

Benjamin v New York City Police Dept.

2014 NY Slip Op 31036(U)

April 7, 2014

Sup Ct, New York County

Docket Number: 106954/2008

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: FRANK P. NERVO
Justice

PART 62

Index Number : 106954/2008
BENJAMIN, BARBARA
vs.
NEW YORK CITY POLICE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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). <u>1 + 2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3</u>
Replying Affidavits _____	No(s). <u>4</u>

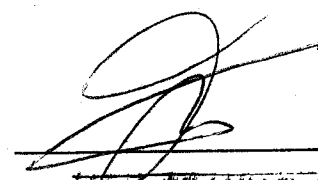
Upon the foregoing papers, it is ordered that this motion is

*denied in accordance
with the general
decision and order.*

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

FILED
APR 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 04/07/2014



HON. FRANK P. NERVO, 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 NEW YORK
COUNTY OF NEW YORK : CIVIL TERM PART 62

-----X

BARBARA BENJAMIN, as Guardian Ad Litem
of TANATHA BENJAMIN,

Plaintiff,

Index No. 106954/2008

Decision and Order

-against-

NEW YORK CITY POLICE DEPARTMENT,
MARY SILACO and THE CITY OF NEW YORK,

Defendants.

FILED

-----X APR 22 2014

**NEW YORK
COUNTY CLERKS OFFICE**

FRANK P. NERVO, J:

In this action plaintiff, a pedestrian, asserts she was injured as a result of having been struck by a motor vehicle owned and operated by defendant, The City of New York (City). Defendant moves for summary judgment on the issue of liability asserting plaintiff "came out of nowhere and struck the side mirror and windshield of [City's] vehicle." In the alternative, defendant asserts these facts created an emergency condition and moves to amend its answer to include the emergency doctrine as an affirmative defense.

* 3]

The City relies on the deposition testimony of defendant Mary Silaco, (Silaco) its employee and vehicle operator, as well as the testimony of certain witnesses and exhibits. While those exhibits and the testimony of witnesses other than Silaco may provide City with evidence in support of a defense, a review of Silaco's deposition, in and of itself, raises sufficient questions of fact as to the manner in which Silaco operated the vehicle that warrant denial of summary judgment.

Silaco testified she first observed the plaintiff "On the double-yellow line...Stopped." Silaco testified innumerable times that she made this observation over the length of "a minute," which testimony she subsequently averred by sworn correction page should have been "a moment." During this period of observation, be it a minute or the undefined moment, Silaco continued to operate the vehicle in the lane closest to the yellow line and, therefore, closest to this pedestrian. Silaco testified further that when she saw plaintiff for the last time it was approximately 30 seconds before impact, and at that time the plaintiff was standing still on the double-yellow line. Silaco thereafter contradicts herself, testifying the plaintiff "came out of nowhere" and "I didn't see her," and "She came out of nowhere...Quickly, one, two, three, no, no warning. There was no warning sign." Curiously, Silaco also stated that she "...[C]an't testify or state with any type of certainty that the [plaintiff] was, in fact, moving at the time of the impact."

In another contradiction, Silaco affirms that her statement as set forth in a police report is accurate, to wit: ". . .I didn't see the woman, I only felt her hit my vehicle..."

In still further contradiction, defendant Silaco testified she veered her vehicle to the right before she heard a boom resulting from a contact with the plaintiff, whom Silaco either did or did not observe, over a minute, a moment, or thirty seconds, or not at all, before that contact, to wit:

"[A]t any time before you felt the impact between your vehicle and [the plaintiff], did you move towards the right lane in order to give [the plaintiff] room?

A: I did veer to the right. I did.

Q: Did you veer to the right though before or after you heard the impact?

A: Since I didn't - - since I didn't feel I had impact or there was an accident, I can't give a time period. I only heard a boom.

Q: Okay. Well, let's use the boom then as the reference rather than the word, impact. Did you veer, using your word veer, did you veer your vehicle to the right at all before you heard the boom or only after you heard the boom?

A: Before.

Q: And what was the reason that you veered your vehicle to the right before hearing the boom?

A: I don't know why, it was just a, I just, I just moved that way. I was in a daze, you know, I just moved to the right, but I didn't think I had any impact, any impact or connection or contact with the person.

. . . .

Q: When you say that you were in a daze, what do you mean by that?

A: I mean I'm driving southbound on Amsterdam on the left lane by the yellow line. All of a sudden, I see a person come out of nowhere. I see a blank face and before you know it, I veer to the right. Before, you know it, boom, all one time, boom. I glanced in the rearview mirror and I saw her image on the floor...

. . . .

Q: But this is my question, what made you veer to the right before you heard the boom if you've already testified that Ms. Benjamin was standing still at the time you saw her at the double-yellow line?

A: I can't give an answer, that was just a reaction.

Q: A reaction to what?

A: I don't know, I was just too dazed. I don't know, that was just a reaction."

In a reply affirmation, defense counsel earnestly and strenuously urges the court to disregard the inculpatory aspects of her own client's deposition testimony as "incredible...manifestly untrue, physically impossible, contrary to experience or self-contradictory" all "as being without evidentiary value." While the court cannot evaluate credibility on a motion for summary judgment, defense counsel's own argument concedes that there are triable issues of fact that preclude summary judgment.

In view of the foregoing, the court finds the numerous contradictions in defendant Silaco's testimony raise triable issues of fact precluding summary judgment.

Defendant's motion to amend its answer to assert an affirmative defense of emergency is equally without merit. This doctrine provides that a person confronted with an emergency not of her own making and without opportunity for deliberation, their action in response to such emergency is not to be considered negligence. Based upon the defendant Silaco's own testimony, when viewed in the light most favorable to her, there is no reasonable view of any version of the events as she testified that anything about her conduct was the product of a sudden and unforeseeable occurrence not of her own making, or about which she had no

opportunity for deliberation. The various versions in which defendant conceded observing the plaintiff for some period of time standing on the double yellow line before plaintiff was struck present no factual emergency; the version in which plaintiff is purported to have "come out of nowhere" and where defendant Silaco "didn't see her" before contact, fails to give rise to any response at all by defendant before her vehicle was in contact with plaintiff.

On this record the Court would be justified in finding this motion to be frivolous and imposing sanctions. However, the court declines to do so. The court finds the imposition of costs is sufficient.

On consent of the parties, all causes of action against the New York City Police Department and all causes of action sounding in negligent hiring against the defendant The City of New York are dismissed with prejudice.

Accordingly, it is

ORDERED that defendant's motion for summary judgment and to amend its answer is **DENIED**, and it is further

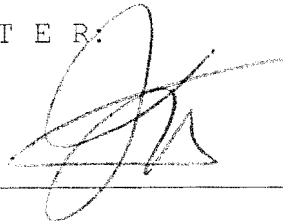
ORDERED that plaintiff shall have the costs of this motion upon submission of a bill of costs to the Clerk.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York

April 7, 2014

E N T E R:



FRANK P. NERVO,

Justice Supreme Court

FILED

APR 22 2014

NEW YORK
COUNTY CLERK'S OFFICE