

Garcia v Lomvardias
2015 NY Slip Op 30847(U)
April 6, 2015
Supreme Court, Bronx County
Docket Number: 308226/12
Judge: Howard H. Sherman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

APR 16 2015

-----x

ANN GARCIA,

Index No.: 308226/12

Plaintiff,

-against-

DECISION/ORDER

STYLIANOS LOMVARDIAS,

Defendants

Howard H. Sherman
J.S.C.

-----x

The following papers numbered 1 to 3 read on this motion noticed on March 26, 2014 duly submitted on the Motion Calendar of June 24, 2014.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and A - J , Affirmation Annexed	1	
Answering Affidavit	2	
Replying Affidavit	3	

Upon the foregoing papers and after oral argument, plaintiff's motion for an order awarding summary judgment on the issue of liability is granted for the reasons set forth below.

Plaintiff commenced this action seeking damages for injuries alleged to have been sustained on July 19, 2012 when she was struck by a motor vehicle while walking across the intersection of Perot Street and Sedgwick Avenue, Bronx, New York.

This action was commenced in October 2012, and issue was joined with the

service of defendant's answer in January 2012.

The Note of Issue was filed on December 18, 2013.

Motion/Contentions of the Parties

Plaintiff now moves for an award of summary judgment on the issue of liability contending that there are no material issues of fact that she was crossing the intersection within the crosswalk with the light in her favor, when she was struck by defendant's left- turning vehicle. The motion is supported by the transcript of the parties' deposition testimony, and plaintiff's affidavit , as well as a certified copy of the police accident report.

Defendant opposes the motion arguing that unresolved issues of fact preclude dispositive relief, including the question of whether plaintiff is comparatively negligent by failing to warn the driver that she was in his path and whether she was in the crosswalk at the time of the accident.

Discussion and Conclusions

Plaintiff testified that she was walking in the center of the crosswalk crossing at the Perot Street intersection with a pedestrian walk sign, and at the point at which she had crossed more than half-way, a motor vehicle came from her right and struck her causing her to lose consciousness [GARCIA EBT: 28-29].

In her affidavit, plaintiff attests that prior to entering the intersection she

looked both ways for traffic, and continued to do so as crossing until she observed defendant's vehicle just before she was hit. Prior to the impact, she had observed the vehicle for a period of less than three seconds, "could be" two, but "it happened too fast" for her to respond [EBT:31].

Defendant testified that he was driving on Sedgwick Avenue at a speed of less than 25 miles an hour, and took his foot off the accelerator when making a left turn onto Perot Street [Lomvardias EBT: 36-39]. He slammed his brakes upon seeing plaintiff and steered to the left, however, "it happened too fast," and he could not say whether the impact had preceded his first observation of plaintiff [EBT 59-60]. He observed plaintiff's body go down [Id. 62]. His car stopped with the front of the vehicle about a car length from the intersection [Id. 64]. Plaintiff's body was lying four to six feet away from the crosswalk [Id. 79].

Police Accident Report

To the extent admissible as an admission, the statement attributable to defendant in the police report follows: "[d]river #1 states as he was making a left turn he struck pedestrian who he did not see crossing street."

Upon review of the moving papers it is the finding of this court that plaintiff has made her prima facie entitlement to summary judgment on the issue of liability by presenting proof that she was walking within the crosswalk with the pedestrian green light, and that she had looked for approaching vehicles before and during the period at

which she had crossed more than one-half of the intersection. In addition, the police accident report contains defendant's admission immediately after the accident that his vehicle had struck plaintiff who he did not observe crossing the street (see, Perez-Hernandez v M. Marte Auto Corp., 104 A.D. 3d 489, 490, 961 NYS 2d 384 [1st Dept. 2013]).

It is the further finding of this court that defendant fails to raise a material issue of fact of plaintiff's comparative negligence as predicated upon the positioning of her body after the impact (see, Hines v New York City Tr. Auth., 112 AD 3d 528, 529, 777 NYS 2d 238 [1st Dept. 2013]; *compare*, Jones v Hampshire Hotel and Resorts, LLC, 102 AD 3d 518, 957 NYS 2d 858 [1st Dept. 2013] [*driver testified that his vehicle that his vehicle was not in crosswalk at time of impact*] and Polanco v Alhassan, 104 AD 3d 543, 962 NYS 2d 105 [1st Dept. 2013]) [*driver testified that at point of impact, the front of his car, which struck plaintiff, was past the crosswalk*]). Also unavailing is defendant's speculation as to how seconds before impact plaintiff was in a position to avoid the accident.

Accordingly, it is

ORDERED that plaintiff's motion be and hereby is granted and it is further

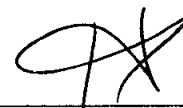
ORDERED that summary judgment be entered in favor of plaintiff as against defendant on the issue of liability, and it is further

ORDERED that upon proof of service of a copy of this decision/order upon

defendant, and the completion of any outstanding discovery with respect thereto, this matter be set down for an assessment of damages, to include a determination of the issues of serious injury and proximate cause.

This constitutes the decision and order of this court.

Dated: April 6, 2015
Bronx, New York



Howard H. Sherman
J.S.C.