any pedestrians either in or near the crosswalk. The bus driver testified he was aware that any pedestrian which would be crossing 50th Street at the intersection of 10th Avenue would have a pedestrian walk signal in his/her favor as the light was green, and that if a pedestrian was in the street or crosswalk, he would have to yield before proceeding. At about 50 to 75 feet before the subject intersection, the bus driver testified that he put his foot on the brake to slow the bus down and did not stop the bus prior to the turn as the light was green. The bus driver stated that while turning in the intersection before striking plaintiff, he was traveling between 2-3 miles per hour.

While making the turn onto 50th Street, the bus driver heard a thud on the right side of the vehicle and brought the bus to a stop. Upon stopping, the bus driver observed plaintiff under the bus.

The NYCTA conducted an investigation regarding the accident and issued a memorandum on November 22, 2005 which outlined its findings. According to this memorandum, a "Safety & Training Division Investigator" arrived at the scene of the accident after plaintiff had been transported to the hospital for treatment. The investigator reported that the bus had not been moved from the original stopped position, and that the right front bumper was eighteen feet past the crosswalk. In addition, he observed that there was an eight-foot tire mark of blood and human tissue made by the right front tire. "This mark began approximately thirteen (13) feet one (1) inch from the northern curb, and started on the western most crosswalk line, tracking east." (Kay Affirm., ex. D at 1). In addition, the investigator found one of plaintiff's shoes as well as a set of headphones located under the center of the bus.

The NYCTA concluded that the bus driver failed to properly scan his surroundings prior to entering the intersection, failed to properly slow the bus prior to and during the turn, failed to use proper defensive driving techniques as he moved through the intersection, and failed to anticipate a pedestrian entering the intersection. The NYCTA also concluded that plaintiff was struck while she was within the crosswalk, that she failed to realize the hazard presented by the approaching bus, and that she ran past the entire front of the bus prior to being struck by the front right corner. Although no individuals reportedly observed the impact, the NYCTA's memorandum states that a witness saw the pedestrian from across the street as she was running along the sidewalk of 10th Avenue southward towards 50th Street.

On November 29, 2005, a disciplinary notification was issued by the NYCTA in which it recommended that the bus driver be discharged from all services. Post investigation hearings were held on February 1, 2006, April 20, 2006, and June 12, 2006, after which the disciplinary penalty of dismissal was sustained. In July of 2006, an arbitration hearing was held pursuant to the bus driver's appeal which sought to review the NYCTA's finding that the accident was preventable and to determine whether the penalty imposed upon him was appropriate.

After reviewing all of the evidence, the arbitrator concluded that plaintiff was struck by the bus and that she had the light in her favor when she entered the crosswalk. According to the arbitrator, there was no compelling evidence that plaintiff walked into the side of the bus from a position where the bus driver could not have seen her before he began his turn. The arbitrator's decision states:

Although the pedestrian may have contributed substantially to the accident, as she was apparently wearing a headset while listening to music and did not hear or notice the bus as she entered the intersection, the evidentiary record establishes persuasively that the pedestrian was crossing in the crosswalk when she was struck by the bus and that she had the light in her favor when she entered the crosswalk.

(*Kay Affirm., ex. E.* at 5). The arbitrator held that even if plaintiff contributed to the accident and was primarily at fault, the accident must be deemed preventable as the bus driver failed to take all reasonable precautions to avoid the collision including entering the intersection more slowly. The arbitrator noted that the bus traveled eighteen feet past the crosswalk after the bus driver heard a thud, and that if it had been traveling as slow as the bus driver claimed, the bus would have been able to stop in a shorter distance. The arbitrator confirmed that the accident was properly deemed by the NYCTA to be preventable.

The arbitrator further held that there was an inadequate basis to terminate the bus driver's

employment with the NYCTA and found the more appropriate penalty to be demotion to a non-driving position for a period of two years with a right to reapply for reinstatement to driving duties.

Plaintiffs filed a complaint on March 7, 2006 alleging that the NYCTA and the bus driver were negligent in causing the accident.

DISCUSSION

Summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). "[A] plaintiff is rarely entitled to summary judgment in a negligence action, summary disposition being generally limited to those cases which are devoid of any conflict in the evidence." *Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 158 (1st Dept 1996).

According to section 1111(a)(1) of New York State's Vehicle and Traffic Law, a pedestrian has the right of way when crossing with the pedestrian light in a crosswalk. Section 1111(a)(1) states:

(a) Green indications:

1. Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at

the time such signal is exhibited.

Vehicle & Traffic Law § 1111(a)(1).

Section 1642(a) of the Vehicle and Traffic Law states that a city having a population in excess of one million, may by local law, rule, ordinance, order, or regulation, restrict or regulate traffic on or pedestrian use of any highway. Vehicle & Traffic Law § 1642(a). New York City has its own set of traffic laws which are set forth in its Traffic Rules and Regulations. Section 30(a) of New York City's Traffic Rules and Regulations states that, "[v]ehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited." 34 RCNY 4-03(a)(1)(i). Section 30(c)(1) further states that when pedestrians have a green hand symbol or a green walking figure, pedestrians facing such a signal shall proceed across the roadway and "[v]ehicular traffic shall yield the right of way to such pedestrians." 34 RCNY 4-03(c)(1). While the violation of New York City Traffic Regulations constitutes some evidence of negligence, the violation of section 1111 of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Elliott v City of New York*, 95 NY2d 730, 734 (2001); *Cruz v City of New York*, 13 AD3d 254 (1st Dept 2004).

The First Department has held that a critical question in pedestrian accidents which involve a right of way is the location of the pedestrian in the crosswalk when a vehicle is turning. In *Brito v New York City Transit Auth.* (188 AD2d 253 [1st Dept 1992], *appeal dismissed* 81 NY2d 993 [1993]), the court held that although section 30(a) of New York City's Traffic Rules and Regulations provides in part that vehicular traffic shall yield the right of way to pedestrians who are lawfully within the intersection, unless the pedestrian could prove that he/she was in a

crosswalk before a bus started to turn, the pedestrian would not be entitled to the right of way. *See also Fannon v Metropolitan Transp. Auth.*, 133 AD2d 211 (2d Dept 1987) (holding whether a pedestrian has a right of way is dependent upon if the bus was moving when the pedestrian stepped off the curb and into the street).

Even if defendants violated section 1111 of the Vehicle and Traffic Law and negligence is established per se, summary judgment must be denied as plaintiff may be found to have been contributory negligent. *Thomas v Ronai*, 189 AD2d 635 (1st Dept), *affd* 82 NY2d 736 (1993).

Plaintiffs argue that it is undisputed that plaintiff had the right of way in the crosswalk as she had the traffic light as well as the pedestrian walk signal in her favor. Plaintiffs contend that it was the bus driver's negligence that is the sole cause of the accident and such negligence was established through his testimony and the results of NYCTA's own investigation. Plaintiffs further contend that there is no direct evidence that would provide a basis to hold that plaintiff left the curb after the bus had already started turning or that the bus driver's failure to see her crossing the street due to a blind spot.

Defendants claim that plaintiff was contributory negligent for the accident as she was inattentive and failed to keep a proper lookout while crossing the intersection. Defendants argue that plaintiff should have been aware of the approaching bus and entered the crosswalk after the bus turned into the crosswalk.

In support of their claims, defendants submit an affidavit from Mark Marpet, a licensed professional engineer. Defendants' expert concludes, based on his review of the evidence and his re-enactment of the accident on May 19, 2007, that plaintiff should have seen the bus before she stepped off the curb, that plaintiff left the curb only after the bus had already started turning

and entered the intersection, and that the bus driver might not have spotted plaintiff because of a blind spot. Defendants' expert bases these conclusions on the speed at which the bus was turning, based on the sworn testimony of the bus driver, the speed at which plaintiff was walking, based on her testimony, and the fact that the physical and testimonial evidence suggests that plaintiff walked into the right side of the bus. He further suggests that since the area on the bus that shows conclusive evidence of contact with the plaintiff is the right-hand front wheel, which is on the right side of the bus behind the driver, and out of his direct field of view, a blind spot may have prevented the bus driver from seeing the plaintiff.

Plaintiffs dispute Marpet's conclusions arguing that they are speculative and contend that plaintiff's point of contact with the bus was not the right front wheel, but the right front corner. Plaintiffs argue that based upon the NYCTA's investigation, the right front corner of the bus had marks which indicated where plaintiff first made contact before falling to the pavement.

It is well settled that "opinion evidence must be based on facts in the record or personally known to the witness." *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959). Here, the affidavit of Marpet states that his affidavit is based not only upon his personal knowledge, but upon review of several items including his inspection of the bus, his re-enactment of the accident,¹ the pleadings, the police report, the NYCTA's November 22, 2005 memorandum, the bus

¹ On May 19, 2007, defendants' expert conducted a re-enactment of the accident which was held at the location of the accident using the same bus. Plaintiffs argue that pursuant to *Riccio v U.S.A.*, 2007 US Dist LEXIS 38713 [EDNY 2007], the re-enactment is without value and should be ignored as it is based upon several factual conclusions which are unknown. Unlike in *Riccio* where an accident reconstructionist was found to have depended on several factual conclusions which should have been determined by the court, Marpet's conclusions were based upon the factual record. Also distinguishable between the two cases, is that here the bus driver was present at the re-enactment and described to Marpet how he performed the turn on the date of the accident.

driver's trip sheet and accident report, and the deposition transcripts of both plaintiff and the bus driver. Therefore, this court cannot discount Marpet's conclusions particularly since plaintiff fails to refute his conclusions with any contrary expert opinion.

If the bus was located in the intersection before plaintiff stepped off the curb and began crossing 50th Street, plaintiff could be found to be contributory negligent. Therefore, as defendants' expert raises a question of fact regarding the location of both the bus and plaintiff prior to and during the accident, summary judgment must be denied.

Defendants contend that a blind spot may have obscured the bus driver's view of the right side of the bus and blocked his vision of plaintiff. The bus driver testified that he was aware of the blind spot prior to the accident and was trained to take proper precautions to eliminate the spot as much as possible. The bus driver stated that he was taught to "scan the mirrors" and to "move around in the seat to be able to see the blind spots" (Monaco's EBT, at 39). The bus driver further testified that as he was going over the crosswalk on Tenth Avenue on the day of the accident, he moved around in his seat, checked his mirrors, and sat up (*id.*, at 129). Therefore, defendants fail to raise a triable issue of fact that a blind spot excused the bus driver's failure to see plaintiff and stop in time to avoid running her over.

Defendants also argue that plaintiff may have been inattentive while crossing the intersection as they allege she was listening to a personal CD player. *See Hersh v New York City Transit Auth.*, 297 AD2d 556 (1st Dept 2002) (plaintiff was contributory negligent for not wearing glasses and a hearing aid at the time of the accident and failed to observe the bus until it hit her). Although plaintiff testified that she was not listening to her CD player at the time of the accident, and that it was in her backpack, she wore her headset on the beginning portion of her

journey home while on the Long Island Railroad and subway. The CD player was also found under the bus, towards the center. This would mean that the bystander who opened her book bag thereafter threw the CD player under the bus. In determining motions for summary judgment, all ambiguities must be resolved, and all reasonable inferences drawn, in favor of the non-moving party. *Cruz v American Export Lines, Inc.*, 67 NY2d 1, 13 (1986), *cert. denied*, 476 US 1170 (1986). Therefore, as plaintiff's use of the CD player at the time of the accident raises a credibility issue, summary judgment must be denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment is denied.

Dated: October 10, 2007



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
OCT 24 2007
NEW YORK
COUNTY CLERKS OFFICE