Astacio v Celeste-Sanchez
2015 NY Slip Op 30824(U)
April 21, 2015
Supreme Court, Bronx County
Docket Number: 350300/2012
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

MARVIN ASTACIO, an infant by his mother and natural guardian MICHELLE GONZALEZ, and MICHELLE GONZALEZ,

Plaintiffs,

-against-

Index No.350300/2012

ANA J. CELESTE-SANCHEZ and JULISSA A. CELESTE,

Defendants.

DECISION AND ORDER

Hon. Sharon A. M. Aarons:

Defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint. Plaintiff files written opposition. The motion is granted.

This action arises out of a "pedestrian knock-down" Bruckner Boulevard and East 144th Street in Bronx County on July 28, 2012, at approximately 9:00 P.M., when a vehicle driven by defendant Julissa Celeste and owned by co-defendant Ana Celeste-Sanchez struck the "infant" plaintiff. At the time of the accident, the "infant"(now adult) plaintiff (born March 28, 1995) was 17 years old. The plaintiff testified at his examination before trial that he had no recollection of the accident from the time he left the subway earlier that evening, until he awoke in the hospital. His brother had told him that at the time of the accident, they were being chased – he did not know by whom, or why.

In support of the motion, plaintiff submits a copy of the pleadings; an uncertified copy of the police accident report;[1] the sworn, certified deposition testimony of the defendant; and the unsworn,

[1]Uncertified accident reports, even those which contain statements attributable to parties, are generally inadmissible hearsay and totally lacking in probative value. (*See Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*,

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uncertified deposition testimony of the defendant.[2] In her deposition testimony, defendant driver Julissa Celeste testified that prior to the collision, she was traveling westbound on Bruckner Boulevard at approximately 30 miles per hour in her lane of travel when the plaintiff "came running and threw himself on my car." She stated that she did not see the plaintiff prior to the accident, when he struck the driver's side of her car.

In opposition to the motion, plaintiff submits the police accident report, and the depositions of both plaintiffs and the defendant driver.

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, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, which 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, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Consequently, 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, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman,* 3 N.Y.2d at 165).

Summary judgment has frequently been awarded in favor of defendants when infants run out into traffic between parked cars, and the driver does not see the plaintiff prior to the accident and has no opportunity to avoid the collision. (*See, e.g., Fatumata B. v. Pioneer Transp. Corp.*, 118 A.D.3d 486, 988 N.Y.S.2d 31 [1st Dept. 2014] [by producing evidence that he was not speeding, that none of the parked school buses had their flashing lights on, and that the infant plaintiff darted out from

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61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].)

[2]An unsworn or uncertified deposition transcript may be considered where not challenged as inaccurate or defective. *Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 119 A.D.3d 45, 984 N.Y.S.2d 401 (2d Dept. 2014).

between two parked school buses into the path of his car, defendant established his entitlement to judgment as a matter of law]; *Brown v. Muniz*, 61 A.D.3d 526, 878 N.Y.S.2d 683 [1st Dept. 2009] [infant darting from between parked cars].)

Similarly, in *Caro-Fortyz v. Peterson* (110 A.D.3d 565, 973 N.Y.S.2d 605 [1st Dept. 2013]) the Court held:

> "Defendants established entitlement to judgment as a matter of law, in this action where plaintiff pedestrian alleges that she was injured when, while crossing the street, she was hit by a truck driven and owned by defendants. Defendants submitted the deposition testimony of defendant driver stating that he was traveling straight in the left lane, at about five-to-seven miles per hour, and did not see plaintiff before the accident, as well as the deposition testimony of plaintiff stating that she got hit shortly after stepping out into the street from between two cars parked on the east side of the street. Plaintiff failed to raise a triable issue of fact as to whether she did not walk into the side of the moving truck."

Summary judgment in these cases is not confined to the situation where the plaintiff emerges from between parked cars. In *Ramirez v. Molina* (114 A.D.3d 540, 980 N.Y.S.2d 433 [1st Dept. 2014]), the Court held as follows:

> "Defendant Juan Carlos Molina testified that he first saw the eight year old plaintiff, who had no memory of the incident, two to three seconds before impact, when she was approximately one foot away from his vehicle. Traveling 12 miles per hour, he hit his brakes and turned his wheel to the right in an unsuccessful attempt to avoid the accident. It was also unrefuted that the infant plaintiff left the safety of the sidewalk, attempted to cross the roadway outside of the crosswalk, and moved into the path of the vehicle. Under such circumstances, defendants were entitled to summary dismissal (*see Sakho v City of New York*, 88 AD3d 581, 931 NYS2d 211 [1st Dept 2011]; *DeJesus v Alba*, 63 AD3d 460, 882 NYS2d 12 [1st Dept 2009], *affd* 14 NY3d 860, 928 NE2d 409, 902 NYS2d 27 [2010]; *Brown v Muniz*, 61 AD3d 526, 878 NYS2d 683 [1st Dept 2009], *lv denied* 13 NY3d 715, 922 NE2d 904, 895 NYS2d 315 [2010]; *Jellal v Brown*, 37 AD3d 179, 830 NYS2d 510 [1st Dept 2007]).
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> "The child's parents' affidavits which speculated that Molina was being untruthful

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> about the speed of his vehicle, based upon the location of their daughter after the impact, or that he should have been able to stop in the two to three seconds after first observing the child, were insufficient to rebut defendants' entitlement to summary judgment (*see Brown v Muniz*, 61 AD3d at 528, citing *Murray v Donlan*, 77 AD2d 337, 433 NYS2d 184 [1980], *appeal dismissed* 52 NY2d 1071 [1981]). "

Here, the uncontroverted facts establish that the plaintiff literally ran into the defendant's car as it traveled on the roadway, that the defendant was driving within the speed limit, and that she had no opportunity to avoid the collision. Plaintiff, albeit he has no memory of the vents, has not sought to produce the testimony of any other witnesses, such as his brother, who was present at the time of the accident. Accordingly, defendants' motion for summary judgment is granted. It is hereby

ORDERED that the defendants are granted summary judgment dismissing the complaint against them; and it is further

ORDERED that defendants' counsel shall serve a copy of this order with Notice of Entry upon counsel for plaintiffs.

Dated: April 21, 2015

SHARON A. M. AARONS, J.S.C.