

Bayo v Pioneer Transp. Corp.

2013 NY Slip Op 33644(U)

April 5, 2013

Sup Ct, Bronx County

Docket Number: 350251/08

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

FATUMATA BAYO, as Mother and Natural
Guardian of ANSUMANA BAYO, an infant,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 350251/08

-against-

PIONEER TRANSPORTATION CORP., DIANE
BARROW, DIANE GUARASCIO, "JOHN DOE
NO . 2 (bus attendant of defendant PIONEER
TRANSPORTATION CORP. whose true name
and identity is presently unknown), THE CITY OF
NEW YORK, NEW YORK CITY BOARD OF
EDUCATION, THE NEW YORK CITY
DEPARTMENT OF EDUCATION and JORGE A.
SOTO,

Defendants.

HON. MARK FRIEDLANDER

Defendant, Jorge A. Soto ("Soto"), moves for an order, pursuant to CPLR§3212, granting Soto summary judgment dismissing plaintiff's complaint and all of the defendants' cross-claims. Defendants, Pioneer Transportation Corp. ("Pioneer"), Diane Barrow ("Barrow"), "John Doe No. 1" and "John Doe No. 2" bus personnel of Pioneer Transportation Corp., The City of New York ("the City"), New York City Board of Education ("BOE"), and The New York City Department of Education ("NYCBOE") (collectively, "Pioneer"), cross-move for an order, pursuant to CPLR§3212, granting them summary judgment on the issue of liability and dismissing plaintiff's complaint and the defendants' cross-claims. The motion and cross-motion are decided as hereinafter indicated.

This is an action by the infant plaintiff, Ansumana Bayo ("Bayo"), to recover monetary

damages for serious injuries allegedly sustained in a motor vehicle accident on March 11, 2008, as a result of the negligence of the defendants. More specifically, Bayo was struck by a 2004 Lincoln Navigator SUV, owned and operated by Soto, after Bayo ran into the street from between parked school buses into the path of Mr. Soto's vehicle.

The facts are as follows: Bayo was born on March 16, 1999. At three years of age, he was diagnosed with lead poisoning. When Bayo was attending first or second grade at P.S. 55, he was evaluated for Special Education by the City, BOE and NYCBOE, because his teachers complained Bayo had "hyperactivity," "difficulty concentrating," and behavioral problems, including fighting with other children. As a result of these evaluations, it was determined that Bayo required more specialized education, having been classified while still in second grade as "Learning Disabled." Bayo was then transferred from P.S. 55 to P.S. 126, where he was placed in a smaller Special Education second grade class, consisting of twelve children, including Bayo. Bayo was still attending Special Education at P.S. 126, when he was in the third grade.

P.S. 126, a/k/a Dr. Marjorie H. Dunbar School, is located on University Avenue between 166th and 168th Streets in the Bronx. University Avenue, at this location, is a one way street, with two parking lanes, one located on the left side of the avenue and one located on the right side of the avenue, and one travel lane in the middle of the street, which runs from south to north. The exit denoted as "Exit 3" of P.S. 126 was located in the middle of the block. Abutting Exit 3 is a parking lane reserved for school buses. Bayo took a Special Education "big bus" to and from home and school. This school bus, had, in addition to a bus driver, a school bus matron who told the children where to sit and to wear their seat belts. For Bayo, school started at 8:30 A.M. and his last class ended at 2:30 or 3:00 P.M.

Sharan Wilson ("Wilson"), a paraprofessional employed by the BOE, witnessed the accident and gave the following testimony. Bayo had a history of what may be characterized as behavioral problems. More specifically, when he would become angry, he would run out of his classroom. This was a daily occurrence. On the date of the accident, Bayo and the other students were in the process of being dismissed. They were being escorted to their respective school buses which were parked against the curb on the school/right side of University Avenue. At Exit 3, both gates were open, which created an opening of approximately eight to ten feet. Wilson was holding the exit door and the children were walking through the gate, while the matron was checking them off. She was looking at the matron and saw something jet past her. Wilson didn't see him (Bayo) run past her, but out of the corner of her eye she saw something and she turned, not quite knowing that somebody ran past her.

Wilson turned her head and she could see an SUV coming. Wilson testified: "And it happened so quick. When he - I'm telling you, I actually saw the impact. When he ran out in the middle of the street, and turned and said 'Ha,' the SUV was there. He didn't know. It was just so simultaneously. I couldn't believe what I was seeing." (Tr., Wilson, Exhibit L, pg. 136). When asked if the driver of the SUV could have done anything to avoid the accident, Wilson testified: "I didn't think there was anything that the driver could do. Oh, that, I believe that the driver had no way of seeing him and he no way of going left or right, and if he did, he would have hit the minivan or he would have ran into another car across the street." (Tr. Wilson, Exhibit L, pg. 186). When asked if the driver of the SUV was speeding before the accident, Wilson testified: "I can't say he wasn't speeding, but if he was speeding, he would have killed him. Let me put it this way. He's coming down the street like everybody else that rides that

block. I can't say he wasn't speeding, but I see speeders. I drive. I know what a speeder is. He wasn't speeding. He was driving. He was driving through that block. I see cars speed through that block all the time. I yell at them. Because there's kids there. It's a school." (Tr. Wilson, Exhibit L, pg. 188).

Defendant Soto testified that he was the owner and operator of a 2004 Lincoln Navigator. Prior to and including the date of this accident, Soto was employed as an "independent taxi driver" who obtained car service customers via radio transmissions through a company called Radio Ultra Dispatch, located just around the corner from P.S. 126 at 277 Est 165th Street, Bronx, New York. Soto's regular working hours in March, 2008, were from 5:00 A.M. through 5:00 or 6:00 P.M. His vehicle's side and rear windows were tinted. Soto's vehicle had radio equipment located in the front row of seats, between the driver's and passenger's seats, including a hand-held radio. This radio equipment was on at all times. Soto also had a "hands-free" cell phone with him in the vehicle at the time of the accident.

Soto was familiar with the area, having driven on University Avenue between West 165th Street and West 168th Street, for fifteen years prior to the accident, because he worked there. There were "20 miles per hour" posted speed limit signs on University Avenue between West 165th and 166th Street, a block before the school. There was also a "speed bump" in the roadway on University Avenue, on the block between West 165th and 166th Street, the block before the street where the school was located. There was also signage indicating that there was a school for children, and Soto knew that there was a school there with children, as he had previously seen small children with parents at that location being picked up or dropped off in the mornings and afternoons. There were no traffic control devices on University Avenue between West 165th and

167th Street. Soto acknowledged seeing school buses stopped or parked at the school in the afternoon all the time, although he never saw the school buses with their flashing lights on or with their "Stop" signs out.

On the date of the accident, it was sunny. He had just picked up two passengers at 1001 University Avenue, between West 164th and West 165th Street, whom he was planning to take to Manhattan. Soto planned to drive straight down University Avenue to West 167th Street, turn left onto 167th Street, and continue to Sedgwick Avenue to the Deegan. After picking up the two passengers, Soto did not stop or make any turns and proceeded on University Avenue toward West 166th Street. When crossing over the speed bump on University Avenue between University Avenue between West 165th and 166th Street (the block before the school), Soto testified that he looked at his speedometer and observed that his vehicle was traveling at 15 miles per hour. There were no cars in front of his vehicle and nothing obscured his vision.

Prior to the accident Soto was looking forward and observed yellow school buses stopped on University Avenue. He did not see any flashing lights on any of the school buses he observed. He did see people on the sidewalk corner of University Avenue and West 166th Street next to the school, but did not remember if he saw any children with the people he observed. Soto testified that he had just passed the intersection of West 166th Street and University Avenue, and could no longer see the sidewalk immediately adjacent to the school, as the yellow school buses blocked his vision. As Soto drove straight through the intersection of University Avenue and West 165th Street, he saw "the child came out from between two buses," pressed his brakes, but his vehicle still struck the child. Soto did not know how much time passed from when he first saw the child until his vehicle struck him.

Based upon the foregoing, defendant Soto has established a *prima facie* case for summary judgment that the accident was unavoidable and he is not liable. In opposition to the motion, plaintiff's contention that Soto was speeding, was traveling at an excessive speed or that he otherwise failed to avoid the accident is based upon mere speculation, is unsupported by any evidence and fails to raise a triable issue of fact requiring a trial. *Cadeau v. Gregorio*, — A.D.3d —, 2012 WL 900162, 2013 N.Y. Slip Op. 01499 (1st Dept 2013); *Murchison v. Incognoli*, 5 A.D.3d 271 (1st Dept. 2004). Accordingly, Soto's motion for summary judgment seeking dismissal plaintiff's complaint against him, only, is granted. The branch of Soto's motion seeking dismissal of all of defendants' cross-claims is denied because the parties' submission of exhibits shows no pleadings containing cross-claims against Soto.

Plaintiff asserts that the cross-motion of defendants Pioneer, seeking summary judgment on the issue of liability and dismissing plaintiff's complaint and all of the defendants' cross-claims, is untimely and cannot be considered by the Court. Pioneer acknowledges that its cross-motion was not served within 120 days of the plaintiff's filing of the Note of Issue. However, Pioneer asserts that it has "good cause" for the late service of its cross-motion for summary judgment and has moved for an extension of time to make dispositive motions.

Specifically, Pioneer has moved for an order: (1) pursuant to CPLR 3121 and 3124, directing the infant plaintiff to submit to an independent pediatric neurological evaluation; (2) directing plaintiff to provide copies of all materials, including, but not limited to, medical reports, documents, raw questionnaires, calculations and analysis, data and test results relied upon by the plaintiff's proposed expert witnesses Theodore Lidsky, Ph. D and Daniel Adler, M.D. in making their determinations; (3) striking this matter from the trial calendar for "material

inaccuracies” in the certificate; and (4) in the alternative, extending the moving defendants’ time to file a motion for summary judgment to sixty (60) days after completion of the infant plaintiff’s pediatric neurological examination and the completion of the above referenced discovery. This motion was submitted in the DCM (discovery part) before Justice Douglas. By Decision/Order, dated March 7, 2013, the Hon. Laura G. Douglas, stated, in relevant part, as follows:

“Finally, Pioneer’s (the collective name used by Justice Douglas to designate all the moving defendants) time to serve and file a motion for summary judgment is extended, but only with respect to the issue of serious injury under Article 51 of the Insurance law. Pioneer may bring such motion no later than sixty (60) days after completion of the infant plaintiff’s pediatric neurological examination. The plaintiffs’ Note of Issue is **not** stricken and the case **shall remain** on the trial calendar.”

Justice Douglas’ Decision/Order granted an extension of time to move for summary judgment only with respect to the issue of serious injury (threshold), not with respect to liability. This is the law of the case.

The Court of Appeals in *Brill v. City of New York*, 2 N.Y.3d 648 (2004) and *Micelli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725 (2004) determined that, absent “good cause,” an untimely motion for summary judgment (made beyond the statutory mandate of CPLR§3212[a]) may not be entertained by the Court, irrespective of its merits. Although *Brill* and *Micelli* did not deal with untimely cross-motions, the Appellate Division, First Department, has ruled on the issue. In *Conklin v. Triborough Bridge and Tunnel Auth.*, 49 A.D.3d 329 (2008), defendants moved for summary judgment seeking dismissal of plaintiff’s complaint, including 240(1) Labor Law claim. Plaintiff cross-moved for summary judgment on his Labor Law claim. The Court stated “that plaintiff’s untimely cross-motion was not improperly considered, since it sought relief on the same issues as were raised in defendants’ timely motion (see *Altschuler v. Gramatan*

Mgt., Inc., 27 A.D.3d 304, 304-305 [2006]).” See also *Lapin v. Altantic Realty Apts. Co.*, 48 A.D.3d 337 (1st Dept. 2008), (cross-motion properly considered “because it raised nearly identical issues ... as in (the) timely motion”); *Filannino v. Triborough Bridge and Tunnel Auth.*, 34 A.D.3d 280 (1st Dept. 2006). Here, the issues raised by the defendants in their cross-motion are not identical to the issues raised by defendant Soto in his timely motion. Consequently, Pioneer’s cross-motion for summary judgment is denied as untimely.

The foregoing constitutes the Decision and Order of the Court.

Dated: 4/5/13



MARK FRIEDLANDER, J.S.C.