

**Forgang v New York City Dept. of Health & Mental
Hygiene**

2011 NY Slip Op 32867(U)

September 19, 2011

Supreme Court, New York County

Docket Number: 400484/09

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

Index Number : 400484/2009
FORGANG, WILLIAM
vs.
NEW YORK CITY DEPARTMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
CAL #49

INDEX NO. 400484/09
MOTION DATE 7/5/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 49

this motion to/for Summary judgment

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

SEP 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/19/11
SEP 19 2011

BARBARA JAFFE J.S.C.
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
WILLIAM FORGANG, Executor of the Estate of HATTIE
FORGANG, and WILLIAM FORGANG, individually,

Index No. 400484/09

Argued: 7/5/11
Motion Seq. Nos.: 002
Motion Cal. Nos.: 49

Plaintiff,

-against-

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF HEALTH AND
MENTAL HYGIENE, THE CITY OF NEW YORK, and
ROBERT FORD,

Defendants.

-----X
For plaintiffs:
Jamie B. Levy, Esq.
Shestack & Young, LLP
233 Broadway, Suite 2200
New York, NY 10279
212-766-1200

FILED

SEP 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

For defendants:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0609

By notice of motion dated March 17, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment on the issue of liability only. Defendants oppose.

I. BACKGROUND

On June 12, 2008, at approximately 12:50 p.m., decedent Hattie Forgang was crossing Park Place near its intersection with Broadway in Manhattan when she was struck by a New York City Department of Health and Mental Hygiene (DHMH) vehicle driven by defendant Robert Ford. (Affirmation of Jamie B. Levy, Esq., dated March 17, 2011 [Levy Aff.], Exh. A). Decedent sustained physical injuries as a result of the accident (*Id.*, Exh. H).

The day of the accident, the New York City Police Department (NYPD) completed a Police Accident Report, which reflects that Ford had stated that his vehicle was stopped at a red light when decedent tripped behind it and grabbed its rear, and that she was dragged behind it

when he accelerated, whereas decedent and witnesses stated that decedent had fallen in front of the vehicle which then ran over her legs. (*Id.*, Exh. E). The report also reflects that the accident occurred on Park Place, south of its intersection with Broadway, when decedent was crossing without a signal or crosswalk. (*Id.*).

On June 17, 2008, Ford completed a New York State Department of Motor Vehicles (DMV) Report of Motor Vehicle Accident, indicating that the accident occurred after decedent tripped behind his vehicle while it was stopped at a red light and attempted to grab the rear of the vehicle. (Affirmation of Jessica Wisniewski, ACC, in Opposition, dated May 9, 2011 [Wisniewski Opp. Aff.], Exh. A).

The same day, a DHMH Vehicular Incident Evaluation Report was completed reflecting that Ford had recounted the accident as follows:

[H]e was at a red light. The light turned green and he proceeded to drive with the flow of traffic. He noticed people in the street trying to get him to stop his vehicle. He stopped and got out of the van and he later was told that someone tripped and in the process of tripping grabbed on to the back of his van when he pulled off.

(*Id.*, Exh. B).

On June 19, 2008, decedent died, and on June 20, 2008, the medical examiner performed an autopsy on her and concluded that the injuries she sustained during the accident caused her death. (Levy Aff., Exh. H).

Sometime after decedent's death, Devaun Branch, a witness to the accident, provided the NYPD with a written statement alleging that decedent tripped and fell in front of the van while it was stopped at a red light and that the van ran over her legs after the light turned green.

(Wisniewski Opp. Aff., Exh. C).

By affidavit dated July 24, 2008, Damon Holmes, another witness to the accident, described it in pertinent part as follows:

I observed an elderly woman, who I later learned was named Hattie Forgang, begin to cross Park Place in a northerly direction. Before she got to the middle of Park Place she stumbled and fell forward onto the street. After she fell to the street a blue van traveling in an easterly direction ran over her body. Both tires on the passenger side ran over her body. Her body was turning underneath the blue van as it ran her over. The blue van finally came to a stop after the blue van was a few feet past her body.

(Levy Aff., Exh. F).

On August 7, 2008, plaintiff served defendants with a notice of claim providing that he was seeking \$5,000,000 in damages. (Wisniewski Opp. Aff., Exh. E).

On September 30, 2008, the NYPD completed a Complaint-Follow Up Informational Report in which it is stated that "pedestrian error" caused the accident, as decedent was crossing between cars and fell directly in front of the van, out of Ford's view, just before the accident occurred. (*Id.*, Exh. D).

On October 24, 2008, plaintiff commenced the instant action by filing a summons and complaint, asserting negligence claims arising from the accident. (Levy Aff., Exh. A). Sometime thereafter, City joined issue with service of its answer. (*Id.*, Exh. B).

On May 29, 2009, plaintiff served defendants with his response to their discovery demands, identifying Holmes as one of three eyewitnesses to the accident and providing his address. (Affirmation of Jamie B. Levy, Esq. in Reply, dated June 1, 2011 [Levy Reply Aff.], Exh. A).

On October 7, 2009, a hearing was held at the DMV Safety Hearing Bureau, during which Ford was represented by private counsel. (Levy Aff., Exh. D). The police report, an

abstract of Ford's driving history, and a motor vehicle accident mechanism report were offered into evidence, and Ford testified that the accident took place mid-block, and not at the intersection, and that he did not know how the accident occurred. (*Id.*, Exh. D). Noting the discrepancy between Ford's account of the accident and those of decedent and the witnesses contained in the police report, the Administrative Law Judge found that the accident occurred at the intersection and held that Ford "violated [Vehicle and Traffic Law] [VTL] § 1146 by failing to exercise due care to avoid the decedent" but made no express finding as to the manner in which the accident occurred. (*Id.*, Exh. D). The Administrative Law Judge suspended Ford's license for 90 days. (*Id.*).

At an examination before trial (EBT) held on August 3, 2010, Ford testified that he did not know where he was looking before the accident occurred, that he did not know whether he ran over a pedestrian with his van, that he did not see decedent before hitting her, and that did not recall whether any part of decedent's body was under his van. (*Id.*, Exh. G).

Plaintiff served the instant motion on defendants by mail on March 18, 2011, annexing thereto, *inter alia*, Holmes' affidavit, a certified true copy of the medical examiner's report, and an unverified copy of the police report. Defendants served their opposition papers on plaintiffs on May 11, 2011, annexing thereto, *inter alia*, unverified copies of the DMV report, the DHMH incident report, Branch's witness statement, and the informational report. Plaintiff served defendants with his reply papers on June 1, 2011, annexing thereto his May 29, 2009 response to defendants' discovery demands.

II. CONTENTIONS

Plaintiff argues that there are no factual issues precluding summary judgment on the issue

of liability, as the police report, the medical examiner's report, and Ford's testimony demonstrate that Ford breached his duty of care in failing to see and avoid decedent, that this breach caused him to strike decedent, and that she died from the injuries she sustained as a result of the accident. (Levy Aff.; Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment on Liability [Mem. of Law]). In any event, he claims that defendants are collaterally estopped from arguing that Ford was not negligent, as the Administrative Law Judge determined that he breached his duty of care in violation of VTL § 1146. (Levy Aff.; Mem. of Law).

In opposition, defendants contend that factual issues as to how the accident occurred preclude summary judgment, as Ford's account of the accident conflicts with those of decedent and witnesses to the accident, and they assert that Holmes's affidavit should be disregarded because it was not produced during discovery, and they have had no opportunity to examine him. (Wisniewski Opp. Aff.). Moreover, they argue that plaintiff has failed to establish, as a matter of law, that decedent was not comparatively negligent, as the police report indicates that she was not walking on the crosswalk when the accident occurred. (*Id.*).

Defendants also deny any identity of issues between whether Ford violated VTL § 1146 and whether he was negligent, as the statute contains a rebuttable presumption of causation and the Administrative Law Judge determined neither how the accident occurred nor whether decedent was comparatively negligent, and the New York City Traffic Rules and Regulations would be pertinent at trial. (*Id.*). They also deny having had a full and fair opportunity to litigate at the DMV hearing, as Ford was not then represented by Corporation Counsel, who would have approached the hearing with an eye toward future litigation, and as multiple non-party witnesses to the accident have been identified, testimony during trial likely will be more extensive than was

the testimony presented at the hearing. (*Id.*).

In reply, plaintiff asserts that defendants provide no authority for the proposition that an affidavit not exchanged during discovery should be disregarded, and in any event, that defendants had an opportunity to examine Holmes, as he named Holmes as a witness in his response to their discovery demands. (Levy Reply Aff.). Additionally, he claims that the DHMH incident report should not be considered, as it is unverified and contains hearsay, and he maintains that defendants had a full and fair opportunity to litigate the issue of Ford's negligence, as Ford was represented by counsel at the hearing, and whether he then considered the possibility of future litigation is inapposite.

III. ANALYSIS

A. Collateral estoppel

“Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency’s quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal.” (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; *Alamo v McDaniel*, 44 AD3d 149 [1st Dept 2007]). A party seeking to collaterally estop another party must demonstrate an identity of issues, whereas the opponent must demonstrate the absence of a full and fair opportunity to litigate. (*Jeffreys*, 1 NY3d at 39; *Ryan*, 62 NY2d at 501).

In the context of an administrative determination, a party is not automatically entitled to collaterally estop another party even if there is an identity of issues (*ABN AMRO Bank, N.V. v*

MBIA Inc., 2011 NY Slip Op 5542, *9 [June 28, 2011], and “[i]n the end, the fundamental inquiry is whether relitigation should be permitted . . . in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results” (*Buechel v Bain*, 97 NY2d 295, 304 [2001]).

1. Identity of issues

To establish a *prima facie* case of negligence, a plaintiff must show a duty owed, a breach thereof, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. (PJI 2:26; *Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391 [4th Dept 2011]; *Barbieri v Vokoun*, 72 AD3d 853 [2d Dept 2010]; *Aloi v County of Tompkins*, 52 AD3d 1092 [3d Dept 2008]).

Pursuant to VTL § 1146(a), (b)(2), “[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway ,” and if a driver “causes physical injury while failing to exercise due care . . . then there shall be a rebuttable presumption that, as a result of such failure to exercise due care, such person operated the motor vehicle in a manner that caused such injury.”

The New York City Traffic Rules and Regulations also require that a driver exercise due care to avoid colliding with a pedestrian (34 RCNY 4-04[d]), and they do not supersede the statute (34 RCNY 4-02[e]). Where a state statute and a local regulation are consistent, “absen[t] express statutory language providing that [the] local regulation controls over [the] state statute,” the state statute controls, and the court should instruct the jury only as to the effect of violating the statute. (PJI 2:26; *Collazo v Metro. Suburban Bus Auth.*, 68 AD3d 803, 804 [2d Dept 2009]).

Here, the issue before the Administrative Law Judge was whether Ford violated VTL § 1146 by failing to exercise due care to avoid the decedent. As this violation constitutes negligence as a matter of law, it is immaterial whether the statute contains a rebuttable presumption of causation or whether the Administrative Law Judge did not determine the cause of the accident occurred or whether decedent was comparatively negligent. Moreover, as the New York City Traffic Rules and Regulations are consistent with and do not supersede the statute, the rules and regulations would not be considered at trial. Absent any dispute that the Administrative Law Judge necessarily determined that Ford violated this section, plaintiff has demonstrated identity of issues.

2. Full and fair opportunity to litigate

In determining whether a party had a full and fair opportunity to litigate an issue at a prior proceeding, courts must consider “the ‘realities of the [prior] litigation,’” including “the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation.” (*Ryan*, 62 NY2d at 501).

Here, although Ford was represented by counsel at the hearing, neither City nor DHMH were parties thereto, and the Corporation Counsel was not present and did not represent the City’s interests or defend Ford with an eye toward potential future litigation involving City. Moreover, only Ford testified at the hearing, and as three eyewitnesses to the accident have been identified, and the NYPD has investigated it, testimony at trial will likely be more extensive. And, as he was facing only the possibility of losing his license, Ford’s incentive to litigate the

issue of his fault at the hearing is not as great as his incentive to litigate at a trial where he is facing \$5,000,000 in potential liability. In light of the totality of the circumstances, defendants have demonstrated that they did not have a full and fair opportunity to litigate the issue of Ford's negligence, and thus, that they are not estopped from litigating this issue now. (*See Rice v Massalone*, 160 AD2d 861 [2d Dept 1990] [defendant not afforded full and fair opportunity to litigate issue of negligence at DMV hearing held to determine whether he violated VTL provision even though he was represented by two attorneys, as incentive to litigate potential liability of \$2,000,000 at trial more compelling than incentive to litigate traffic infraction, and only two witnesses testified at hearing, whereas several more eyewitnesses to accident testified at trial]; *cf. Levine v Tolchin*, 239 AD2d 279 [1st Dept 1997] [plaintiff not afforded full and fair opportunity to litigate issue of defendant's negligence at DMV hearing even though she was present and represented by counsel, as only defendant, and not investigating police officers testified, plaintiff did not cross-examine defendant or call witnesses, and hearing was held solely to determine whether circumstances of fatal accident warranted revocation of defendant's license]).

B. Consideration of affidavit

Absent "unusual or unanticipated circumstances" warranting additional pretrial proceedings," failure to disclose a witness before the note of issue is filed bars consideration of the witness's affidavit on a motion for summary judgment. (*Rodriguez v New York City Hous. Auth.*, 304 AD2d 468 [1st Dept 2003]). As plaintiff listed Branch as an eyewitness to the accident and provided his address in his response to defendants' discovery demands more than eight months before the note of issue was filed, consideration of Branch's affidavit is not barred.

C. Prima facie showing

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Here, plaintiff relies on the police report, Branch's affidavit, and Ford's deposition testimony in claiming that there exist no material issues of fact as to whether Ford failed to exercise due care in striking decedent. As the police report contains conflicting accounts of the accident and reflects that it did not occur in the crosswalk, neither Branch nor Ford specified whether the accident occurred on the crosswalk, Ford's testimony conflicts with the statement contained in the police report, and plaintiff only speculates as to Ford's ability to see plaintiff, material issues of fact exist as to whether Ford exercised due care in operating the vehicle and whether plaintiff was comparatively negligent in crossing the street. (*See Pareja v Brown*, 18 AD3d 636 [2d Dept 2005] [plaintiff not entitled to summary judgment where she failed to demonstrate that defendant's alleged negligence was sole proximate cause of collision, as she crossed street mid-block and defendant did not see her before impact]; *see also Villaverde v Santiago-Aponte*, 84 AD3d 506 [1st Dept 2011] [plaintiff pedestrian not entitled to summary judgment where defendant driver's testimony that accident occurred beyond crosswalk and that

he checked crosswalk for pedestrians and saw no one raised issues of fact as to his negligence and plaintiff's comparative negligence]; *Nazario v Kohtio*, 49 AD3d 429 [1st Dept 2008] [denying summary judgment where plaintiff crossed street at point other than crosswalk and material issues of fact existed as to whether she was comparatively negligent and whether defendant driver failed to exercise due care to avoid accident]; *Ryan v Budget Rent a Car*, 37 AD3d 698 [2d Dept 2007] [same]; *Dragunova v Dondero*, 305 AD2d 449 [2d Dept 2003] [same]).

As plaintiff failed to make a *prima facie* showing, the sufficiency of defendants' opposition need not be considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is denied.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: September 19, 2011
New York, New York
SEP 19 2011

FILED

SEP 21 2011

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