

**Goppel v Chiarella**

2009 NY Slip Op 32357(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 100058/07

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

CHRISTINE GOPPEL,

Plaintiff,

-against-

VINCENT CHIARELLA,

Defendants.

**FILED**  
OCT 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. 100058/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. 37

The following papers, numbered 1 to 3 were read on the motion by Christine Goppel :  
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

On February 25, 2005, at around 10:00 in the evening, a northbound car, owned and operated by the defendant Vincent Chiarella, came into contact with the plaintiff Christine Goppel, while he was making a left turn from 1<sup>st</sup> Avenue onto 79<sup>th</sup> Street and she was crossing 79<sup>th</sup> Street within a crosswalk going from the northwest corner to the southwest corner at the intersection of 79<sup>th</sup> Street and 1<sup>st</sup> Avenue. 79<sup>th</sup> Street is a two-way street with six lanes, two for parking, one on each side of the street, with two moving lanes in each direction. The impact between Goppel's person and the Chiarella vehicle occurred after Goppel had traversed across two and a half lanes within the crosswalk on 79<sup>th</sup> Street. Goppel commenced her negligence action on or about

January 2, 2007. The parties have completed discovery and a note of issue was filed on or about July 15, 2008. Goppel now moves, pursuant to CPLR 3212, for an order under motion sequence number 001<sup>1</sup> granting summary judgment on the issue of liability.

#### SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the Court is obligated to construe the evidence liberally in a light most favorable to the non-moving party (*Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [1<sup>st</sup> Dept 2006]; *Gonzalez v Metropolitan Life Ins. Co.*, 269 AD2d 495, 496 [2d Dept 2000]). The proponent of a motion for summary judgment is required to make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 230-231 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 10 [1<sup>st</sup> Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof ..." (CPLR § 3212 [b]). A party may also demonstrate a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New*

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<sup>1</sup>Pursuant to an April 6, 2008 order under motion sequence number 002, the time to file a summary judgment motion on the issue of serious injury was extended until 45 days after receipt of plaintiff's medical examination report, with plaintiff being directed to appear for said examination within 30 days of the date of that order.

York, 49 NY2d at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Where the proponent of a motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a triable issue of fact, or to tender an acceptable excuse for his or her failure to do so (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 553 [1<sup>st</sup> Dept 2003], *affd* 3 NY2d 295 [2004]).

Where the evidence indicates that a plaintiff has established defendants' prima facie entitlement to summary judgment on liability for the subject accident, the burden shifts to the owner and operator of the offending vehicle to rebut the inference of negligence by offering a non-negligent explanation for the contact (*see Mariano v New York City Transit Authority*, 38 AD3d 236, 236 [1st Dept 2007]; *Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]; *Woodley, v Ramirez*, 25 AD3d 451, 452 [1<sup>st</sup> Dept 2006]; *Garcia v Bakemark Ingredients [East], Inc.*, 19 AD3d 224, 224 [1<sup>st</sup> Dept 2005]), and thereby, raise triable issues of material fact in order to defeat the plaintiff's motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Perez v Brux Cab Corp.*, 251 AD2d 157, 159 [1st Dept 1998]).

#### DISCUSSION

In support of his motion, Chiarella submits, among other things, a copy of the pleadings, party depositions, Goppel's affidavit and the MV-104 AN police accident report. In the section for the officer's notes on the MV-104AN, it was recorded that

Chiarella stated that he was making a left turn with a green light in his favor when he hit the pedestrian and that he did not see her until it was too late. The officer's notes also provide that Goppel stated that she was crossing with the light in her favor when she was struck by Chiarella's car. The time of the accident was 10:20 P.M.

In paragraph 7 of Chiarella's attorney's affirmation, it is stated that "[as] [h]e approached the intersection, the light was green." It is then stated that "[w]hen the light was in the process of changing to yellow and he was in the middle of the intersection, he came to a complete stop in the intersection. When he saw the plaintiff, he was turning from the left lane ... when she came into view. ... Plaintiff was wearing all black and talking on the cell phone when she was struck." In paragraph 10, defense counsel alleges comparative negligence on the part of plaintiff. In paragraph 11, it is further alleged that she crossed against a flashing pedestrian signal into the path of defendant's vehicle while using a cell phone.

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~~The deposition transcripts of Goppel and Chiarella present contradictory~~  
viewpoints regarding weather conditions, alleged comparative negligence issues and the status of the traffic control right-of-ways at the time of the accident. Defendant states that he entered the intersection with a green light and his left turn signal flashing. He further states that it was raining on the night of the accident, and plaintiff was crossing the street while using a cell phone, with the pedestrian crosswalk signal on the northwest corner flashing "do not cross." He alleges that he saw her pick up the cell phone after the accident and continue talking.

Plaintiff states that it was a clear night without rain or snow and that she was not using her cell phone at the time of the accident, though she admits that she did pick up

the cell phone and called a friend just after the accident occurred. Contrary to Chiarella's allegation, she states that she crossed the street with the pedestrian crosswalk signal in her favor.

He said that she was dressed in dark clothes and he did not see her until just before hitting her, at which time he put on his brakes. She states that she saw the car just before it struck her. It is undisputed that she and the defendant's car made contact by the left driver's-side front of Chiarella's car, whereupon she rolled over the hood and landed on the pavement. Her right foot was run over by a tire and her left knee was injured.

Vehicle and Traffic Law § 1151, entitled "Pedestrian's right of way in crosswalks," provides in section 1151 (a):

When traffic-control signals are not in place or not in operation, the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling ....

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However, section 1151 (b) provides:

No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

It follows that summary judgment may be denied to a plaintiff lawfully in a crosswalk when struck by a vehicle turning left, "since a failure to yield the right of way does not ipso facto settle the question of whether the other party was herself guilty of negligence" (*Thoma v Ronai*, 189 AD2d 635, 636 [1st Dept 1993], *aff'd* 82 NY2d 736 [1993]; *but see Rosenblatt v Venizelos*, 49 AD3d 519 [2d Dept 2008] [the fact that "the plaintiff walked into the side of (defendant's) vehicle while talking on a cell phone,

'heedless of traffic,'" failed to raise a triable issue of fact]; *Beamud v Gray*, 45 AD3d 257, 257 [1<sup>st</sup> Dept 2007] [plaintiffs demonstrated they were crossing the street within the crosswalk with the light in their favor]; *Hoey v City of New York*, 28 AD3d 717, 717 [2d Dept 2006] [evidence submitted by plaintiff, who alleged that he looked both ways and then entered the crosswalk, and, thus, was not comparatively negligent, was corroborated by eyewitness]).

Summary judgment will be granted in a negligence suit "only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct either was not really involved ... or was clearly of exemplary prudence in the circumstances'[citation omitted]" (*Andre v Pomeroy*, 35 NY2d 361, 365 [1974]). Summary judgment on the issue of negligence will be denied where triable issues of fact exist concerning whether plaintiff was comparatively negligent and whether the defendant exercised due care to avoid striking her (~~*Gator v Filipe*, 47 AD3d 664, x [2d Dept 2008]; *D.F. v Wedge Mascot Corp.*, 43 AD3d 1372, 1373 [4<sup>th</sup> Dept 2007]; *Dragunova v Dondero*, 305 AD2d 449, 450 [2d Dept 2003]~~ [summary judgment denied where triable issue exists as to whether plaintiff was comparatively negligent for failing to exercise due care when crossing the roadway in a place other than an intersection or crosswalk]; *Schmidt v S.M. Flickinger Co.*, 88 AD2d 1068, 1069 [3d Dept 1982], *appeal withdrawn* 58 NY2d 655 [1982]).

Based on the deposition testimonies, questions of fact exist. Regardless of the alleged cell phone usage, in the facts before this court, there is the issue of whether or not Goppel crossed against the light in front of Chiarella. The record does not reflect that the non-party eyewitnesses listed on the MV-104AN were deposed. Credibility

issues are for the trier of fact (*Binetti v Infante*, 38 AD3d 210, 210 [1<sup>st</sup> Dept 2007]). As a result of the various versions in the depositions and upon the foregoing papers, it is

ORDERED that the motion by Christine Goppel for summary judgment on the issue of liability is denied; and it is further

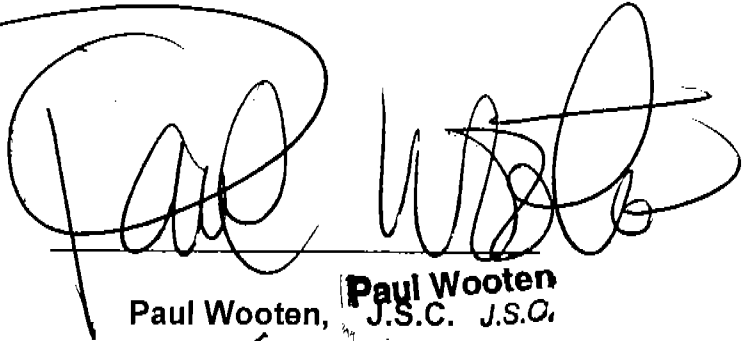
ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon the other party.

Dated:

9-30-09

SEP 30 2009

Enter:



Paul Wooten,

Paul Wooten  
J.S.C. J.S.O.

Check one:      FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:       DO NOT POST

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