Kennedy v Service Glass & Storefront Co., Inc.
2014 NY Slip Op 31717(U)
June 24, 2014
Supreme Court, New York County
Docket Number: 153797/2013
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 57

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MARIE KENNEDY

Plaintiff,

Index No. 153797/2013

- against -

SERVICE GLASS & STOREFRONT CO., INC. and MARK SMALLS,

Defendants.

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PETER H. MOULTON, J.S.C.:

In this action, plaintiff alleges that on March 8, 2012, she was struck by a van operated by defendant Mark Smalls and owned by defendant Service Glass & Storefront Co., Inc. In the instant motion, plaintiff moves for summary judgment on the issue of liability, including her freedom from comparative fault. Plaintiff also seeks an immediate trial on damages pursuant to CPLR § 3212(c).

BACKGROUND

At issue here is an accident that occurred on March 8, 2012 at the intersection of University Place and Waverly Place in the vicinity of Washington Square Park, New York, New York. Plaintiff was a pedestrian attempting to cross at the intersection of University Place and Waverly Place. Once she observed a "WALK" signal, plaintiff looked both ways for traffic and proceeded into the crosswalk where she was struck by the front of defendants' vehicle. Defendants' vehicle was turning

left at the intersection of Waverly Place and University Place at the time of the collision. A police report confirms that plaintiff was struck by a vehicle operated by defendant Mark Smalls while defendants' vehicle was attempting to make a left turn.

ARGUMENTS

Plaintiff and a nonparty eyewitness to the accident claim that plaintiff was crossing the pedestrian crosswalk with the right of way when she was struck by defendants' van. At the time, they claim, defendants' vehicle was making a left turn through a green light and refused to yield. In opposition, defendants claim that the vehicle was attempting to make a left turn when plaintiff walked in front of the vehicle, lost her balance, and fell to the ground.

DISCUSSION

A party wishing to prevail on a motion for summary judgment must make a prima facie showing of an entitlement to a judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Courts have repeatedly held that a plaintiff struck by a vehicle making a turn can establish a prima facie showing of an entitlement to summary judgment on the issue of liability by presenting proof that she was hit while walking within a crosswalk, with the traffic control in her favor, after looking both ways before crossing (*see Perez-Hernandez v. M. Marte Auto* Corp., 104 AD3d 489, 490 [1st Dept. 2013] ["Plaintiff established his entitlement to judgment as a matter of law on the issue of liability by showing that he was crossing the street within the crosswalk, with the light in his favor, when defendants' vehicle struck him while making a left turn"]; *Hines v. New York*

City Tr. Authority, 112 AD3d 528, 529 [1st Dept. 2013] [plaintiff established entitlement to judgment on liability as a matter of law by submitting evidence demonstrating that she was crossing the street, within the crosswalk, with a "walk" sign in her favor, when defendant's vehicle, which was making a left turn, struck her]; *Beamud v. Gray*, 45 AD3d 257, 257 [1st Dept. 2007] [court held that plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law where they were crossing the street, within the crosswalk, with the light in their favor, when they were struck by defendant's vehicle]; *see also Martinez v. Kreychmar*, 84 AD3d 1037, 1038 [2d Dept. 2011] [summary judgment on issue of liability granted where plaintiff demonstrated that she looked both ways before crossing, was within a crosswalk, with the pedestrian signal in her favor, when defendant's car failed to yield the right-of-way and struck her]; *Kusz v. New York City Tr. Auth.*, 88 AD3d 768, 768 [2d Dept. 2011] [summary judgment on liability was upheld where plaintiff was crossing in crosswalk with signal in her favor when she was struck by left-turning vehicle]; *Sulaiman v. Thomas*, 54 AD3d 751, 752 [2d Dept. 2008] [court reversed IAS court's denial of plaintiff's motion for partial summary judgment on issue of liability where plaintiff was crossing in the street in the crosswalk with light in his favor when struck by defendant's vehicle]; *Zabusky v. Cochran*, 234 AD2d 542, 543 [2d Dept. 1996] [summary judgment on issue of liability granted to plaintiff where plaintiff was walking within crosswalk with light in her favor when defendant motorist, with an unobstructed view of the intersection, struck her while making a left-hand turn]).

Plaintiff has met her prima facie burden based on her affidavit and the supporting affidavit of nonparty eyewitness Jill Dimeglio that plaintiff was crossing the street, after looking both ways, with the light in her favor, when she was struck by defendants' van. Moreover, plaintiff has demonstrated the absence of any factual question regarding comparative fault, and defendants have

failed to raise a triable issue.

Plaintiff alleges that she had waited for the pedestrian "WALK" sign in order to cross Waverly Place from the north to the south side at the intersection of University Place and Waverly Place (Kennedy Aff. ¶ 6). Once she observed the "WALK" signal, plaintiff states that she looked both ways for oncoming traffic, and only entered the crosswalk once she was sure that there was no oncoming traffic (*Id.* ¶ 8). Not seeing any oncoming traffic, plaintiff states that she began to walk in the crosswalk, across the street (*Id.* ¶ 9). While in the middle of the crosswalk, plaintiff was struck by the front of defendants' van.

In her affidavit, nonparty eyewitness Jill Dimeglio states that she was standing at the corner of University Place and Waverly Place as plaintiff was crossing over (Dimeglio Aff. ¶ 1).[1] According to Dimeglio, the pedestrian walk signal was in plaintiff's favor when plaintiff began crossing the street (*Id.*). Dimeglio further states that she was right behind plaintiff when defendants' "van made a very fast and sudden left turn from northbound University Place onto Waverly" and hit plaintiff in the middle of the street (*Id.*). Dimeglio maintains that both plaintiff and defendant Smalls had lights in their favor but that defendants' van "did not yield the right of way to the pedestrian in the crosswalk" (*Id.*). Dimeglio goes on to state that plaintiff "had no time to react to the van because he [defendant Smalls] was so fast" (*Id.*).

Defendant Smalls' affidavit concedes that plaintiff was in the crosswalk at the time of impact. (Smalls Aff. ¶ 6-8). According to Smalls, however, the accident happened as follows:

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[1]Ms. Dimeglio's supporting affidavit originally was missing the stamp of the Notary Public. Pursuant to CPLR § 2001, the court has accepted plaintiff's counsel's submission of an identical affidavit with a Notary stamp.

> I had a green light and was attempting to make a left turn onto Washington Square behind a police car. There were a lot of people in the intersection. I allowed the pedestrians to pass and was inching along at a very slow rate of speed, when to my knowledge the plaintiff suddenly walked into my vehicle. She put her hands on my right front hood, I immediately stopped the vehicle, her hands went up in the air, she lost her balance and fell to the ground (Smalls Aff. ¶ 6).

The accounts differ with respect to the manner in which plaintiff was hit. Notably, however, neither account disputes that plaintiff had the light in her favor as she was walking across the street and was hit in the middle of the crosswalk by the front of the van. That being the case, plaintiff had the right of way. In such a circumstance, vehicular traffic facing a green light "including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited" (*see* Vehicle and Traffic Law § 1111 [a][1]; *see also* 34 RCNY 4-03 [a] [1] [i] [vehicular traffic shall yield right of way to pedestrians lawfully within the intersection]; *Brito v. Manhattan & Bronx Surface Tr. Oper. Auth.*, 188 AD2d 253, 255 [1st Dept.1993] [once plaintiff establishes that plaintiff was "lawfully within the intersection" before vehicular traffic entered the intersection, pursuant to New York City Traffic Regulations § 30[a], 34 RCNY 4-03[a] [1] [i], plaintiff has the right of way over vehicular traffic turning with a green light]).

Defendant Smalls' affidavit corroborates his failure to yield. Under Smalls' scenario, plaintiff was inside the crosswalk *before* he entered it. Smalls states that he "allowed pedestrians to pass and was inching along at a very slow rate of speed." Although Smalls goes on to state that as he was doing so "plaintiff suddenly walked into my vehicle," he does not state that his vehicle was stopped when plaintiff stepped in front of it and does not explain why he could not stop and yield

to plaintiff if he was traveling at a "very slow rate of speed."[2]

In any event, the court cannot ignore the absurdity of defendants' affidavit. Although credibility is usually an issue for the fact-finder, a court is not "required to shut its eyes to the patent falsity of a defense" (*see MRI Broadway Rental v. United States Min. Prods. Co.*, 242 AD2d 440, 443 [1st Dept. 1997]; *affd* 92 NY2d 421 [1998]; *see also Sexstone v. Amato*, 8 AD3d 1116 [4th Dept. 2004]). Defendant Smalls' affidavit states that after plaintiff walked in front of the van, she placed her hands on the right front hood then suddenly threw them in the air. Defendant Smalls further contends that plaintiff subsequently lost her balance and fell to the ground. In short, his statements impute a series of actions to plaintiff that are "incredible as a matter of law" (*see Kirchgaessner v. Hernandez*, 40 AD3d 437, 438 [1st Dept. 2007] [driver's claim that he had been observant yet never saw the plaintiff in the crosswalk was "incredible as a matter of law"]; *see also Weigand v. United Traction Co.*, 221 NY 39 [1917]; *O'Farrell v. Inzeo*, 74 AD2d 806 [1st Dept. 1980]). Here, defendants' account as to their inability to yield is undermined and outright contradicted by the vehicle's alleged slow movements, plaintiff's position in the crosswalk, and the description as to plaintiff's conduct at the time of the accident.

Accordingly, plaintiff has met her prima facie burden and demonstrated the absence of any factual question regarding comparative fault. Defendants have failed to raise a triable issue.

It is hereby

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[2]Although not mentioned by either defendant or plaintiff in their motion papers, the First Department's holding in *Maniscalco v. New York City Tr. Auth.*, (95 AD3d 510, 511 [1st Dept. 2012]), does not require a different result. There, plaintiff was also struck by a left-turning vehicle. However, in that case, plaintiff was struck by defendants' vehicle's side mirror, evidencing that defendant's vehicle was already in the intersection, and therefore under no obligation to yield, at the time that plaintiff came into contact with it. The defendants further submitted accident reports to corroborate their account. Here, however, defendants' vehicle was in the crosswalk *after* plaintiff had already entered it.

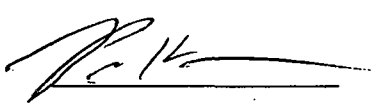
ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that plaintiff and defendants contact the court to schedule an immediate trial on damages pursuant to CPLR § 3212(c), as well as to schedule a settlement conference with the court by e-mailing hkingo@nycourts.gov and afield@nycourts.gov with the opposing party copied.

This Constitutes the Decision and Order of the Court.

Dated: June 24, 2014

ENTER:



J.S.C.

HON. PETER H. MOULTON