

Hernandez v Syed

2007 NY Slip Op 33834(U)

November 23, 2007

Supreme Court, New York County

Docket Number: 0110080/2006

Judge: Deborah A. Kaplan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

BRANDON HERNANDEZ an infant by his
Mother and Natural Guardian **GRACE MELENDEZ**

INDEX NO. 110080/06

MOTION DATE 10-10-07

- v -

MOTION SEQ. NO. 001

RAZA MAHMOOD SYED

MOTION CAL. NO. 26

The following papers, numbered 1 to 3 were read on this motion by the plaintiff for summary judgment on the issue of liability.

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

Answering Affidavits -- Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

As he was crossing the street at the intersection of Columbus Avenue and West 107th Street in Manhattan on May 23 2006, on his way to the Booker T. Washington School, the infant plaintiff, Brendan Hernandez, was struck by a vehicle owned and operated by the defendant, Raza Mahmood Syed. A police report indicates that the defendant stated to an officer at the scene that, the plaintiff ran from between parked cars and jumped onto the hood of his car. However, both the plaintiff's deposition testimony and defendant's deposition testimony indicate otherwise. The plaintiff commenced the instant action seeking damages for personal injuries he allegedly sustained in the accident. He now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability.

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 demonstrate the absence of any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). The moving party must demonstrate his or her

entitlement to judgment as a matter of law by tendering proof in admissible form. See Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065(1979). If moving party meets that burden, the opposing party, in order to defeat the motion, must come forward with evidentiary proof in admissible form that would raise a triable issue of fact. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of her motion, the plaintiff proffers the pleadings in this action, his attorney's affirmation, his complete deposition testimony, the complete deposition testimony of the defendant and several photos of the intersection where the accident occurred. In his testimony the plaintiff maintains that at the time of impact, he was crossing at the corner of West 107th Street and Columbus Avenue and that the traffic light was in his favor. He alleges that the defendant's vehicle entered the intersection suddenly, striking him without warning. As a result of the impact he was thrown onto the hood of the car, where he remained as the car continued to move. Once the vehicle stopped, he rolled forward and landed on the street. As a result of the impact he was knocked unconscious and only came to as he was being placed in an ambulance by responding emergency medical personnel.

The defendant's deposition testimony reveals that he was proceeding at a rate of approximately fifteen to twenty miles per hour on his way to the airport with three passengers, when he saw an individual on the hood of his taxi cab. He indicated that this was the first time he saw the child and that he continued to drive approximately ten yards further with Hernandez on the hood, before stopping. He indicated the child then rolled off, landing some five to six feet from the car. The driver further indicated he was aware of the school located at that corner. The pictures submitted by plaintiff show that the street is painted with a warning "school x-ing" and that there are several posted signs indicating the presence of a school and children crossing.

In opposition to the motion, the defendant submits his attorney's affirmation, portions of the parties deposition transcripts and a copy of the New York City Police Department report made in this matter. In her affirmation, the defendant's attorney restates some of the factual portions of the deposition testimony, indicating that defendant did not see the child prior to striking him. She claims that in the initial police report, the defendant indicated the plaintiff ran from between cars and jumped onto the hood of the taxi. She argues that this statement is

admissible and as such creates an issue of fact, requiring denial of the motion. Since the attorney claims no personal knowledge of the accident, her affirmation is without probative value on the factual issues presented by this motion. See Zuckerman v City of New York, *supra* at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority, 12 AD3d 316 (1st Dept. 2004). However, she properly asserts legal arguments regarding the admissibility of the defendant's statement.

It is not disputed that the defendant's statement contained in the police report, as an out-of-court statement offered for the truth of the fact asserted therein, constitutes hearsay and must, therefore, fall within one of the exceptions to the hearsay rule in order to be admissible. See generally Prince, Richardson on Evidence, § 8-101et seq. [Farrell 11th ed.]

In the First Department, police reports are admissible as business records (CPLR 4518[a]) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d392 (1st Dept. 2003); Yeargans v Yeargans, 24 AD2d 280 (1st Dept. 1965). If the information contained in the report came from witnesses not engaged in the police business in the course of which the report was made, or it came from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., *supra*; Yeargans v Yeargans, *supra*; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Connors v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). While the driver of an offending vehicle is required to provide the responding police officer with proof of registration of the vehicle (see Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]), he or she has no duty to report the circumstances or the causes of the accident. See Cover v Cohen, 61 NY2d 261 (1984); Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); see also Mooney v Osowiecky, 235 AD2d 603 (3rd Dept. 1997). Indeed, the First Department has consistently held that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept.

1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980). Accordingly, the defendant's hearsay statement is inadmissible on this motion.

Here, the plaintiff's proof establishes negligence on the part of the defendant and prima facie entitlement to judgment as a matter of law. As a pedestrian who is crossing at the corner with a traffic light in his favor, the plaintiff had the right of way. See Vehicle and Traffic Law § 1111. In his own sworn testimony, the defendant does not dispute the facts asserted by the plaintiff but simply alleges that he never saw him. This submission does not raise any triable issues as to the defendant's liability or the plaintiff's comparative negligence. See Kirchgaessner v Hernandez, 40 AD3d 437 (1st Dept. 2007); Zabusky v Cochran, 234 AD2d 542 (2nd Dept. 1996).

For these reasons, it is

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

ORDERED that the parties are to appear for a pre-trial conference on January 10, 2007 at Part 22, 80 Centre Street, N.Y., N.Y. Room 136, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: November 23, 2007

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

Deborah Kaplan
Deborah A. Kaplan J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST