

**Eisenberg v Marcan Transp. Co., Inc.**

2012 NY Slip Op 33687(U)

May 25, 2012

Supreme Court, Bronx County

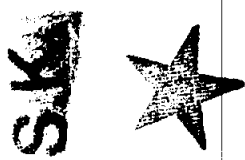
Docket Number: 308380/09

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**



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**PRESENT:** Honorable Mary Ann Brigantti-Hughes

DANIEL EISENBERG and EVE EISENBERG,

**DECISION/ORDER**

Plaintiffs,

Index No.:308380/09

-against-

MARCAN TRANSPORTATION CO., INC. and  
GWENELL MCGRUDER,

Defendants

The following papers numbered 1 to 6 read on the motion for summary judgment noticed on , **November 26, 2011**, and submitted on the motion calendar of **March 6, 2012** in Part IA-15:

<u>Papers submitted</u>	<u>Numbered</u>
Plaintiff's Notice of Motion, Affirmation, & Exhibits,	1,2,3
Affirmation in Opposition & Exhibits	4,5
Reply Affirmation	6

Upon the foregoing papers, plaintiffs Daniel Eisenberg and Eve Eisenberg (collectively, "Plaintiffs") seek an order granting summary judgment on the issue of liability pursuant to *CPLR* 3212 against defendants Marcan Transportation Co., Inc. and Gwenell McGruder (hereinafter "Defendants"). The instant matter seeks to recover monetary damages for personal injuries allegedly sustained by plaintiff Daniel Eisenberg, and for loss of consortium allegedly sustained by plaintiff Eve Eisenberg as a result of a motor vehicle-versus-pedestrian accident which allegedly occurred on June 19, 2009 at approximately 8:27 AM at the intersection of Gramatan Avenue and Grand Street, Mount Vernon, New York.

I. Background

Mr. Eisenberg alleges that he was a lawful pedestrian crossing Gramatan Avenue within the crosswalk, with the pedestrian light in his favor, when he was struck by a school bus owned

and operated by Defendants. The school bus was allegedly attempting to make a left hand turn from Grand Street onto Gramatan Avenue. Mr. Eisenberg testified that he had no specific recollection of whether he looked to his left and right before crossing Gramatan Avenue, although he usually did. He did not hear any sounds prior to the accident, such as honking horns or warning sounds. The accident occurred when Mr. Eisenberg was approximately two-thirds of the way across the roadway, in the southbound direction of traffic, while still in the crosswalk with the pedestrian signal in his favor. Mr. Eisenberg stated that he did not see the school bus before the impact, and did not hear any warning sound or screeching brakes. The school bus struck Mr. Eisenberg on the right side, knocking him to the ground and running over his feet. Plaintiff could not testify what portion of the bus impacted him. He did testify that the front driver's side tires ran over his legs.

Defendant Ms. McGruder, the operator of the school bus, testified at deposition that prior to attempting the left hand turn, she was driving on Grand Street. The traffic signal in her direction was green, and nothing was obstructing her view on the left side. She testified that she saw no pedestrians when she looked to her left. After stopping in the intersection to allow a vehicle approaching from the opposite direction to make a turn ahead of the school bus, Ms. McGruder testified that she again looked to her left and did not see a pedestrian. When asked if the pedestrian darted out or ran into the roadway, Ms. McGruder testified "I just didn't see him. I didn't see him. I really didn't see him." She testified that she first looked to the left to check for pedestrians when she was "in the crosswalk coming into the intersection." After waiting for an oncoming vehicle to complete a turn, she again checked right and left and testified that she didn't see anything. She then slowly proceeded to complete the turn when she "felt something" and stopped the bus. Defendant then exited the vehicle and saw a man sitting in the street in front of her bus, but couldn't recall whether he was in the crosswalk at the time.

Plaintiffs also submit an uncertified Police Accident Report and MV-104 form in support of their motion for summary judgment.

## II. Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

### III. Analysis

Plaintiffs have established entitlement to judgment as a matter of law by demonstrating that Mr. Eisenberg was crossing the street, within the crosswalk, with the light in his favor, when he was struck by Defendants’ vehicle. *See Gonzalez v. Arc Interior Const.*, 83 A.D.3d 418 (1<sup>st</sup> Dept. 2011), Vehicle and Traffic Law §1112(a).

In opposition, Defendants argue that since Plaintiff admitted he did not see the school bus prior to the impact, summary judgment must be denied, since there is a factual issue as to whether the plaintiff was negligent himself in entering the intersection. Plaintiff testified that he did not recall if he stopped or hesitated before entering the street. He had no specific recollection

if he turned right or left before crossing, but testified that he usually did so. Defendants argue that the annexed police report and MV-104 reports are inadmissible. Even if admissible, they do not state that Plaintiff was within the crosswalk when the accident occurred.

The First Department has traditionally held that a plaintiff's comparative negligence is not a complete bar to recovery, and a plaintiff is entitled to summary judgment as to a defendant's negligence even where there are issues of fact as to her own culpable conduct. See *Gonzalez, supra.*, citing *Strauss v. Billig*, 78 A.D.3d 415 (1<sup>st</sup> Dept. 2010), *lv. dismissed* 16 N.Y.3d 755 (2011); *Tselebis v. Ryder Truck Rental, Inc.*, 72 A.D.3d 198, 200 (1<sup>st</sup> Dept. 2010).

The Appellate Division, however, has recently declined to follow its previous holding in *Tselebis, supra.* In *Calcano v. Rodriguez*, 91 A.D.3d 486 (1<sup>st</sup> Dept. 2012), the Court held that a "plaintiff moving for summary judgment ... must eliminate any material issue, not only as to the defendant's own comparative negligence, but also as to whether the plaintiff's own comparative negligence contributed to the accident." *Id.* at 186-187. The First Department specifically adopted the Court of Appeals holding in *Thoma v. Ronai*, 92 N.Y.2d 736, 737 (1993), *aff'd* 189 A.D.2d 635 (1<sup>st</sup> Dept. 1993), which found that even where it was undisputed that a plaintiff was struck by a vehicle while she was in a crosswalk with a favorable light, a "failure to yield the right of way does not ipso facto settle the question of whether the other party was herself guilty of negligence." 189 A.D.2d at 635-636. The Court in *Calcano* found that *Thoma*, and not *Tselebis*, was binding, and it should therefore be followed. *Calcano* at 188. The Court in *Thoma* held specifically that the plaintiff had a duty to use her eyes to protect herself from danger, and the failure to look before crossing the street would constitute negligence. 189 A.D.2d 635, 637, *aff'd*, 92 N.Y.2d 736 (1993). The reasoning of the *Calcano* panel was recently followed in *Maniscalco v. New York City Transit Authority*, 2012 WL 1582786 (1<sup>st</sup> Dept. 2012), where a pedestrian was struck by the side-view mirror on the drivers side of the left-turning defendants' van as she crossed an intersection within a crosswalk and light in her favor. The Court held that the pedestrian was not entitled to summary judgment as to liability where there is a question of fact as to comparative negligence. That court cited *Calcano, supra* as well as *Wein v. Robinson*, 92 A.D.3d 578 (1<sup>st</sup> Dept. 2012)(affirming denial of pedestrian's motion for summary judgment).

In light of the motion record and this recent controlling precedent, this Court must deny

Plaintiff's motion as there are issues of fact as to whether he exercised reasonable care while crossing the subject intersection. Plaintiff could not recall if he specifically looked both ways before crossing the street, even though he usually did so. He testified that he did not see Defendants' vehicle at any time prior to the impact. Ms. McGruder testified that she did not see Plaintiff prior to impact, despite looking to her left and right before proceeding to make her full turn onto the southbound lane of Gramatan Avenue. Even considering the alleged admissions contained in the police report and MV-104 report, they do not confirm that Plaintiff was in the crosswalk or establish that Plaintiff was free of negligence himself.


IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: May 25, 2012

  
Hon. Mary Ann Brigantti-Hughes, J.S.C.