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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

MARIO MORALES,

Plaintiff,

-against-

HAWKEYE, L.L.C. s/i/a HAWKEYE CONSTRUCTION, L.L.P. and SAJI M. VARUGHESE,

Defendants.

Motion Sequence #2
Submitted September 5, 2007
XXX

INDEX NO: 7768/06

The following papers were read on this motion:

Notice of Motion.....1
Memorandum of Law in Support of Motion.....2
Affidavit in Opposition.....3
Reply Affirmation.....4

Requested Relief

Defendants, HAWKEYE, L.L.C. s/i/a HAWKEYE CONSTRUCTION, L.L.P. (hereinafter referred to as "HAWKEYE") and SAJI M. VARUGHESE, move for an order, pursuant to CPLR §3212(b), granting them summary judgment dismissing the action in its entirety. Plaintiff, MARIO MORALES, opposes the motion which is determined as follows:

Background

This action arises from an accident that occurred on November 3, 2004, at approximately 5:30 P.M. on Nassau Boulevard, south of its intersection with Maxwell Street, West Hempstead, New York. According to movant, defendant SAJI M. VARUGHESE, he was driving home from work as an inspector of construction projects for his employer, HAWKEYE, proceeding northbound on Nassau Boulevard, at approximately thirty (30) miles per hour, when plaintiff, a pedestrian, ran into the street in front of his vehicle and came in contact with his vehicle. VARUGHESE testified that he was in the right lane of traffic of two (2) northbound lanes, and another vehicle was traveling parallel to him on the left, when plaintiff ran from the left side of the street, across the southbound lane and the left lane of the northbound lane and into his lane of traffic, and that he did not see him until an "instant" before the accident, that "he just jumped from the other side. . .".

In support of the motion to dismiss, defendants submit the deposition transcript of non-party witness, Officer Mark Casella, the Nassau County Police Officer who responded to the accident. He corroborated VARUGHESE's version of the events and testified that plaintiff crossed the street in the middle of the roadway, not at an intersection or crosswalk, and in front of moving traffic. He confirmed that the police report he completed indicated that the roadway was straight and level, that the weather was clear, and that the pedestrian was in error for crossing a street in front of a moving vehicle, outside of a crosswalk. He stated that the speed limit at the portion of the roadway where the accident occurred was thirty (30) miles per hour but, just north of that, drops down to twenty (20) miles per hour as the road enters a school zone. Counsel argues that defendants are entitled to summary judgment because plaintiff violated Vehicle and Traffic Law §1152(a), which provides that

a "pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to vehicles on the roadway" and because there is no evidence of negligence on the party of the defendants. It is counsel's position that defendants have demonstrated a *prima facie* right to summary judgment.

In opposition to the motion, counsel for plaintiff asserts that defendants' motion should be denied because defendants' admitted to speeding at the time of the accident and had ample opportunity to avoid coming in contact with plaintiff. He claims, therefore, there are issues of fact which must be resolved by a jury. To support this position, counsel annexes, *inter alia,* a series of photographs which allegedly depicts the scene of the accident (Exhibit "1" to the opposition), which prominently show a twenty (20) mile per hour school zone speed restriction, and counsel points out that defendant VARUGHESE admitted to driving thirty (30) miles per hour at the time of event and, therefore, was speeding. Counsel for plaintiff contends that if defendant was not speeding he would have been able to stop before coming in contact with the plaintiff, he would have been able to see plaintiff sooner and plaintiff would have been able to completely cross the street before being hit by defendants' vehicle. However, the Court notes that the photograph marked by defendant VARUGHESE at his deposition (Exhibit "2" to the opposition), which he stated depicts the scene of the accident and on which he marked an "X" on the spot where contact with plaintiff was made, depicts a more southern point on Nassau Boulevard and contains no signs indicating a twenty (20) mile per hour school zone speed restriction. Indeed, counsel for defendants points out that the photographs upon which plaintiff relies have not been authenticated and, at plaintiff's deposition, he denied recognizing what was

shown in the photograph and stated "No, as I do not know the area, I don't even know where I was up until today. I practically do not know the area". (Exhibit "C" to moving papers, p.101). Counsel for defendants states that plaintiff is attempting to raise a "feigned issue of fact, designed to avoid the consequences of the plaintiff's deposition testimony", citing *Rivera v Glen Oaks Village Owners, Inc.*, 41 AD3d 817, 839 NYS2d 183 (2nd Dept. 2007). Moreover, at plaintiff's deposition, he acknowledged that he was not walking at a crosswalk nor where there were any traffic lights and, as he began to cross, he was scared of the traffic.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light

most favorable to the non-moving party. (*See, Mosheyev v Pilevsky*, *supra*).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that defendants have demonstrated their *prima facie* right to summary judgment. The record herein established that plaintiff crossed the road not at an intersection or crosswalk and in front of moving traffic and ran into defendants' lane of traffic and that defendant VARUGEHSE was unable to observe the plaintiff until the instant before he jumped in front of defendants' vehicle. The record further established that the accident occurred in a thirty (30) mile per hour speed zone and that defendant driver was not speeding at the time of the accident and that the driver was free of actionable negligence and that there are no genuine issues of fact requiring a trial. *See, Johnson v Lovett*, 285 AD2d 627, 728 NYS2d 753 (2nd Dept. 2001); *Brown v City of New York*, 237 AD2d 398, 655 NYS2d 567 (2nd Dept. 1997); *Miller v Sisters of the Order of St. Domenic*, 262 AD2d 373, 691 NYS2d 168 (2nd Dept. 1999). The plaintiff's submissions in opposition to the motion, consisted of conclusory and unsubstantiated allegations and was insufficient to defeat the defendants' *prima facie* showing of entitlement to judgment as a matter of law. *Johnson v Lovett, supra.*

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 5, 2007

WILLIAM R. LaMARCA, J.S.C.

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