

**Wong v Isakov**

2015 NY Slip Op 30113(U)

January 5, 2015

Supreme Court, Queens County

Docket Number: 703574/2014

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

LILA WONG, Index No.: 703574/2014  
Plaintiff, Motion Date: 11/17/14  
- against - Motion No.: 170  
Motion Seq.: 1  
EDWARD ISAKOV and IRINA ISAKOV,

Defendants.

- - - - - x

The following papers numbered 1 to 11 were read on this motion by the plaintiff, Lila Wong, for an order pursuant to CPLR 3212 granting partial summary on the issue of liability and setting the matter down for a trial on damages:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 9
Reply Affirmation.....	10 - 11

This is a personal injury action in which plaintiff, Lila Wong, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on March 5, 2014, on Union Turnpike near its intersection with Grand Central Parkway, Queens County, New York. At the time of the accident, plaintiff was a pedestrian who was struck by the motor vehicle owned by defendant Irina Isakov and operated by defendant, Edward Isakov. Plaintiff alleges that as a result of the impact she sustained serious injuries including a ruptured ligament of the right ankle requiring arthroscopic surgery, a tear of the medial meniscus of the right knee, disc bulges of the cervical and lumbar spines, and rotator cuff tendinopathy of the left shoulder.

Plaintiff commenced this action by the filing of a summons and verified complaint on May 23, 2014. Issue was joined by service of defendant's verified answer with affirmative defenses dated June 3, 2014.

The plaintiff now moves, prior to depositions, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and for an order setting the matter down for a trial on damages only. In support of the motion, the plaintiff submits an affidavit from counsel, Scott L. Wiss, Esq; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; an affidavit of facts from the plaintiff; and a copy of the police accident report.

The description of the accident contained in the police report prepared by the responding officer states: "at t/p/o Veh #1 (defendant) states he was making a left turn and did not see the pedestrian crossing at the crosswalk. Vehicle #1 further states he did not strike pedestrian with driver's side rear quarter panel."

In her affidavit dated June 9, 2014, the plaintiff, age 63, states that on March 5, 2014 at approximately 8:40 p.m. I was a pedestrian at Union Turnpike near its intersection with Grand Central Parkway, Queens County, She states that she was a pedestrian in the crosswalk crossing with the "WALK" signal in her favor when she was struck by the motor vehicle operated by defendant, Edward Isakov.

In his affirmation, plaintiff's counsel contends that the defendant driver was negligent and breached his duty to the pedestrian by failing to see what was there to be seen in front of him, failing to exercise due care to avoid striking a pedestrian, and failing to yield the right of way to a pedestrian who was visible in the street directly front of him. Moreover, counsel contends that as a pedestrian with the right of way and walking in the crosswalk, plaintiff exercised due care as she looked in all directions prior to crossing the street and was entitled as a matter of law to anticipate that the other vehicles would obey the traffic laws that require them to yield. Counsel claims that plaintiff established her prima facie entitlement to summary judgment as a matter of law by demonstrating that the defendant violated VTL § § 1151(a) and 1163(a) which require drivers to yield the right of way to pedestrians crossing the roadway within crosswalks and to not make a left turn until such movement can be made with reasonable safety (citing Sulaiman v Thomas, 54 AD3d 751 [2d Dept. 2008]; Zhenfan Zhang v Yellow Transit Corp., 5 AD3d 337 [1<sup>st</sup> Dept. 2004]; Razzaque v Krakow Taxi, 238 AD2d 161 [1<sup>st</sup> Dept. 1997]).

The plaintiff contends that she established her burden of demonstrating, prima facie, that the defendant was negligent as a matter of law based upon the plaintiff's testimony that she was crossing Grand Central Parkway in the marked crosswalk with the "Walk" sign in her favor when she was struck by the defendant's vehicle which failed to yield the right of way while attempting to making a left turn. Counsel claims that the defendant made an admission against interest stating to the responding police officer that he did not see the plaintiff in the crosswalk.

In opposition, the defendant, Edward Isakov, age, 55, submits an affidavit dated October 3, 2014, stating that on March 5, 2014 he was operating a 2012 Jeep Cherokee. His wife was seated in the front passenger seat. He states that he exited Grand central Parkway at Union Turnpike and was on the service road. He states that he reached the intersection with Union Turnpike and stopped for the traffic signal which was red in his direction. He stated that he engaged his left turn signal because he intended to make a left turn onto Union Turnpike. He states that "when the light turned green I started my left turn and saw the plaintiff, stopped in the middle of the street. I continued, thinking she was waiting for me to complete my turn; it was then that she apparently walked into the driver's side quarter panel of the Jeep." He states that he was proceeding at a rate of 10 miles per hour and had almost fully completed the left turn when the alleged contact occurred. He states that he did not feel the contact. He states that he immediately stopped his vehicle, got out and attempted to help the plaintiff. He does not recall telling the officer that he did not see the plaintiff.

Defendant's counsel, Michell F. Vlosky, Esq., contends that based upon the affidavit submitted by the defendant, the plaintiff's motion must be denied as there are material questions of fact as to how the accident occurred. Counsel specifically cites to the statement of the defendant who claimed that he saw the plaintiff prior to the accident stopped in the middle of the street who appeared to be waiting until he completed his turn but then walked into the driver's side of the defendant's vehicle. Counsel claims that this is not a similar situation to cases in which a driver hits a pedestrian with the front of the vehicle. Defendant also claims that the plaintiff has not demonstrated her freedom from comparative negligence because she does not state whether she saw the defendant's vehicle prior to the accident, whether she made any efforts to avoid the collision, and whether she walked into the side of the vehicle.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

Based upon a review of the respective affidavits of the parties, this Court finds that there are material issues of fact which preclude granting summary judgment to the plaintiff on the issue of liability. Here the plaintiff contends that she is entitled to summary judgment because the defendant-driver failed to yield the right of way as she proceeded across Grand central Parkway service Road in a crosswalk with the "WALK" sign in her direction and was struck by defendant's motor vehicle making a left turn (see Cuevas v Chavez, 94 AD3d 803 [2d Dept. 2012]; Qamar v Kanarek, 82 AD3d 860[2d Dept. 2011][plaintiff made prima facie case in showing that he exercised due care in crossing the street and that he was struck by the defendant driver, suddenly and without warning, when he was more than halfway across the street]; Klee v Americas Best Bottling Co., Inc., 60 AD3d 911 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Sulaiman v Thomas, 54 AD3d 751 [2d Dept. 2008]; Voskin v Lemel, 52 AD3d 503 [2d Dept. 2008]).

However, this Court finds that under the circumstances of this case, there are issues of credibility which should be assessed by the trier of fact rather than on a motion for summary judgment. Viewing the evidence submitted in the light most favorable to the nonmoving party (see Stukas v Streiter, 83 AD3d 18 [2d Dept. 2011]; Judice v DeAngelo, 272 AD2d 583 [2d Dept. 2000], there are triable issues of fact as to whether any negligence on the plaintiff's part contributed to the accident. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]). In both the police report and his affidavit, the defendant consistently stated that the plaintiff was stopped in the street waiting for him to make the left turn but thereafter walked into the side of his vehicle. Therefore, there is a question of fact as to whether the plaintiff exercised due care in attempting to cross the street. Under the circumstances of this case, whether the plaintiff exercised reasonable care is a triable issue of fact for the jury. Given the conflicting versions as to how the accident actually occurred and who was responsible for the accident, issues of credibility have been raised that cannot be determined on a

motion for summary judgment (see Calderon-Scotti v Rosenstein, 119 AD3d 722 [2d Dept. 2014]; Lee v Hossain, 111 AD 3d 799 [2d Dept. 2013]; Koeppel-Vulpis v Lucente, 110 AD3d 851 [2d Dept. 2013])).

The credibility of the defendant's affidavit as well as his assertion that he did not make the statement attributed to him in the police report with respect to not seeing the plaintiff prior to the accident is a question of fact for the determination of the jury (see Imamkhodjaev v Kartvelishvili, 44 AD3d 619 [2d Dept. 2007]; cf. Buchinger v Jazz Leasing Corp., 95 AD3d 1053 [2d Dept. 2012][court found feigned issue of fact where the defendant made no effort to dispute the accuracy of defendant's statement contained in the police accident report]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the plaintiff's motion for an order granting partial summary judgment on the issue of liability is denied.

Dated: January 5, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**