

Haass v Schneider

2010 NY Slip Op 33465(U)

December 2, 2010

Supreme Court, Nassau County

Docket Number: 19804/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MICHAEL HAASS, an infant by his mother and natural guardian, KELLY HAASS, and KELLY HAASS, individually,

Plaintiffs,

- against -

HELEN SCHNEIDER and NORMAN SCHNEIDER,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.:19804/08
Motion Seq. No.: 01
Motion Date: 09/28/10

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Affidavit</u>	<u>2</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an Order granting them summary judgment on the issue of liability and dismissing plaintiffs' complaint. Plaintiffs oppose the motion.

This action arises from a motor vehicle accident which occurred on November 18, 2005, at approximately 9:00 a.m., at or near the intersection of Monroe Boulevard and East Broadway, Long Beach, New York. The accident involved a 1995 Buick Century owned by defendant Norman Schneider and operated by the defendant Helen Schneider. On that date, at that time, plaintiff was dropping off her two sons (one being the infant plaintiff Michael Haass who was

two and a half years old at the time) at her sister's residence at 854 East Broadway, Long Beach, New York. Plaintiff parked her automobile in the parking spaces provided in the middle of East Broadway. Plaintiff then intended to cross over East Broadway with her two children to get to her sister's residence. Plaintiff testified at her Examination Before Trial ("EBT") that she was holding both of her sons' hands, waiting behind her parked automobile for cars to stop driving down East Broadway so she and the children could cross said street. Plaintiff testified that she saw that the road was beginning to get clear and then she saw a car coming and decided to stay back and not proceed across the street. The aforementioned car that plaintiff saw was a dark sedan traveling in a westbound direction on East Broadway. The infant plaintiff was to plaintiff's right side and holding her right hand. Plaintiff further testified that, when the infant plaintiff saw plaintiff's sister and her new puppy across the street come out to the stoop, he let go of plaintiff's hand and started to quickly walk across the street. Plaintiff and her sister then both screamed and plaintiff tried to run to get infant plaintiff, but was not able to do so. Plaintiff testified that the next thing that happened was that the car that she had seen coming (the dark sedan which has been identified as defendants' vehicle) hit the infant plaintiff. Plaintiff asserts that the area of the defendants' automobile that hit the infant plaintiff was the front left/driver's side by the front wheel. When the infant plaintiff was struck by said automobile he was thrown from being hit and fell back and hit his head. As the result of this accident, the infant plaintiff suffered injuries to his right leg - specifically a fracture of the leg. *See Defendants' Affirmation in Support Exhibit D - Transcript of Kelly Haass.* Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on or about October 30, 2008. Issue was joined on or about November 28, 2008. The action against defendant Norman Schneider was

discontinued on or about June 17, 2010.

Briefly, it is defendants' contention that, at the time of the accident, plaintiff was in violation of New York State Vehicle and Traffic Law ("VTL") § 1151(b) which states that no pedestrian shall suddenly leave a curb...and walk into the path of a vehicle which is so close that it is impractical for the driver to yield. Defendants argue "[t]aking the testimony in the light most favorable to plaintiff that the infant walked into the left side front near the wheel of the defendants (*sic*) vehicle, 'Evidence that pedestrian walked into passenger side of motorist's car after front of vehicle had passed pedestrians (*sic*) position precluded liability of motorist that accident was caused by motorist's negligence.' *Carrsaco v. Monteforte*, 266 A.D.2d 330, 698 N.Y.S.2d 326 (2d Dept 1999)." Defendants submit that there are not any issues surrounding the conduct of defendant Helen Schneider - she was not negligent and her negligence, if any, was not the proximate cause of the accident.

In opposition to defendants' motion, plaintiffs argue "[d]istilled into its simplest form the Defendants (*sic*) basis for their motion for summary judgment *upon an assumption that a critical material issue of fact will be decided in it's (*sic*) favor*. The Defendants would like this Court to accept the elderly Defendants (*sic*) position that the Infant-Plaintiff, MICHAEL HAASS, either walked into or ran into **the side** of her car. *If* this were so, then perhaps the cases cited by the Defendants are worth reading. I submit that the cases are innopposite (*sic*) to the actual facts presented in this case because the Infant-Plaintiff's mother clearly saw that the point of impact between the Defendants (*sic*) car and her child as being the car's left **front side**." Plaintiff submits that there indeed exists an issue of material fact with respect to the question of what part of defendants' automobile struck the infant plaintiff - plaintiff, who "had a clear view

and recollection that the left **front** side of the Defendants (*sic*) car struck her child” or defendant whose “version is that she never saw the mother or child at the side of the roadway as she approached and never once saw the child except through her side view mirror placing the point of impact with the car either somewhere on its left side *behind the side view mirror*.”

Plaintiff also argues that defendants’ citation of VTL § 1151(b) is improper since that section “provides in part, that no pedestrian shall suddenly leave a curb -and walk into the path of a vehicle which is so close that it is impractical for the driver to yield.” Plaintiff submits that she and her child “did not in fact leave ‘the curb’ while crossing the street, but in fact at the edge of the travel portion of the roadway in clear view of anyone who took appropriate time to look and observe.”

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the

non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985).

Defendants, in their motion, have demonstrated *prima facie* entitlement to summary judgment on the issue of liability against plaintiff. Therefore, the burden shifts to plaintiff to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that plaintiffs met the burden to demonstrate an issue of fact which precludes summary judgment. As previously stated, in rendering a decision on a summary judgment motion, the Court is not to resolve issues of fact or determine matters of credibility. The Court finds that the facts and circumstances


surrounding the motor vehicle accident do indeed involve determining the credibility of the parties involved in said accident. The Court holds that the parties' conflicting versions of the accident, specifically by which part of the defendants' automobile the infant plaintiff was struck, raise a triable issue of fact.

Therefore, based upon the foregoing, defendants' motion for an order, pursuant to CPLR § 3212, granting summary judgment and dismissing all claims against them is hereby denied.

All parties shall appear for a Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 9, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
December 2, 2010

ENTERED
DEC 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE