[* 1]

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

PRESENT: HAROLD BEELER J.S.C. PART 21

Justice

FAITH KAMINSKY

-v-

M.T.A NEW YORK CITY TRANSIT ET AL

INDEX NO. 101974/2006

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

is denied as per annexed decision and order.

FILED
NOV 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/30/09

HAROLD BEELER J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

FAITH KAMINSKY,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, and KIRK J. CAHILL

Defendants

----------X

Index No. 101974/2006

SEQUENCE MS002
DECISION & ORDER

HAROLD B. BEELER, J.S.C.:

Plaintiff Faith Kaminsky moves for summary judgment against defendants on the grounds that there are no questions of fact as to defendants' liability and therefore plaintiff is entitled to judgment as a matter of law. Defendants oppose the motion. Because the court finds that there is a triable issue of fact with respect to plaintiff's comparative negligence, plaintiff's motion is denied.

The following facts are uncontested except where otherwise noted. On November 17, 2005 at approximately 7:00 P.M., plaintiff pedestrian was struck by a bus owned and operated by defendant New York City Transit Authority and driven by defendant Kirk J. Cahill. Plaintiff was walking west on 55nd Street crossing Second Avenue. The bus was making a left turn from 55th Street onto Second Avenue, a downtown one-way street with six lanes. The bus struck plaintiff while she was in the crosswalk.

Plaintiff testified at her examination before trial that she stopped at the southeast corner of 55th Street and Second Avenue and waited for the walk signal before she began to cross the street. She testified that she checked for traffic before she began walking. However, when asked if she looked in any particular direction, she replied "no, not particularly." She looked straight

ahead as she walked. When she was approximately halfway through the crosswalk, she was struck by the bus. She did not see the bus before it struck her. She testified that she was not wearing headphones and she was not talking on her cell phone.

Cahill testified that he was on his way to begin his regular route, and that he was familiar with the intersection and the marked crosswalk on 55th Street. This was his normal trip from Castleton Depot to the beginning of his route at 57th Street and Third Avenue. Because of traffic ahead of him on 55th Street, he decided to turn left onto Second Avenue instead of continuing straight. It was dark outside, but the bus's lights were functioning. He stopped at a red light before making his turn. His view was unobstructed, and he saw no vehicles in front of him. While stopped at the red light, he observed the crosswalk on 55th Street, and noticed pedestrians crossing in both directions. He also saw pedestrians on the southeast corner, waiting to cross Second Avenue.

After the traffic light turned green, Cahill saw pedestrians on the southeast corner cross Second Avenue. He waited until the white pedestrian walk signal turned to a red flashing "don't walk," and then accelerated. He moved forward until he was approximately halfway into the intersection onto Second Avenue. He stopped the bus, waiting for pedestrians walking in both directions to cross. After the walk signal changed from a blinking "don't walk" to a solid "don't walk," and Cahill saw that there were no more pedestrians crossing, he proceeded to turn onto Second Avenue onto the fourth lane of traffic.

As he was turning, he allegedly saw a cell phone go from the left to the right, although it is unknown from his testimony who, if anyone, was holding the cell phone. He stopped the bus when he noticed people on the sidewalk motioning him not to move. He did not feel any impact and he was not aware that he had hit a pedestrian. He did not see plaintiff until he exited the bus.

There is no testimony from Cahill or any other witness that a cell phone or other hand held device was found.

Discussion

Where a driver has violated a traffic law designed to ensure the safety of others, and this violation causes another's injury, the court may find judgment in favor of the injured plaintiff so long as no comparative negligence has been established. *Cf. Soniake v. Jenious*, 285 A.D. 2d 457, 458, 727 N.Y.S.2d 151, 152-53 (2d Dept 2001) (holding that where defendant violated Vehicle and Traffic Law § 1142(a) by proceeding into the intersection without yielding right of way to plaintiff driver, jury's verdict in favor of defendant was vacated because defendant's violation was negligence as a matter of law); *see also Dellavechhia v. Zorros*, 231 A.D.2d 549, 647 N.Y.S.2d 291 (2d Dept 1996). A driver of a motor vehicle is legally obligated to yield the right of way to pedestrians in the crosswalk who are crossing when the "Walk" signal is in their favor, and a driver 's failure to do so establishes prima facie negligence as a matter of law. N.Y. Vehicle and Traffic Law §1111(a)(1); New York City Traffic Reg. § 30(a); *Beamud v. Gray*, 45 A.D.3d 257, 844 N.Y.S.2d 269, 269-70 (1st Dept 2007) (finding that plaintiff is entitled to judgment as a matter of law, where plaintiff was in the crosswalk with the light in her favor, and defendant struck her while making a left turn); *Kirchgaessner v. Hernandez*, 40 A.D.3d 437, 438, 836 N.Y.S.2d 170, 171 (1st Dept 2007). Moreover, a driver has an obligation to observe and watch for pedestrians, and is negligent where he has failed to see what through the proper use of his senses he should have seen. *Ferrara v. Castro*, 283 A.D.2d 392, 393, 724 N.Y.S.2d 81 (2d Dept 2001); *Bolta v. Lohan*, 242 A.D.2d 356, 661 N.Y.S.2d 286, 287 (2d Dept 1997); *see also Kirschgaessner*, 40 A.D.3d at 438, 836 N.Y.S.2d at 171 (finding that driver's statement that he never saw pedestrian while being observant is incredible as a matter of law).

Defendants do not dispute that plaintiff was legally in the crosswalk when she was hit by Cahill, and that Cahill was obligated to wait for passengers to cross before continuing his turn. However, defendants argue that summary judgment for plaintiff is inappropriate because 1) defendants are not negligent as a matter of law where plaintiff began to enter the crosswalk while the bus was already turning onto Second Avenue, and 2) there are issues of fact as to plaintiff's comparative negligence.

Defendants' negligence is not established as a matter of law if plaintiff began to enter the crosswalk while the bus was already turning into it. *Cf. Brito v. Manhattan and Bronx Surface Transit Operating Auth.*, 188 A.D.2d 253, 254, 590 N.Y.S.2d 450, 452 (1st Dept 1992) (reversing a trial verdict because trial judge's jury instruction cited Traffic Regulation § 30(a), but the judge did not order the jury to determine where plaintiff was when the bus began to turn).

However, plaintiff's and Cahill's testimony establishes that the bus was not in motion when plaintiff began to cross. Cahill testified that as he reached the intersection at Second Avenue, he stopped for the red light. After the traffic light turned green, he moved the bus halfway through the intersection, and then stopped while the pedestrian signal still indicated "walk." While the bus was still facing in a westerly direction, he observed pedestrians go through the crosswalk, and, most importantly for this argument, he did not proceed until the pedestrian walk signal turned to a solid red.

Plaintiff's testimony is undisputed, and is consistent with Cahill's. She began to cross when she observed the solid walk signal, and proceeded to go through the crosswalk with her eyes straight ahead. She observed the white "walk" signal turn to a flashing "don't walk," and the next thing she knew she was struck by the bus.

Based on both parties' testimony, plaintiff must have begun to enter the crosswalk before the bus made its turn. Cahill did not turn onto Second Avenue until the walk signal had already

turned to "don't walk," and plaintiff was already in the middle of the crosswalk when she saw the signal change from "walk to "don't walk." Thus, at the time the bus began to turn, plaintiff had already entered the crosswalk and was entitled to the right of way.

As to defendants' second argument, defendants have raised a triable issue of fact as to plaintiff's comparative negligence. To establish an issue of fact, defendants must provide more than mere speculation that plaintiff might have been negligent. *See Beaumud v. Gray*, 45 A.D.3d 257, 269, 844 N.Y.S.2d 269 (1st Dept 2007); *Zhang v. Yellow Transit Corp.*, 5 A.D.3d 337, 774 N.Y.S.2d 502 (holding that the trial court properly directed verdict in favor of plaintiff where defendant hit plaintiff in the crosswalk, and defendant offered no evidence to warrant a comparative negligence claim).

Defendants have established an issue of fact as to whether plaintiff looked for vehicles before she entered the crosswalk. A pedestrian has a responsibility to use her eyes when crossing the street, and to keep herself from danger. *Thoma v. Ronai*, 189 A.D.2d 635, 636, 592 N.Y.S.2d 333 (1st Dept 1993), *affirmed* 82 N.Y.2d 736, 621 N.E.2d 690, 602 N.Y.S.2d 323 (1993) (denying summary judgment to plaintiff where she testified that she did not look to her left before crossing); *see also Cator v. Filipe*, 47 A.D.3d 664, 850 N.Y.S.2d 510 (2d Dept 2008) (denying summary judgment to plaintiff, where defendant failed to yield right of way to plaintiff, because plaintiff testified that she had not looked to her left or right while crossing the street). If she "looks as she starts to cross, and the way seems clear, [she] is not bound as a matter of law to look again." *Thoma*, 189 A.D.2d at 636, 592 N.Y.S.2d at 333.

Plaintiff's testimony establishes that she might not have properly looked in the direction of oncoming traffic before she entered the crosswalk. At her deposition, when asked if she looked in particular direction before she crossed, she replied "no, not particularly." This testimony raises the question of whether she looked to her right when crossing the street.

Plaintiff was aware, or should have been aware, that vehicles would be attempting to turn left from 55th Street. By acknowledging that she did not look in any particular direction, she has created an issue of fact that her own failure to see the bus was a contributing cause of her injuries.

Plaintiff argues that even if she looked before she crossed, her failure to do so was not the proximate cause of her injuries because the bus was not moving before she began to cross. However, if plaintiff had fulfilled her obligation to look for oncoming traffic, she would have noticed the presence of the bus intending to make a turn, and taken necessary precautions as she proceeded to cross. Moreover, Cahill testified that he waited for pedestrians to cross the street before entering the crosswalk. Thus, there is an issue of fact as to whether she crossed the street after the other pedestrians had passed, leading the driver to believe that the crosswalk was clear.

Triable issues of fact are, at this stage, limited to the aforementioned. Defendants raise several other potential triable issues which are either merely speculative or insufficiently supported. Cahill's testimony that he saw a cell-phone pass from left to right, where he is unable to articulate who was allegedly carrying the phone and no phone was found in plaintiff's possession, is insufficient to create an issue of fact that plaintiff was using her cell phone at the time of her accident. A report that a witness remarked that plaintiff was a "woman not paying attention," not signed or sworn to by the witness, is inadmissible hearsay. Although inadmissible hearsay may be considered in opposition to a motion for summary judgment where it is corroborated by admissible evidence, *DiGiantomasso v. City of New York*, 55 A.D.3d 502, 503, 866 N.Y.S.2d 184, there is no corroboration here. There is no indication that this witness was deposed, even though his name and address were on the accident report. Furthermore, the same witness later met with a representative from Transit Authority and provided a signed (but not sworn to) statement where he said that he did not eyewitness or observe a pedestrian walking

outside of the cross walk, and "did not eyewitness or observe that woman pedestrian was not paying attention or was inattentive." Other possible issues alluded to by plaintiff are completely speculative.

Because defendants have raised triable issues of fact as to plaintiff's comparative negligence, the court cannot find defendants wholly negligent as a matter of law. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York

October 30, 2009

ENTER:

Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.

FILED

NOV 05 2009

NEW YORK
COUNTY CLERK'S OFFICE