

Donovan v Ehrling

2012 NY Slip Op 31353(U)

May 8, 2012

Supreme Court, Nassau County

Docket Number: 16764/10

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

-----X
MARY DONOVAN,

Index No: 16764/10

Plaintiff,

- against -

DECISION AND ORDER

STEPHEN J. EHRLING,

Motion Sequence No: 001
Original Return Date: 02-10-12

Defendant.
-----X

P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 4 were submitted on this Notice of Motion on March 9, 2012:

	<u>Papers numbered</u>
Notice of Motion and Affirmation in Support	1-2
Affidavit in Opposition	3
Reply Affirmation	4

The motion by defendant, Stephen J. Ehrling, for an Order pursuant to CPLR 3212, granting him summary judgment dismissal of the plaintiff's complaint on the issue of liability, is denied.

This personal injury action arises out of an accident in which the vehicle owned and operated by the defendant, Stephen J. Ehrling, came into contact with the plaintiff, Mary Donovan, a pedestrian. The accident occurred on August 6, 2009 on Jericho Turnpike at approximately 8:00 pm.

At her oral examination before trial (EBT), plaintiff testified that she had consumed at least six alcoholic beverages on the day of the accident between 2:30 p.m. and 7:00 p.m. She had also taken two dosages of prescription Valium at 2:30 p.m. and at 7:30 p.m. She testified that she knew from a previous occasion that taking the Valium with alcohol increased the effect of the Valium and

made her lightheaded. She stated that she did not remember eating on the day of the accident. Nonetheless, she testified that she was not drunk at the time of the incident (plaintiff's EBT, pp. 57-59).

Plaintiff explained her reason for walking on Jericho Turnpike at that time of the day. She stated that she left Hicksville to go to Huntington with a man that she knew but that he instead drove her to a motel on Jericho Turnpike. When she refused to get a room with him, she stated that she left him at the motel and started walking back home to Hicksville. She stated that she was walking westbound on Jericho Turnpike and had been walking for half a mile before the accident took place. Specifically, plaintiff stated that she wanted to get to a bar/restaurant that she knew to be located nearby in hopes of locating someone she knew there and getting a ride back home from them. Plaintiff decided she needed to cross Jericho Turnpike but that there were no intersections at the area where the accident took place (p. 35). She stepped off the sidewalk and looked to her left at oncoming traffic just before the accident happened. She testified that she "came off the sidewalk, went into the curb, looked to cross, waited a minute and got hit" (p. 74). Although there was nothing obstructing her view of traffic, she did not see the defendant's vehicle prior to this accident. She does not remember the details of this accident, including coming into contact with defendant's vehicle.

At his EBT, defendant testified that he was operating his vehicle westbound on Jericho Turnpike when he was involved in the subject accident. He stated that he was traveling approximately 35 miles per hour in the right hand of the three lanes heading west (defendant's EBT, p. 20). He described Jericho Turnpike as a flat road without bends. He testified that while there are street lights along Jericho Turnpike, the one near where the accident took place was not working at that time (p. 30).

Defendant stated that he first realized he was involved in an accident when "something hit [his vehicle]" (p. 32). He testified that he heard and felt an impact to the back end of the driver's side fender and to the driver's side door of his vehicle. Defendant stated that he did not know then that he had been involved in an accident with a pedestrian (p. 44). He immediately pulled over to the side of the road. When he got out of the car, he saw the driver's side mirror of his car as well as the plaintiff laying on the ground in the middle lane (p. 38). Defendant testified that he first saw the plaintiff "just prior or immediately before being hit, okay. Right in the left, I saw, again, this beige image and, you know, I'm driving and I see it, and I see this beige image and then, boom" (p. 42). She was approximately 23-30 feet behind where he pulled over his vehicle.

Upon the instant motion, defendant seeks summary judgment dismissal of the plaintiff's complaint. Thus, he bears the initial burden herein to make a *prima facie* showing of entitlement to judgment as a matter of law. Indeed, defendant is required to tender sufficient evidence to demonstrate the absence of any material issues fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). If he fails to make such a *prima facie* showing, this Court must deny the motion regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the plaintiff as the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Defendant's basis for summary judgment in this case is that documentary evidence, including the deposition testimony of the plaintiff herself, establishes that she entered the roadway without exercising caution and that she walked into defendant's vehicle. Defendant argues that he did not

breach any duty owed to the plaintiff and that he was not negligent as a matter of law. Defendant claims that the plaintiff was negligent *per se* because she violated Vehicle and Traffic Law § 1152(a).

These arguments are without merit and do not establish defendant's entitlement to judgment as a matter of law on this motion for summary judgment.

Vehicle and Traffic Law § 1152(a) provides that a pedestrian crossing a street at a place other than a crosswalk "shall yield the right of way to all vehicles upon the roadway" (Vehicle and Traffic Law § 1152[a]; *Billiny v. Blagrove*, 84 AD3d 848 [2nd Dept. 2011]; *Ryan v. Budget Rent a Car*, 37 AD3d 698 [2nd Dept. 2007]). However, Vehicle and Traffic Law § 1146 imposes a superseding duty upon a motorist to exercise due care to avoid hitting a pedestrian. Vehicle and Traffic Law § 1146 provides that "[e]very driver of a vehicle shall exercise due care to avoid colliding with any * * * pedestrian * * *." That is, a driver is under a duty to keep a reasonably careful look out for pedestrians, to see what is there to be seen, and to use reasonable care to avoid hitting any pedestrian on the roadway (*Deitz v. Huibregtse*, 25 AD3d 645 [2nd Dept. 2006]). Thus, the fact that a pedestrian crosses a street at a site other than a cross road is not prohibited, nor is it negligence *per se* (*Id.* at 646; *Franco v. Zingarelli*, 72 AD2d 211 [1st Dept. 1980]). Failure to comply with Vehicle and Traffic Law § 1146 constitutes negligence, even if the plaintiff failed to exercise due care in crossing the roadway in a place other than an intersection or crosswalk (*Ruocco v. Mulhall*, 281 AD2d 406 [2nd Dept. 2001]).

Here, there is no dispute that the plaintiff crossed in mid-block where there was no crosswalk. Nonetheless, the defendant has failed to establish, *prima facie*, that plaintiff was negligent as a matter of law in crossing the street and that such negligence was the sole proximate cause of the collision. Indeed, the defendant has failed to demonstrate that he exercised due care to avoid the

subject accident. The defendant driver had a duty to see that which he should have seen through the proper use of his senses. Here, the defendant testified that he observed the plaintiff in the roadway prior to the accident. Yet, there is no indication on this record that he, for example, reduced his speed, sounded his horn or that he even slowed or stopped his vehicle as he approached the plaintiff improperly crossing the road. As such, there remain questions of fact as to whether the defendant contributed to the accident by failing to exercise due care in operating his vehicle (Vehicle and Traffic Law §§ 1146, 1152[a]; *Parrinello v. Davis*, 2 AD3d 610 [2nd Dept. 2003]; *Dragunova v. Dondero*, 305 AD2d 449 [2nd Dept. 2003]; *Garner v. Fox*, 265 AD2d 525 [2nd Dept. 1999]).

That is, notwithstanding any alleged negligence on the part of the plaintiff, the defendant has failed to establish that he did not breach his common-law duty to see that which she should have seen through the proper use of his senses (*Botero v. Erraez*, 289 AD2d 274, 275 [2nd Dept. 2001]). There is no evidence that the plaintiff's conduct in crossing the street at a location other than an intersection was the sole proximate cause of the accident, or that the defendant is free from negligence in failing to avoid a collision with the plaintiff (Vehicle and Traffic Law § 1146, 1152[a]; *Alvarez v. Prospect Hosp.*, *supra*; *Ruocco v. Mulhall*, *supra*; *Gecaj v. DiFiglio*, 303 AD2d 548, 549 [2nd Dept. 2003]; *Levy v. Town Bus Corp.*, 293 AD2d 452 [2nd Dept. 2002]).

Accordingly, viewing the evidence submitted in support of the defendant's motion in the light most favorable to the non-moving party, this Court finds that there remain triable issues of fact as to whether any negligence on the defendant's part contributed to the accident (*Roman v. Al Limousine, Inc.*, 76 AD3d 552 [2nd Dept. 2010]; *Eastmond v. Wen Po Wong*, 300 AD2d 344 [2nd Dept. 2002]). Since the defendant failed to meet its burden of proof, this Court need not address the sufficiency of the plaintiff's papers in opposition (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d

851, 853 [1985]).

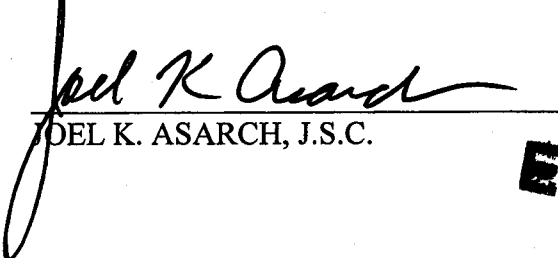
Accordingly, after due deliberation, it is

ORDERED, that the defendant's motion for summary judgment dismissing the complaint is denied.

This shall constitute the Decision and Order of this Court.

Dated: Mineola, New York
May 8, 2012

ENTER:



Handwritten signature of Joel K. Asarch in black ink, written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Buttafuoco & Associates, P.L.L.C.
Attorneys for Plaintiff

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ENTERED
MAY 10 2012
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