

DeJesus v Dunaway

2010 NY Slip Op 32168(U)

August 13, 2010

Supreme Court, Richmond County

Docket Number: 103166/08

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND DCM PART 3

Index No.: 103166/08
 Motion No.:002, 004

ANDREW DEJESUS, an infant by his mother and natural
 guardian, MAGALE LEITOE, and
 MAGALE LEITOE, Individually,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

MARY E. DUNAWAY,

Defendant

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves for summary judgment dismissing the plaintiff's complaint. The plaintiff cross-moves for summary judgment on liability and the scheduling of a trial on damages. Both motions are denied in their entirety.

Facts

This is an action for personal injuries sustained when Andrew DeJesus, the infant plaintiff, was struck by an automobile owned and operated by the defendant. The accident occurred on Staten Island on Forest Avenue across from an entrance to Clove Lake Park. Forest Avenue is a heavily traveled thoroughfare that has two lanes of traffic separated by a double yellow line.

On the date of the accident, the infant plaintiff, along with his five siblings and his mother had been in Clove Lake Park, but left to go grocery shopping. At the time of the accident the family was returning to the park after completing their shopping. Andrew's mother set out to enter Clove Lake Park by crossing in the middle of Forest Avenue directly across the street from the park's entrance. The deposition testimony states that the infant plaintiff's mother, Magale Leitoe led her children between two stopped cars in the middle of Forest Avenue. Ms. Leitoe pushed a stroller that contained her youngest child, and Andrew DeJesus held on to one of the arms of the stroller. The other children followed close behind. While Andrew held on to his brother's stroller with one hand he used his free hand to carry a beach ball.

According to testimony taken at the depositions, while the family was crossing between the stopped cars Andrew dropped the beach ball and ran in the direction of the park's entrance and into oncoming traffic. It was at this point that the defendant's car and 6 year old Andrew came into contact.

The defendant testifies that she was traveling at approximately twenty-five miles per hour. And only became aware of Andrew's presence in the street just before the impact. The defendant testifies that she has no recollection of a ball being present at the scene of the accident.

After the accident, 911 was called and ambulances appeared at the scene. Andrew was taken to the hospital where he was treated for skull fractures, broken arm and leg, second and third degree burns and a host of other physical trauma. The defendant was also taken from scene of the accident by ambulance due to acute anxiety. Her testimony reveals that she had difficulty breathing and was sweating profusely. At the hospital the defendant's heart was monitored and she was released.

Both the plaintiff and the defendant move for summary judgment.

Discussion

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.¹ It is well established that summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.²

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.³ If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant's motion should be denied without regard to the sufficiency of the opposition papers.⁴

Defendant's Motion for Summary Judgment

The defendant directs the court's attention to the Appellate Division, First Department's decision in *Brown v. Muniz*.⁵ In *Brown*, the Appellate Division, First Department affirmed the trial court's dismissal of an action where a child darted out into oncoming traffic. In that case the plaintiff testified that he ran in between two parked cars without looking to his right. The driver

¹ *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

² *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

³ *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

⁴ *Hughes v. Cai*, 31 AD3d 385, [2d Dept 2006].

⁵ 61 AD3d 526, [1st Dept 2009].

also testified that two other children had darted out into traffic and was proceeding at approximately five miles per hour when his car struck the infant plaintiff in that case.

In sustaining the dismissal of the plaintiff's complaint the court stated:

The deposition testimony of both plaintiff and the driver establish that plaintiff, without warning and without looking in the direction of oncoming traffic, darted out between two parked vehicles directly into the path of defendant's vehicle, leaving the driver unable to avoid plaintiff. . .⁶

The facts in this case are inapposite to those in *Brown*. Here, there is an issue of fact as to whether the defendant had any warning that Andrew was going to enter the roadway. Unlike the cases cited by the defendant, Andrew was led into the street by his mother and was accompanied by his five siblings. The record indicates that there were no fewer than seven individuals passing between the two cars stopped in traffic at the time of the accident, which would obviate the issue of whether this was a sudden dart-out into traffic by an individual. Moreover, the plaintiff is 6 years old which raises other issues as to his own culpability. Furthermore, there is also conflicting testimony as to the existence of a ball entering the roadway prior to Andrew entering into traffic.

Indeed, it is not the province of the court to pass judgment on the credibility of witnesses' testimony at the summary judgment stage. As such, the defendant has not demonstrated a prima facie entitlement to judgment as a matter of law and her motion must be denied.

Plaintiff's Cross-Motion for Summary Judgment

The plaintiffs' cross motion for summary judgment must be denied in its entirety. The plaintiffs' attorney's arguments that this is a case of negligence per se is unsupported in law. In

⁶ Id at 684 (citations omitted).

fact, the plaintiffs' supporting papers indicate that this is a case that will turn on the evaluation of witness testimony. As such, the plaintiffs have not met their burden of demonstrating a prima facie entitlement to judgment as a matter of law.

Accordingly, it is hereby:

ORDERED, that Mary E. Dunaway's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the cross-motion of the plaintiffs, Andrew DeJesus and Magale Leitoe, for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, September 13, 2010 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: August 13, 2010

Joseph J. Maltese
Justice of the Supreme Court