

**Luperon v City of New York**

2014 NY Slip Op 32655(U)

September 3, 2014

Supreme Court, Bronx County

Docket Number: 308347/2008

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

DARIANA LUPERON a/k/a DARIANA LUPERON REYES,

INDEX NUMBER: 308347/2008

Plaintiff,

-against-

THE CITY OF NEW YORK,

Present:  
HON. ALISON Y. TUITT  
*Justice*

Defendant.

EDWIN SUERO,

INDEX NUMBER: 309023/2008

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

The following papers numbered 1 to 3,

Read on this Defendant's Motion for Summary Judgment

On Calendar of 3/24/14

Notice of Motion-Exhibits and Affirmation 1

Affirmations in Opposition 2, 3

Upon the foregoing papers, defendant The City of New York (hereinafter "City") motion for summary judgment is granted for the reasons set forth herein.

The within action involves a motor vehicle accident that occurred on August 2, 2007 at the

intersection of Longwood Avenue and Barry Street in Bronx, New York. Plaintiff Edwin Suero (hereinafter "Suero") testified at his 50H hearing that the accident occurred at 4:00 or 5:00 p.m. In his Notice of Claim, he alleges that the accident occurred at 7:00 p.m. In his verified bill of particulars, he alleges the accident occurred at 7:20 p.m. Plaintiff Dariana Luperon a/k/a Dariana Luperon Reyes (hereinafter "Luperon") testified at her deposition that she did not remember the time of the accident but it was daytime and the sun was out. In her Notice of Claim, she alleges the accident occurred at approximately 6:25 p.m. Plaintiffs allege that the accident resulted from a missing stop sign at the subject intersection.

Plaintiff Suero testified that he was the driver of his brother's motor vehicle at the time of the accident and plaintiff Luperon, his girlfriend, was his passenger. Plaintiff had been traveling on Longwood Avenue at the time of the accident. He testified that before the date of the accident, he traveled through the subject intersection on a daily basis and there was a stop sign for the cars traveling on Longwood Avenue. Suero had traveled through the intersection the day before the accident and the stop sign was not there. He stated that she heard from people that there had been an accident at the subject intersection two weeks prior and the stop sign had broken. As he approached the intersection, Suero was traveling 20 miles per hour and there were no vehicles in front of him. He was involved in an accident with a tractor trailer that had been traveling on Barry Street. Before entering the intersection, Suero checked for oncoming traffic on Barry Street and did not see any traffic. He was in the middle of the intersection when the accident occurred. Suero told the responding police officer that he was going through the intersection and the truck came suddenly. He testified that the police officer told him that the truck was traveling 40 or 50 miles per hour and did not apply the brakes because they did not see any skid marks on the street. Luperon testified that she was a passenger in Suero's vehicle when it was involved in an accident with a truck. She did not recall the exact intersection where the accident occurred. She saw the front of the truck before impact but could not recall if it was minutes or seconds prior to the impact.

Anthony Spagnullo, a Supervisor of Traffic Device Maintainers at the New York City Department of Transportation, testified that an intersection order would explain the type and number of signs at a specific location. At the time of his testimony, the current order for Barry Street and Longwood Avenue was written on September 29, 2006 and required two stop signs at the subject intersection; one at the southeast corner of the intersection facing south and the other at the northwest corner facing north. He

also testified as to a printout of a 311 call made on August 1, 2007, the day before the plaintiffs' accident, at 1:55 p.m. about a broken stop sign and a corresponding repair order. It also provided that "[c]aller states that a car accident took down the stop sign and the sign needs to be put back at the Barry Street and Longwood Avenue intersection because several near misses, car accidents, are happening at this location. Caller states that a lot of people will get killed if the stop sign is not replaced." Mr. Spagnullo testified that repair orders are created specifically for the day when a repair was done. The directives for the repair order, which was received on August 2, 2007, was to "[r]emove stump and replace stops sign at southeast corner. As per the repair order, the complained of condition in the 311 call report, a broken stop sign, was repaired on August 3, 2007.

The police accident report provides that the accident occurred on the Eastbound lanes of Longwood Avenue at its intersection with Barry Street. The report provides that "[a]t t/p/o Vehicle #1 was travelling (sic) E/B on Longwood Ave. Vehicle #2 was travelling (sic) N/B on Barry Street. Vehicle #2 hit vehicle #1 in a t-Bone formation. Neither vehicle had a stop sign or traffic device."

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

The City argues that it is entitled to summary judgment because plaintiffs have failed to demonstrate that it had the requisite notice and a reasonable amount of time to correct any defective or missing stop sign. Defendant argues that here there was insufficient notice setting forth a reasonable time to cure the missing sign. The City contends that it had only one day of actual notice because the 311 call was only made the day before the plaintiffs' accident. The City also argues that any alleged negligence on its part was not the proximate cause of the accident because plaintiff Suero admitted that he would drive through the subject intersection daily so he was aware that there had been a stop sign there and that it was missing.

“Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint.” Sheehan v. City of New York, 40 N.Y.2d 496 (1976). Here, summary judgment is warranted based on plaintiff Suero's testimony that he would drive through the intersection on a daily basis and had in fact driven through the intersection the day before the accident and noted that the stop sign was missing. See, Pabon v. Scott, 908 N.Y.S.2d 516 (4<sup>th</sup> Dept. 2010)(The evidence establishing that Sheontra Harper was aware that the stop sign at the intersection was missing raised triable issues of fact whether she was negligent in entering the intersection without stopping and whether her failure to stop was a proximate cause of the accident); Boucher v. Town of Candor, 649 N.Y.S.2d 959 (3d Dept. 1996)(Even resolving all of the inconsistencies in the foregoing testimony in favor of plaintiff and viewing the evidence in a light most favorable to him, we agree with the Town that the absence of curve warning or speed advisory signing was not a proximate cause of the accident as both drivers were intimately familiar with the road, so they required no warning of the upcoming curve); Plantikow v. City of New York, 592 N.Y.S.2d 755 (2d Dept. 1993)(Trial court erred in not giving jury charge that the absence of stop sign at intersection was not proximate cause of accident if the driver knew or should have known that he was required to stop at intersection); Atkinson v. Oneida County, 59 N.Y.2d 840 (1983)(Where both drivers were familiar with the location and character of intersection of roads where accident occurred, plaintiff driver could not sustain action against county for alleged negligent failure to add lights and signs at intersection, as the county's failure to erect additional lights and signs could not be deemed proximate cause of plaintiff's injuries)

In Noller v. Peralta, 941 N.Y.S.2d 700 (2d Dept. 2012), the Court held that

A [municipality] is not the insurer of the safety of its roads, and no liability will attach unless the ascribed negligence of the [municipality] in maintaining its roads in a reasonable condition is a proximate cause of the accident. Moreover, without evidence that the failure to provide a traffic control device was a proximate or concurring cause of an accident, municipal liability may not be found. Such proximate cause may be found only where it is shown that it was the very absence of the stop sign [or other traffic control device] which rendered the driver unaware of the need to stop before proceeding across the intersection. Where, however, the driver had all the warning, all the notice of danger, that a stop sign would have afforded, there is no basis for finding that the absence of a sign caused the driver to do anything other than [he or] she would have done had it been present". (Citations omitted).

In the instant matter, plaintiff Suero was fully aware of the condition at the subject intersection and knew that there was a stop sign that was missing. Thus, the missing stop sign was not the proximate cause of the accident. Consequently, the motion for summary judgment must be granted and the complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: 9/3/14



Hon. Alison Y. Tuitt