

Mermelstein v Keystone Fr. Corp.
2009 NY Slip Op 31454(U)
June 26, 2009
Supreme Court, New York County
Docket Number: 105307/2006
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Paul Wooten
J.S.C.

PRESENT: _____
Justice

PART 22

Mermelstein, Steven

INDEX NO. 105307106

MOTION DATE _____

- v -

Keystar Freight Corp.,

MOTION SEQ. NO. 003

MOTION CAL. NO. 82

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

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

Answering Affidavits — Exhibits _____

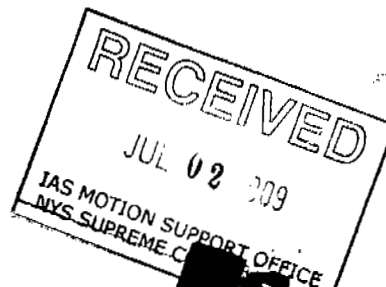
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

*Motion Decided
Per Attached Decision*



MAILED

JUL 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-26-09
JUN 26 2009

[Signature]
Paul Wooten
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

-----X
STEVEN MERMELSTEIN and ADRIANNE
GIBILISCO, as Executors of the Estate of OTTO
MERMELSTEIN, deceased,

Plaintiffs,

Index No.: 105307/06

-against-

KEYSTONE FREIGHT CORP., NATIONAL RETAIL
SYSTEMS, INC. and JAGAT ANIROODH,

Defendants.
-----X

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

WOOTEN, J.:

In this wrongful death action involving a truck/bicyclist accident which was brought by Steven Mermelstein and Adrienne Gibilisco as executors of the estate of the deceased, Otto Mermelstein (Mermelstein), defendants Keystone Freight Corp. (Keystone), National Retail Systems, Inc. (National), and Aniroodh Jagat (Jagat), move, pursuant to CPLR 3212, for an order granting summary judgment on liability.

Plaintiffs oppose the motion for summary judgment, contending that the motion papers are erroneous and misleading, that Jagat violated both the Vehicle and Traffic Law and the New York City Traffic Rules and Regulations, and that Jagat should be found negligent per se in failing to see and yield to Mermelstein.

FACTUAL ALLEGATIONS

Jagat is employed as a tractor-trailer driver for Keystone, a company which delivers merchandise to retailers. On September 22, 2005 at about 8:00 p.m., he was traveling in a 10-wheel, white Mac Truck with a trailer which was 40 feet long which was owned by defendant

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National. At the time of the accident, Jagat was driving to Bloomingdales located at 60th Street and Third Avenue in Manhattan in order to make a daily delivery. Jagat testified that he was unsure if the truck had any blindspots, that it was dark outside, and that there were street lights and lighting illuminating the area from adjacent stores.

Jagat maintained that before the accident, he was driving in the second lane from the left on Third Avenue and approaching its intersection with 59th Street.¹ He estimated that the maximum amount of speed he was traveling was about five to six miles per hour and states that just before the accident his vehicle was stopped at a red light at 59th Street and was located behind two vehicles. Jagat described the traffic as being heavy, and that along with the two vehicles located to the front of his truck, there were vehicles in the lane to his right.

After the light turned green, Jagat estimated that he traveled about fifteen feet at about two to three miles per hour before the impact with Mermelstein who was riding a bicycle. He maintained that prior to the accident he had a clear and unobstructed view of the intersection, that he did not see Mermelstein prior to the impact, and only became aware of the accident after he had heard a loud "pop" sound emanating from the right front passenger side of the truck. After exiting his truck to see what had happened, Jagat found Mermelstein under the front right passenger side of the truck south of the south crosswalk at 59th Street. At the scene of the accident, Jagat was not issued any traffic citations, however, he later voluntarily turned himself in to the 17th Precinct of the New York City Police Department where he received a desk appearance ticket for driving with a suspended New York license.

¹ Third Avenue runs northbound and has seven lanes for traffic, while 59th Street has three lanes of traffic.

Mermelstein was brought to the emergency room and died shortly thereafter. According to the testimony of John Fiorianti, a paramedic who assisted at the scene of the accident, Mermelstein stated that he was riding his bicycle and got hit by the front of the truck. (Fiorianti EBT, at 70). Elliot Kelly, an EMT that also assisted at the scene of the accident, conversed with Mermelstein and recalled him stating that "the guy didn't see him." (Kelly EBT, at 28).

DISCUSSION

Defendants contend that they are entitled to summary judgment because plaintiffs cannot establish a prima facie case of negligence and that it is undisputed that Jagat had a green light in his favor, looked both ways before proceeding, was traveling slowly at the time of the collision, and was not operating his vehicle in an improper, unsafe or negligent manner. Defendants also maintain that Mermelstein was required to use reasonable care while operating his bicycle and observe the same traffic rules and regulations as the operators of other vehicles.

Plaintiffs maintain that, pursuant to the decision of the Court of Appeals in *Noseworthy v City of New York* (298 NY 76, 80 [1948]), a plaintiff in a wrongful death action is not held to as high a degree of proof as where an injured plaintiff can himself offer his version of the accident to the court. The *Noseworthy* rule is not applicable to this case, because there are at least two eyewitnesses to the accident. *Hager v Mooney Aircraft, Inc.*, 63 AD2d 510, 524 (1st Dept 1978). In addition, even if this court applies the holding of *Noseworthy* to this case, the First Department has held that "the rule [in *Noseworthy*] does not shift the burden of proof or eliminate the need for plaintiffs to introduce evidence of a prima facie case [of negligence]." *Holliday v Hudson Armored Car & Courier Serv., Inc.*, 301 AD2d 392, 398 (1st Dept 2003) (citations omitted); see also *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 333-34 (1986).

Plaintiffs contend that Jagat should be held negligent per se for failing to yield to Mermelstein in violation of section 1111 of the Vehicle and Traffic Law and section 4-03 of the New York City Traffic Rules and Regulations. Although defendants contend that this argument is untimely and should have been made by plaintiffs' own motion for summary judgment and not in an attorney's opposing affirmation, pursuant to CPLR 3212 (b) "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without necessity of a cross-motion."

In order to prove that Jagat was negligent per se, plaintiffs refer to the testimony of Allison Santora (Santora) and Alexander Violette (Violette), two non-party witnesses that were standing at the southwest corner of Third Avenue and 59th Street at the time of the accident. However, the testimony of Santora, Violette, Jagat, and the emergency responders raise several questions of fact concerning the circumstances of the accident and whether any statutes were violated.

The Court of Appeals has held that "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Jagat testified that prior to the accident he was stopped at a red light with two vehicles located in front of his truck. Santora, however, testified, that Jagat's truck was the first vehicle immediately before the light and that Mermelstein was riding his bicycle across the south crosswalk from west to east. Violette maintained that prior to the accident, Jagat's truck was

stopped or just started moving, that there were no vehicles located in front of the truck before the accident took place, that Mermelstein was not biking in between any cars, and that there were vehicles in the lane to the immediate right of the truck. This dispute concerning the existence or nonexistence of vehicles in front of Jagat's truck is important because it relates to whether or not Jagat had time to see Mermelstein approaching, whether he could have avoided the impact, and whether Mermelstein was traveling between the truck and other vehicles.

There is also a dispute concerning the point of impact location between the truck and Mermelstein and whether the decedent was traveling within or outside of the designated crosswalk. At her deposition, Santora marked the location of the accident in the middle of the crosswalk and maintained that Mermelstein was traveling inside the southeast crosswalk when the truck struck his bicycle with the front bumper, that Mermelstein tumbled under the vehicle, and that the truck stopped passed the south crosswalk. However, Violette maintained that, Mermelstein was traveling inside or outside of the crosswalk and states "he was kind of straddling it. He was like on it. Maybe a little bit inside of it. Maybe a little bit outside of it. He was on the line. He was real close." (Violette EBT, at 32). Violette further maintained that, after the impact, the decedent tumbled under the truck two or three times and that the truck stopped before the crosswalk or partially in it.

The testimony of the emergency responders also raises questions of fact as to where the impact took place. EMT Elliot Kelly testified that, based upon the location Mermelstein's body, it appeared that the truck had struck Mermelstein south of the crosswalk. However, police officer Daniel Gross (Officer Gross) testified that he found a pool of blood in the middle of the crosswalk behind the first set of wheels of the tractor portion of the truck, which may suggest that

Mermelstein was struck in the crosswalk.

Also, attorney Frank Braunstein's affirmation in opposition to the motion for summary judgment states that photographs were taken at the accident scene by a Keystone driver and attaches, as exhibit H to his affirmation, two photographs which appear to show a Keystone truck stopped in the crosswalk. However, Braunstein fails to specifically identify at what time the photographs were taken, does not explain whether the truck had been moved prior to the taking of the photographs and does not identify who from Keystone took the photographs.

Unauthenticated photographs constitute merely inadmissible hearsay. *Coleman v Macclas*, 61 AD3d 569 (1st Dept 2009); *Morales by Perez v City of New York*, 278 AD2d 293 (2d Dept 2000).

There also exists a question as to what color the light was when Mermelstein began to cross Third Avenue and whether it changed while he was in the process of crossing. Santora testified that, just prior to the accident, she was about to cross Third Avenue, when she was told by Violette to wait because the light was going to change. Both Santora and Violette stopped at the crosswalk and within seconds witnessed the impact. Santora testified "I saw the man on the bike coming towards me, and as it -- I guess, when the light turned green, the truck started to move, and they just collided. He hit him dead on." (Santora EBT, at 15).

In further questioning at her EBT, Santora stated that the light "was about to change, so we waited, because we didn't want to walk out into the middle of the street and then have the light change, which is exactly what happened to the bicyclist. It changed while he was traveling across Third Avenue." (Santora EBT, at 61-62). When asked if she observed or was surmising the last statement, Santora testified that she was surmising this statement. Therefore, it remains

unclear whether Mermelstein had the light in his favor when he began to cross the five lanes, if Jagat failed to yield in violation of traffic laws, or whether Mermelstein was traveling against the light the entire time he was in the crosswalk.

There is also a question of fact as to the speed which Jagat was traveling prior to the impact with Mermelstein. Jagat testified that, at the time of impact, he was traveling two to three miles per hour. However, although Santora at first testified that she did not remember how fast Jagat was traveling and that she is not an accurate judge of speed, she later estimated he was traveling at about fifteen miles per hour. (Santora EBT, at 59).

Finally, plaintiffs contend that, based upon the testimony of Detective Daniel Ryan (Detective Ryan), who conducted a police investigation after the accident, Jagat was making a right turn at the intersection at Third Avenue and 59th Street. Detective Ryan's testimony is also inconsistent with the testimony of Santora and Violette because he stated that Mermelstein was traveling northbound and parallel to the truck, that it was a right-angle accident, and that the accident occurred at 9:05 p.m. and not 8:05 p.m.

However, Detective Ryan stated that his report was based upon the observations of Officer Gross, who did not arrive at the scene until after the accident, and Detective Ryan believed he was confusing the Mermelstein accident with another case. (Detective Ryan EBT, at 119). Detective Ryan stated that he would confer with Officer Gross to make sure that his conclusions were correct.

In conclusion, because there exists issues of fact and questions as to the credibility of the testimony of the various witnesses, summary judgment must be denied.

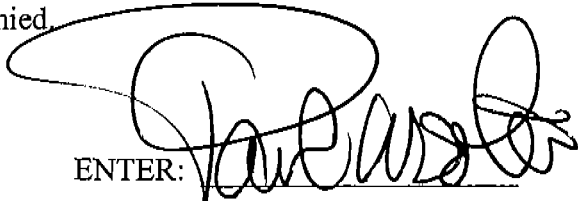
ORDER

Accordingly, it is hereby

ORDERED that defendants Keystone Freight Corp., National Retail Systems, Inc., and Jagat Aniroodh's motion for summary judgment is denied.

Dated: June 26, 2009

ENTER:


Paul Wooten
S.S.A.

[JUN 26 2009]

FILED
JUL 06 2009
COUNTY CLERKS OFFICE
NEW YORK