

Burgos v City of New York

2013 NY Slip Op 31272(U)

June 7, 2013

Sup Ct, New York County

Docket Number: 112535/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 112535/2011
BURGOS, MARCELINA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

CAL #21

7

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

ACCOMPANYING DECISION / ORDER

FILED

JUN 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

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Dated: 6-7-13
JUN 6 2013



HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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

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
MARCELINA BURGOS,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION and
KENDRA T. KEARNEY,

Defendants.

-----X
HON. KATHRYN E. FREED:

DECISION/ORDER
Index No. 112535/2011
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NUMBERED

FILED

JUN 18 2013

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

.....1-2.....
.....3.....
.....4.....
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.....
.....
**COUNTY CLERK'S OFFICE
NEW YORK**

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§3212 granting summary judgment pursuant to CPLR 3212, on the issue of liability. Defendants oppose. After a review of the instant motion, all relevant statutes and case law, the Court **grants** the motion.

Factual and procedural background:

This is an action to recover monetary damages for personal injuries allegedly sustained as a result of a traffic accident. On April 11, 2011, in New York County, plaintiff and pedestrian Marcellina Burgos (“plaintiff”), was struck by a vehicle owned by defendant New York City Health and Hospital Corporation (“HHC”) and driven by its employee, defendant Kendra T. Kearney

("Kearney"). As a result, plaintiff sustained serious injuries.

Prior to the commencement of the instant action, a Notice of Claim was served upon the City and HHC on May 31, 2011. The action was commenced via the filing of a Summons and Verified Complaint on November 3, 2011. Issue was joined by all defendants via their Amended Answer dated December 30, 2011. On July 14, 2011, plaintiff was examined at a General Municipal Law 50-hearing. She was subsequently deposed at a deposition conducted on May 23, 2012. The deposition of defendant Kearney was also held on that day. A Note of Issue has yet to be filed.

Both parties predictably proffer contradictory versions of the subject accident. However, certain facts remain undisputed. These facts are that the instant accident occurred at the aforementioned date and time at the intersection of Leonard and Centre Streets, that the subject intersection, Leonard Street is a one way roadway which runs from east to west and that Centre Street is a one way roadway running from south to north. More importantly, it is undisputed that there is a crosswalk at the subject intersection, consisting of white painted lines on the Leonard Street roadway between the sidewalks on both the north and south sides of the street. A traffic light is situated in the intersection, governing crosswalk traffic. Additionally, both plaintiff and Kearney testified that at the time of the accident, other cars were parked perpendicular to the sidewalk along the south side of Leonard Street near its intersection with Centre Street (see Exhibit 5, pp. 31-32, Exhibit 6, pp. 24-25, p31-lines 9-24).

In essence, plaintiff asserts that she was walking in the crosswalk when she was struck by HSC's vehicle as it was making a left turn; that Kearney did not see plaintiff prior to or at the moment of impact because she was looking down; that plaintiff specifically looked before entering the crosswalk and continued looking for oncoming traffic as she crossed; and that prior to striking

her, Kearney did not honk, brake or swerve; and when she was close enough to see into the vehicle, and observed a cell phone resting on Kearney's lap.

Plaintiff specifically testified that she stopped at the intersection and waited for the light to turn green before proceeding. "The light was 'don't walk,' so I—you have to wait there for the light to change, because there was a car coming from—that's another name of the street that goes to Leonard. I don't know the—it's a straight street (indicating), but the street, you know, they change, so it was coming, so we had to wait there for the light to change. So when the light change, walk, I was ready to walk..." (see Exhibit #5, p22). In response to the question, "[d]id you wait until the crosswalk sign said you could go before you went,?" plaintiff responded "[w]alk. Yeah. I could see the man walking. Not the word. The man walking (*id* at p.23).

Plaintiff testified that "She, [Kearney], was in the front making the turn and I'm already going to the sidewalk there. When she made the turn I looked and she had her head down so I tried to run but she made the car too close to the car that's when she dragged me" (Exhibit 4, pp36-37). When asked what part of Kearney's vehicle struck her, plaintiff responded "[h]er mirror and then I bounced from her car back to the white car that was parked there. In other words, she twist me back and forth" (*id* at 37). "All of a sudden, I heard a big celerator [sic], so I looked up and I turned my face. It was too late. The car came real fast, hitting me, bounce—bouncing me to the car, that is parked right there (indicating). My whole body bouncing back to her car, bouncing back to another she heard a "big accelerator" and looked up and turned her face," but "it was too late." (*id* at 29).

Kearney testified that she was in fact approaching the intersection with the intent of making a left turn (see Exhibit 6, p24 & p29), and find a place to park a vehicle she customarily used in the

course of her duties as a messenger employed by HHC. Additionally, she testified that she was unaware of anything amiss until she observed her driver's side mirror "go down" (see it 26). Kearney also testified that "when the mirror went down, I was—I'm gonna say [I was] almost out of the crosswalk" (*id* at 30).

Positions of the parties:

Plaintiff argues that summary judgment is appropriate in that there is no material dispute regarding the facts establishing liability, specifically, that the accident occurred when the vehicle Kearney was driving struck plaintiff as it turned left, and thus failed to yield the right-of-way to plaintiff as a pedestrian in a crosswalk. Additionally, she argues that no evidence has been presented establishing any liability on her part; that case law and the Vehicle and Traffic Law, specifically provide that a pedestrian has the right of way while a pedestrian control signal is in his/her favor; that any failure on her part to observe the vehicle prior to being struck by the vehicle is not indicative of comparative negligence; and that her exercise of due care in following pedestrian traffic signals also spares her from being classified as comparatively negligent.

Defendants argue that triable issues of fact which concern the issue of whether plaintiff was indeed within the crosswalk at the time of the accident, exist. They also argue that negligence cases are not usually disposed of via summary judgment because the very question of negligence is one more appropriately reserved for a jury. Defendants further argue that even if the Court finds that the impact occurred in the crosswalk, the instant motion still warrants denial in that plaintiff must show, and has failed to show, a lack of comparative negligence.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material

issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). “Mere conclusory assertions, devoid of any evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept.1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the instant case, the Court finds that plaintiff has established her entitlement to summary judgment on the issue of liability. First, the Court notes that it is well settled that “[p]edestrians have the right of way in a crosswalk, provided that they do not enter them suddenly. Pedestrians using crosswalks are required to use the right half, whenever practicable. Pedestrians have the right of way on sidewalks, and drivers entering or leaving driveways, alleyways, buildings, or private roads, must yield to them” (see VTL§ 27:2 Rights of pedestrians).

Moreover, following a careful review of the deposition testimony of both plaintiff and Kearney, the Court finds that plaintiff’s rendition of the accident remains consistent and uncontradicted, in that while crossing the street within the crosswalk, with the pedestrian signal in her favor, she was struck by a vehicle operated by Kearney while Kearney was making a left turn, and that plaintiff was free from comparative negligence (see *Beamud v. Gray*, 45 A.D.23d 257 [1st

Dept. 2007]; *Cartegena v. Girandola*, 104 A.D.3d 599 [1st Dept. 2013]; *Klee v. Americas Best Bottling Co., Inc.*, 60 A.D.3d 911[2d Dept. 2009]).

The Court also finds defendants' proffered arguments in opposition to the instant motion to be unavailing. Indeed, their argument that plaintiff was not in the cross walk at the time of the accident is belied by Kearney's own testimony. To reiterate, she testified that the first indication she had that there was a problem was when "the mirror went down," (which means when the mirror on the driver's side of the vehicle she was driving clipped plaintiff), she was "almost out of the crosswalk," (which means that she was still *in* the crosswalk).

The Court further finds that the case of *Maniscalco v. New York City Transit Auth.*, 95 A.D.3d 510 [1st Dept. 2012], which defendants proffer as support for their argument that plaintiff can and should be held comparatively negligent, is distinguishable from the case at bar. In *Maniscalco*, the court held that "in determining whether one party's conduct was a legal cause of the injury, the possible causal role of the other party's conduct should also be considered" (*id* at 512).

Unlike the fact pattern in *Maniscalco*, in the case at bar, there is not a scintilla of evidence that any negligence can be attributed to plaintiff. To buttress their argument of comparative negligence, defendants refer to and rely on a particular segment of plaintiff's testimony wherein she testified "[a]ll of a sudden, I heard a big celerator [*sic*], so I looked up and I turned my face. It was too late. The car came real fast, hitting me, bounce—bouncing me to the car, that is parked right there (indicating). My whole body bouncing back to the car, bouncing back to another....." (Exhibit 5, p29, lines 7-9).

Defendants argue that this testimony is proof positive that if plaintiff "looked up," she most certainly had to have been "looking down." This argument is really overreaching. Kearney was

driving a type of SUV that is higher than a regular vehicle. "Looking up" in this scenario just means looking "directly at" the vehicle as it bore down on plaintiff.

Indeed, this particular portion of plaintiff's testimony is woefully taken out of context. Following a reading of her entire testimony, it is certainly not sufficient evidence of any comparative negligence on the part of plaintiff, and defendants' reliance on it is tantamount to picking at straws.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on the theory of liability only is granted and it is further

ORDERED that plaintiff shall serve a copy of this order on defendants and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: June 7th 2013

ENTER:

JUN 07 2013

FILED

JUN 18 2013

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed
HON. KATHRYN FREED
J.S.C.
JUSTICE OF SUPREME COURT