

Best v Saldana

2008 NY Slip Op 31558(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0112769/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

DENISE BEST

INDEX NO. 112769/05

MOTION DATE 4-30-08

- v -

MOTION SEQ. NO. 001

ADRIANO SALDANA, AMERICAN RADIO
DISPATCHER, INC. and JOHNNY MORENO

MOTION CAL. NO. 7

The following papers, numbered 1 to 3, were read on this motion by the plaintiff for summary judgment as against the defendants on the issue of liability and dismissing the affirmative defenses premised upon the defendants' contention that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits 1

Affirmation in Opposition 2

Replying Affidavits (Reply Memo) 3

Cross-Motion: Yes No

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident wherein the plaintiff, a pedestrian, was struck by the defendant's livery vehicle while crossing the street at the intersection of East Tremont Avenue and West Farms Road in Bronx County on April 9, 2005. At her deposition, the plaintiff testified that she had a "walk" sign in her favor and was within the crosswalk and more than halfway across the street when hit. She was admitted to the hospital with a right tibial plateau fracture and torn meniscus in the right knee and other injuries. By an order of this Court dated November 26, 2007, the driver of the vehicle, defendant Adriano Saldana, has been precluded from testifying or offering evidence on the issue of liability at trial pursuant to CPLR 3126 due to his repeated failure to appear for a deposition in violation of several prior court orders.

The plaintiff now moves for summary judgment on the issue of liability and to dismiss the defendants' affirmative defenses premised upon Insurance Law § 5102(d).

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(1) Summary Judgment on the Issue of Liability

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a material issue of fact requiring a trial. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980).

Both Vehicle and Traffic Law §1111(a)(3) and New York City Traffic Regulations §30(a) (11 RCNY 4-03[a][1][I]) grant the right of way to pedestrians walking within a crosswalk with a green light in their favor. See Rudolf v Shayne, Daçhs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007); Kirchgaessner v Hernandez, 40 AD3d 437 (1st Dept. 2007) Conradi V New York City Transit Authority, 249 AD2d 436 (2nd Dept. 1988); Brito v MBSTOA, 188 AD2d 253 (1st Dept. 1992). Further, an unexcused violation of a statutory standard of care, such as those, constitutes negligence per se. See Martin v Herzog, 228 NY 164 (1920); Holleman v Miner, 267 AD2d 867 (3rd Dept. 1999); Cordero v City of New York, 112 AD2d 914 (2nd Dept. 1985); Pattern Jury Instructions 2:26 (1999). Moreover, "a driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen." Berner v Koegel, 31 AD3d 591, 592 (2nd Dept. 2006); see Breslin v Rudden, 291 AD2d 471 (2nd Dept. 2002), *lv denied* 98 NY2d 605 (2002); Salamone v Barebaum, 281 AD2d 199 (1st Dept. 2001).

The plaintiff correctly argues that she is entitled to summary judgment on the issue of liability because she was a pedestrian with the right of way in a crosswalk with a light in her favor. The proof submitted in support of her motion, which includes the pleadings in this case and her deposition testimony, establishes her entitlement to that relief. In opposition, the defendants submit the affirmation of their attorney. Affirmations of attorneys who claim no personal knowledge of the accident are without probative value on summary judgment motions. 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). While they may serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect

Hospital, supra at 325; Zuckerman v City of New York, supra at 563), the only attachment here is an affidavit by defendant Saldana, dated November 15, 2005. In the affidavit, Saldana alleges that the plaintiff appeared suddenly in front of his vehicle when the light changed and a van in front of him made a right turn, moving out of his line of sight. He does not dispute that the plaintiff was within the cross-walk when he struck her. Thus, defendant Saldana's affidavit does not raise any material issue of fact requiring a trial.

The plaintiff, argues that, in light of its preclusion order, the Court may not consider Saldana's affidavit on this motion and must grant her judgment as a matter of law on liability. See e.g. DuValle v Swan Lake Resort Hotel, 26 AD3d 616 (3rd Dept. 2006); Greaves v Burlingham, 12 AD3d 730 (3rd Dept. 2004). However, summary judgment based on an order of preclusion is not automatic in the First Department. See Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1st Dept. 2004); see also Anderson v RC Dolner, Inc., 43 AD3d 837 (2nd Dept. 2007). Instead, "the Court must analyze the effect of the preclusion order in each particular case." Mendez v Queens Plumbing Supply, Inc., 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, the defendants' answer has not been stricken and they are not, by the order, precluded from establishing any affirmative defense (other than a defense based upon Insurance Law § 5102(d), as discussed below) or cross-claim of comparative negligence asserted therein through the cross-examination of the other parties and their witnesses. See Ramos v Shendell Realty Group, Inc., supra. Nonetheless, inasmuch as the defendant driver has been precluded from offering any evidence on the issue of liability at trial and the defendants have not proffered proof from any other eyewitness to the accident or sufficiently articulated any theory of comparative negligence in their motion papers, the Court's prior preclusion order warrants the granting of summary judgment in the issue of liability in this case.

(2) Summary Judgment on Insurance Law § 5102(d) Defenses

The plaintiff's motion seeking summary judgment on the threshold "serious injury" issue (Insurance Law § 5102(d)) is, in effect, a motion to dismiss the affirmative defenses based upon the statute. There is no dispute that the plaintiff's injuries meet the threshold requirement inasmuch as fractures are expressly included in the statutory definition and the decisional law has established that a "torn miniscus" is a "serious injury." Indeed, the defendants offer no opposition to that portion of the plaintiff's motion. Therefore, any affirmative defenses premised upon Insurance Law § 5102(d) are dismissed.

For these reasons and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted in its entirety and any affirmative defenses premised upon Insurance Law § 5102(d) on the issue of liability are dismissed and, it is further,

ORDERED that, a Note of Issue having been filed, the matter shall be placed upon the appropriate calendar for an ^{trial} ~~inquest~~ on damages upon the service of this order with notice of entry upon all parties.

Dated: June 2, 2008

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

DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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