

Marrero v Beaudou

2011 NY Slip Op 31078(U)

April 14, 2011

Supreme Court, Nassau County

Docket Number: 20418/09

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 21
CINDY MARRERO,

Plaintiff,

- against -

Index No. 20418/09

Mot. Seq. # 04

Mot. Date 2-16-11

CHANTAL E. BEAUDEAU and ALAIN C. BEAUDEAU,

Submit Date 4-6-11

Defendant.
-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affirmation.....	3

Defendants move by notice of motion for the following relief: an order pursuant to CPLR §3212 for summary judgment due to plaintiff's failure to prove a *prima facie* case of liability against the defendants.

This claim involves a pedestrian collision which occurred on December 10, 2008 at approximately 4:50 p.m. in the vicinity of Hillside Avenue and Springfield Boulevard, County of Queens, State of New York.

Defendants state that upon a thorough review of the record including the deposition testimony of the plaintiff, the defendant, the police officer who responded to the scene, and two eyewitnesses, the defendant, Chantal E. Beaudreau, was free of negligence and the accident of record was caused by the plaintiff, with no contributory negligence on the part of defendant.

A police accident report was prepared by Police Officer Joseph Grubert wherein it indicates the following: at the time of the occurrence the driver states that she was traveling straight in the left lane of traffic with a green light when a pedestrian crossed the center median against traffic causing the collision. The pedestrian states that she stepped into the street and was

struck by the vehicle unsure if she had the right of way. The witnesses side with the driver and the officer did not witness the occurrence. Additionally, it was noted that at the time of the occurrence, the pedestrian was crossing against the signal.

Defendant's deposition testimony revealed, in sum and substance, the following: that on December 10, 2008, while driving on Hillside Avenue, plaintiff made contact with the left side of her vehicle, near the driver's side door; that defendant never saw plaintiff prior to the contact; that the contact occurred not within the intersection, but before the crosswalk, approximately 36 feet from the intersection of Springfield Boulevard; that she was driving at a moderate speed of between 25-30 mph; that she was looking straight ahead at the steady green light the entire time when the accident occurred.

Eyewitness, Lamar Wheelless, testified at a deposition, in part, to the following: that he got off a bus in front of a 7-Eleven store and started walking across Springfield Boulevard towards McDonald's; that plaintiff was traveling in the same direction as him; that he saw the plaintiff in the split moment before the accident; that he saw her when he got to the middle median before crossing; that plaintiff looked side to side and ran across the street and then got hit; that he noticed plaintiff because she was looking around; that when he first saw plaintiff she was at a ready stance, about to go; that plaintiff looked anxious; that immediately before the accident, the walk signal indicated not to walk; that approximately ten people were waiting for the walk signal when plaintiff ran into the road; that he wasn't looking and didn't see defendant's vehicle prior to the accident because he wasn't supposed to walk anyway; that everyone else was waiting because there were cars passing; that the traffic signal was green for traffic going easterly on Hillside Avenue; that plaintiff "kind of hopped out there and the first motion" he saw her get hit; that cars were traveling in both directions on Hillside Avenue when the accident occurred; and that the vehicle came to a stop in the crosswalk after the accident occurred.

Eyewitness, Joann Pietsch, testified at a deposition, in part, to the following: that she got off a bus and was crossing Springfield Boulevard towards McDonald's; that at the time of the occurrence, she had to wait on the median for the traffic to go across the street; that she observed the WALK/DON'T WALK symbol across the street; that when she got to the island, the symbol was displaying a red blinking hand, signaling not to go; that she was waiting on the median less than five minutes before the accident occurred; that she did not proceed to cross the street because there were cars approaching; that she did not see the plaintiff prior to the accident; but plaintiff was across the street coming in her direction; that she was shocked that plaintiff was attempting to cross the street when cars were coming; that plaintiff was hit in the lane closest to where the witness was standing; that plaintiff crossed over two lanes of traffic and was hit in the third lane; that plaintiff was running and not looking; that plaintiff jetted in front of the cars; that plaintiff was hit because she ran in front of the car; that plaintiff ran in the crosswalk; and that plaintiff had a Walkman on her ears.

Plaintiff sets forth her deposition testimony as evidence. It revealed, in sum and substance, the following: that she was dropped off by a bus near the Dunkin Donuts on the corner of Hillside Avenue and Springfield Boulevard; that she intended to cross Hillside Avenue which consisted of three lanes of traffic in each direction and two medians; that she crossed to the last median prior to the accident occurring; that prior to starting to cross Hillside Avenue, she waited on the corner for the signal light to give her the sign to proceed; that while traversing the lanes of traffic, she remained the entire time in the crosswalk; that she did not look at the traffic light at the intersection before starting to cross; that she did not look at the traffic light at any time before the accident occurred; that the walk signal was illuminated in white; that she looked at the pedestrian walking sign after she crossed the first median but not after that; that she did not look for any traffic coming on Hillside Avenue at any time prior to the accident; that the first time she observed the vehicle was when someone told her to “look out”; that four seconds elapsed between the time she heard the warning and the occurrence; that during those four seconds, she tried to get out of the way; that she observed defendant’s vehicle swerving left and right; that she felt the median on her heel just before the occurrence; and that she did not observe any other cars proceeding on Hillside Avenue in the direction in which she was struck.

Plaintiff argues that defendant was negligent in failing to see the plaintiff prior to striking her and in negligently operating her vehicle at the time and place of the occurrence. Furthermore, defendant’s own testimony is impossible of belief, physically impossible, contrary to experience and self-contradictory that it is incredible as a matter of law and must be disregarded. Plaintiff points to defendant’s alleged contradictory testimony as to the weather conditions; the exact location, in terms of distance from the intersection, that the accident occurred; the exact location on her vehicle where the contact occurred; and defendant’s account of the accident as told to her husband.

Plaintiff further argues that the eyewitnesses’ testimony raises questions of fact to preclude summary judgment: whether plaintiff failed to yield to a pedestrian in a crosswalk; whether defendant was speeding; whether defendant should have observed plaintiff prior to the accident; and whether defendant’s headlights were on.

Plaintiff argues that defendant failed to keep her vehicle under control as she approached the intersection as she failed to observe what there was to be seen. Namely, the plaintiff in the crosswalk for four seconds prior to the accident. In addition, she failed to slow down, or make any clear observations surrounding the intersection, making her comparatively negligent.

Based on the foregoing, the decision of the court is as follows:

Summary judgment is the procedural equivalent of a trial. *S.J. Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *Matter of Suffolk Cty Dept of Social Services v James M.*, 83 NY2d 178, 182 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. *Guiffrida v Citibank Corp.*, 100 NY2d

72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). It is insufficient for a party opposing a motion of summary judgment to use "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562.

The granting of summary judgment continues to be a rare event in negligence cases and that "[the] very question of whether the defendant's conduct amounts to 'negligence' is inherently a question for the fact trier in all but the most egregious instances" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:8, p 430).

In the case at bar, despite the fact that two eyewitnesses have stated that plaintiff ran in front of defendant's vehicle causing the accident, a question of fact exists as to the location on Hillside Avenue the plaintiff crossed and, if plaintiff crossed in the crosswalk, whether the plaintiff crossed in violation of VTL 1112. Defendant espouses that while lawfully traveling on Hillside Avenue towards the intersection of Springfield Boulevard, plaintiff darted out in front of her vehicle, approximately 36 feet from the crosswalk, causing the accident without any liability on her part. Additionally, while witness Wheeler testified that immediately before the accident the pedestrian crossing sign reflected a steady direction not to walk, witness Pietsch testified the signal was blinking not to walk at the time of the occurrence.

VTL 1112(b) states:

Flashing DON'T WALK or upraised hand. No pedestrian shall start to cross the roadway in the direction of such signal, but any pedestrians who have partially completed their crossing on the WALK or walking person signal shall proceed to a sidewalk or safety island while the flashing DON'T WALK or upraised hand signal is showing.

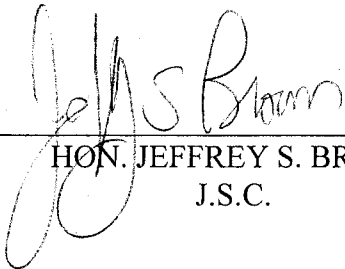
Thus, the contradictory deposition testimony of defendant and the eyewitnesses raises a material question of fact whether defendant was negligent in the operation of her vehicle. The defendants' failure to make a *prima facie* showing requires the denial of the motion, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316).

Accordingly, the application is **DENIED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
April 14, 2011

ENTER :



HON. JEFFREY S. BROWN
J.S.C.

APPEARANCES

Salenger Sack Kimmel & Bavaro, LLP
233 Broadway, Ste. 950
New York, NY 10279

Picciano & Scahill, P.C.
900 Merchants Concourse, Ste. 310
Westbury, NY 11590

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