

Patrice v Affinity Bldg. Corp.

2012 NY Slip Op 30729(U)

March 14, 2012

Supreme Court, Nassau County

Docket Number: 17916/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

EVAN PATRICE, an infant under the age of eighteen (18) years by LIBRA A. PATRICE, as parent and natural guardian and LIBRA A. PATRICE, Individually,

Plaintiff,

- against -

AFFINITY BUILDING CORP., and DOMENIC TAORMINA,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 17916/09

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defense moves for summary judgment on the grounds the defendant has no liability in this action.. The plaintiffs oppose the motion. The underlying action arises from a July 31, 2009 afternoon incident involving a motor vehicle and a lone 12-year old bicyclist on East Main Street, at or near its intersection with Anstice Street, in the Town of Oyster Bay, County of Nassau, State of New York near a public school.

The defendant van operator and the infant plaintiff bicyclist testified at examinations before trial. A nonparty witness testified, at an examination before trial, the weather was clear and sunny, and the helmet less bicyclist rode down Anstice Street very fast without stopping at a stop sign.

A defense expert opined, in a September 10, 2011 affidavit, within a reasonable degree of engineering certainty the plaintiff had a stop sign against him, but he failed to stop. The defense engineer opined the critical factors in the July 31, 2009 incident were the bicyclist's excessive approach speed into the intersection and the inappropriate brake responses by the infant plaintiff. The defense expert opined the control of this occurrence was entirely in the bicyclist's hands. The defense expert stated the normal time for a motor vehicle operator to react to an unexpected event is 1.5 seconds, and the stop distance from 10 miles per hour is approximately 4.5 feet, so it would have taken the defendant van operator 40.5 feet to stop after seeing the bicyclist coming down the hill if the defendant was traveling at 10 miles per hour. The defense expert opined the defendant van operator had no opportunity to avoid this occurrence and the operator's action in no way contributed to the happening.

The defense bio-mechanical engineering consultant specializing in human tolerance opined, in a September 12, 2011 affidavit, within a reasonable degree of bio-mechanical engineering the plaintiff rode northbound downhill on Anstice Street through the intersection. This defense expert opined the bicyclist's injuries resulted from abrupt short duration, high acceleration bending and torsional forces which reflected the extreme speed the infant plaintiff was traveling.

The defense argues the infant plaintiff rode his bicycle down the hill, passed a stop sign without stopping and crashed into the defendants' vehicle. The defense contends the defendants did not cause nor contribute to this happening. The defense asserts there are no material issues of fact regarding liability.

The plaintiffs' attorney points out, in a December 13, 2011 affirmation, the van operator testified it was not until he entered the middle of the intersection that he noticed the bicyclist's approach. The plaintiffs' attorney notes it was approximately five to 10 seconds from that observation until impact, and the van operator's only maneuver was braking.

The Second Department, in an analogous matter held:

It is well settled that once the moving party has made a *prima facie* showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). In this case, even when the factor of the retrograde amnesia of Annmarie Leek, who was operating a minibike when it struck the McGlone vehicle, is taken into account, it is clear that the McGlones have established their entitlement to summary judgment dismissing all claims and cross claims against them in Action No. 1. The only apparent independent eyewitness to the accident, Maria Sullo, who was a passenger on the Leek minibike, testified at a deposition that Annmarie Leek ran the stop sign at the intersection in question as well as several other stop signs prior to that. Several witnesses buttressed this testimony by detailing the rate of speed of the minibike and the fact that the minibike failed to stop at the stop sign. In short, the testimony of the independent witnesses corroborated the testimony of the McGlones as to the lack of culpable conduct of Doreen McGlone, whose vehicle was hit. The Leeks failed to come forth with any evidence which would raise any triable issue on the question of negligence in this case.

Leek by Leek v. McGlone, 162 A.D.2d 504, 505-506, 556 N.Y.S.2d 704[2d Dept, 1990]. Vehicle and Traffic Law § 146 (a) provides: Stop "[w]hen required means complete cessation from movement." Vehicle and Traffic Law § 1142 (a) provides:

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

Vehicle and Traffic Law § 1172 (a) provides:

Except when directed to proceed by a police officer, every driver of a vehicle

approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

Vehicle and Traffic Law § 1231 provides:

Every person riding a bicycle or skating or gliding on in-line skates upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this title, except as to special regulations in this article and except as to those provisions of this title which by their nature can have no application.

The Vehicle and Traffic Law § 1232 provides: “A person propelling a bicycle shall not ride other than upon or astride a permanent and regular seat attached thereto, nor shall he ride with his feet removed from the pedals.”

This Court determines the defense makes a *prima facie* showing of its entitlement to summary judgment as a matter of law. The defense proffers evidence showing the infant plaintiff rode his red, one speed non-dirt bicycle with hand brakes from home toward the public library three blocks away near the bottom of the hill. The defense shows the plaintiff infant failed to stop and did not ride his bicycle with his feet on the pedals as required by law. There was no stop sign nor traffic control device at that intersection facing the defendant operator. The defense proffers of the nonparty witness and the defense expert also show the plaintiff infant was the sole cause of the occurrence in a rapid occurrence with limited time for the van operator to react. The van driver testified the 1996 Ford commercial van approached the intersection at five to 10 miles per hour with a vehicle two car lengths behind it. The van driver testified he saw the infant plaintiff coming face down

the hill with his feet swinging, looking out of control. The van driver testified he tried to accelerate, but the van did not respond well, so he used the brakes. The bicycle hit the van near the front tire.


In opposition, the plaintiffs proffer the plaintiffs attorney's affirmation. The plaintiff infant's deposition shows he testified he knew there was a stop sign facing him at that "T" intersection where he went a lot on his bicycle, but he could not recall whether he stopped in front of it. The plaintiff infant testified he rode on the sidewalk before the accident, but he could not remember whether he stopped completely, and whether he looked to his left and right to see if there were any vehicles coming. The plaintiff infant also testified he had been riding his bicycle since he was nine years old, and he knew he was supposed to stop at the stop sign. The plaintiffs' showing fails to raise a triable issue of fact (*see generally Dobrovinskaya v. Dembitzer*, 77 A.D.3d 609, 908 N.Y.S.2d 730 [2d Dept, 2010]).

Accordingly, the motion is granted.

So ordered.

Dated: **March 14, 2012**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED
MAR 19 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE