

Ianello v Baxter Corp.
2008 NY Slip Op 31360(U)
May 9, 2008
Supreme Court, New York County
Docket Number: 0111778/2006
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

SALVATORE IANELLO

INDEX NO. 111778-2006

MOTION DATE 4/23/08

- v -

MOTION SEQ. NO. 001

BAXTER CORP. and GEORGE A. BOWEN

MOTION CAL. NO. 418

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) _____

FILED
MAY 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

As he was crossing within the pedestrian crosswalk at the intersection of East 10th Street and Third Avenue in Manhattan on August 22, 2005, at approximately 8:40 a.m., the plaintiff Salvatore Ianello, was struck by a vehicle operated by George A. Bowen and registered to Baxter Corp. He commenced the instant action for personal injuries allegedly sustained in the accident and now moves, pursuant to CPLR §3212, for summary judgment on the issue of liability as against all defendants. Defendants oppose the motion for summary judgment.

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 eliminate any material issues of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1986). In support of his motion, the plaintiff proffers the pleadings, his deposition testimony, the deposition testimony of defendant driver Bowen and the

New York City Police report filled out in conjunction with this case. These submissions reveal that as he approached the intersection of East 10th Street and Third Avenue, Ianello stopped, checked for on-coming traffic and crossed with the light in his favor. As he proceeded across the street, within the designated pedestrian crosswalk he was struck by the defendant's vehicle which was making a left turn onto Third Avenue. Ianello indicated he looked as he was crossing but only saw the defendant's vehicle when it was about to strike him. Defendant admits he did not see plaintiff until immediately prior to the collision, and stopped upon impact. The defendant, during his deposition indicated that he followed a box truck into the intersection, despite being unable to see the controlling traffic light or if the intersection was clear. He could not recall if he stopped prior to entering the intersection or even if he checked for pedestrians while making his turn onto Third Avenue. He testified that the first time he saw Ianello was when the front of his car made contact with him.

Once the plaintiff met his burden, it became incumbent upon the defendants to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. The defendants in opposition to the instant motion argue that the police report is not admissible and that both parties to the accident were traveling with the green light. The defendants' argument regarding the admissibility of the police report is correct. 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).

On summary judgment, the court's role is one of issue identification, not issue determination. It is undisputed that a pedestrian has the right of way when crossing within the crosswalk. See Pire v Otero, 123 AD2d 611 (2d Dept 1986). The defendant driver Bowen also has a common-law duty to see that which he should have seen through the proper use of his senses. Domanova v State of New York, 2007 NY Slip Op. 5454 (2d Dept 2007); Larsen v Spano, 35 AD3d820 (2d Dept 2006). However, the law imposes a duty upon the pedestrian not to leave the curb or other place of safety and enter the path of the vehicle when it is so close that it is impractical for the driver to yield. Rudolph v Kahn, 4 AD3d 408 (3d Dept 2004). Here, the plaintiff indicated that he checked for on-coming vehicles, seeing none began to cross the street within the designated pedestrian crosswalk and with the green light when he was struck. In response, the defendants have not presented any issues of fact to be resolved by a jury on the issue of liability. There is no opposition to the defendant Bowen's claim that he was turning with the light, as the plaintiff testified that he was moving with a green signal at the time of the accident.

Upon the foregoing papers, and oral argument held on April 23, 2008, 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 directed to appear for a pre-trial conference May 22, 2008, 9:30 a.m., at Part 22- Room 136, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

FILED
MAY 14 2008
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NEW YORK

Enter:

Dated: ~~April 24, 2008~~
May 9, 2008
MAY 9 2008

Deborah Kaplan
Deborah A. Kaplan

DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DEPOSITION
Check if appropriate: DO NOT POST