SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 107642/2010
CASEY, MARGARET
vs.
ABBA, MIRZAS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 22

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to 3, were read on this motion to/for MSJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1

Answering Affidavits — Exhibits — No(s). 2

Replying Affidavits — No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
MAY 17 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/14/13

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 107642/10
Mot Seq 001

Margaret Casey individually and as p/n/g of Caitlin Toro,

Plaintiffs,

-against-

Mirza Abbas and Fenda Taxi, Inc.

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the grounds that plaintiff[1] Caitlin Toro's negligence in darting out between parked cars was the sole proximate cause of the accident and of her injuries is granted, and the complaint is dismissed.

In this action, Toro, who was sixteen at the time of the accident, seeks damages for personal injuries she incurred when, while playing tag, she ran out between parked cars and into the street and was hit by defendants' car. At the time of the accident, defendant was going straight on East 11th Street, a one way west bound street in Manhattan and Toro was crossing from the north to the south side of the street (which would have been from defendant's right side to his left). She alleges that her right rib was struck by defendants' right side mirror and that the back wheels ran over her foot.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the

[1]Although there are two plaintiffs and two defendants, the term "plaintiff" refers only to Toro and "defendant" refers to the driver Abbas.

opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

Defendants' Showing

In support of their motion, defendants submits the deposition transcripts of Toro, defendant driver Abbas and Christine Torres, an independent witness, and related documents.

In his deposition, the driver Abbas testified that he never saw plaintiff until after the impact. He turned onto 11th Street from Avenue A, was going about 10 miles per hour, and a few car lengths into 11th Street he heard a thump on the right side of his car, as if someone threw something at his car. He stopped to check what hit him and he saw plaintiff lying on the ground, crying. Although he was not asked, it is clear that he did not swerve to avoid her because he testified that he never saw her until after the impact.

In her deposition, Toro admits that she was playing tag with other teenagers when this

accident happened, that she was being chased by "Victor" and looking back toward him at least right before she entered the street, that she intended to cross the street as he chased her, that she ran out between parked cars and into the street about five or six car lengths (toward First Avenue) away from the crosswalk/intersection with Avenue A, and that the initial point of impact was her right rib and the car's passenger side mirror. This means that she had to have been facing Avenue A at the time of impact; otherwise her right rib would not have been the point of impact. Because the car was coming from her left, had she been facing straight, her left side would have been hit and if she was facing toward First Avenue, her back or left side would have been hit. This comports with her testimony that when she saw the car, it was 5-6 feet away and she turned to go back to the curb; she must have turned toward the car without time for any other movement.

Based upon these facts, defendants have made a prima facie showing that they were not negligent, entitling them to judgment as a matter of law. This accident happened only because plaintiff ran into the street between parked cars. *Brown v Muniz* 61 AD3d 526 (1st Dept 2009). Thus the burden shifted to plaintiff to demonstrate factual issues for a jury to decide.

Plaintiff's opposition

Plaintiff's attorneys argue that several factual issues exist. First, in paragraph 4 of the opposition, they claim that plaintiff looked toward the corner of Avenue A and 11th Street before she stepped into the street. Although they cite to page 39 of her deposition, nowhere on that page does she make such a claim.

Next her attorneys point out the following undisputed testimony: plaintiff was in the roadway prior to the impact, that the driver was going less than 10 miles per hour and that after the impact, when he stopped in the middle of the street, he estimated that the space between his

car and the parked cars was more than two feet to his left and three or more feet to his right. Based on that, plaintiff's attorneys argue that the driver *had* to have seen her and had at least two feet or room to his left to swerve to the left to avoid her. Relying on plaintiff's testimony that she first saw him when he was 5-6 feet away, when she was already in the street, the attorneys speculate that, even if he did see her, he would have been able to avoid her when traveling at a speed of 10 miles per hour. That he "had to have seen her" and "could have swerved" is pure speculation and is not an issue of fact any more than the speculation that what really happened was that plaintiff ran into the side of defendant's car from between parked cars after his front bumper passed her.

Plaintiff's attorneys try to make defendant's speed an issue of fact simply because plaintiff claims that he was going "pretty fast". However, she claims that she first saw him when he was 5-6 feet away and impact was to the passenger side mirror "a second or two later" (Toro transcript, p 5). Being overly generous to plaintiff at defendant's expense, if this Court assumes that she first saw him when he was 5 feet away (she claimed 5-6 feet) and the impact happened 10 feet from the front of his car, then the car traveled 15 feet in one second (she said "a second or two"). Simple math shows, even under those assumptions unfair to defendant, he still was going less than 10 miles an hour because if he was going 10 mph, he would have traveled a little less than 15 feet in a second. (10 mph x 5280 feet per mile = 52,800 feet per hour. 52,800 feet per hour divided by 3,600 seconds per hour = 14.666 feet per second). Therefore, that is not an issue of fact – according to plaintiff's testimony, the driver was going less than 10 miles per hour.

Plaintiff also claims an issue of fact for the jury is whether they believe the independent witness, Ms. Torres – who testified that plaintiff never looked for traffic when running into the street – or believe plaintiff - who testified that she looked after stepping into the street but before

she emerged from between the cars. This does not reflect plaintiff's testimony. On page 60 or her deposition transcript, after much confusion, plaintiff clarified exactly when she looked.

She testified (pages 60 and 61) "I meant to say that when the two parked cars was there, like I put one foot past the two parked cars and I looked and there was no car coming and when I took two more steps, I looked again and there was a car coming. That's what I meant." And in answer to the follow-up question "So the first time you looked to see if there was a car coming was when you took one step past the parked cars as you were just running between"? And she answered "Yes." Clearly, plaintiff's own testimony establishes that she did not look until she was already past the parked cars and into traffic.

Therefore, to the extent that plaintiff's attorneys argue that the obligation to look is before one enters traffic and not before one enters the street (because one can enter the street between parked cars where there is no chance to be hit by oncoming traffic), that argument is irrelevant here because plaintiff testified that she did in fact enter the lane of traffic before she looked.

Conclusion

Plaintiff, while playing tag, darted out between parked cars. She did not look for oncoming traffic until she stepped past the parked cars. Defendant never saw her before the impact.. According to plaintiff's testimony, defendant could not have been going more than 10 miles per hour. These uncontested facts, viewed in light most favorable to plaintiff, the non-moving party, fails to raise an issue of fact. "Had plaintiff, who was 16 years old, not entered the street, without warning, there would have been no accident. Such a factual scenario warrants dismissal of the complaint" *DeJesus v Alba*, 63 AD3d 460, 463, 882 NYS2d 12, 14-15 (1st Dept 2009). Plaintiff has admitted facts which demonstrate that her negligence was the sole cause

of this accident and any resulting injuries. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted and defendant is ordered to serve a copy of this order on plaintiff's attorneys and the appropriate court clerks.

This is the Decision and Order of the Court.

Dated: May 13, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC