

Finch v Strother

2015 NY Slip Op 30946(U)

May 20, 2015

Supreme Court, Kings County

Docket Number: 505593/14

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

GENOVEVA FINCH,

Plaintiff(s),

-against-

HERMA STROTHER,

Defendant(s).

Index No.: 505593/14
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: grant the plaintiff partial summary judgment on the issue of liability

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	____ 1-2 ____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	____ 3 ____
Replying Affidavits.....	____ 4 ____
Exhibits.....	_____
Other:.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff, Genoveva Finch (“Ms. Finch”), has moved for summary judgment pursuant to CPLR section 3212, as to the issue of liability, on the basis there is no evidence of plaintiff’s liability and that the accident was caused solely by the actions of defendant, Herma Strother (“Ms. Strother”) who allegedly violated provisions of both the New York State Vehicle & Traffic Law as well as the New York City Traffic Rules and Regulations.

Defendant, Ms. Strother, opposes the motion upon the grounds that there is a material issue of fact regarding the liability of the defendant. Defendant maintains that the plaintiff has failed

to establish that the alleged actions of the defendant were the sole proximate cause of this accident and that the plaintiff did not in any way contribute to the happening of the accident. Defendant further argues that the motion is premature as discovery has not as yet been completed.

Background:

This action arose as a result of an accident that occurred between the plaintiff (pedestrian) and the defendant (driver) on January 15, 2014, at the intersection of Troy Avenue and St. John's Place, in the County of Kings, City of New York. At the time of the incident, defendant was traveling in her vehicle on Troy Avenue, proceeding with a green light into the intersection and in the process of making a left turn onto St. John's Place, when her vehicle came into contact with the plaintiff, who was crossing St. John's Place, while walking within the cross-walk with a green light.

As a result of the accident, plaintiff allegedly sustained serious personal injuries. Plaintiff commenced this action by filing a summons and verified complaint on or about June 18, 2014. On October 6, 2014, the defendant served a verified answer and on October 20, 2014, the plaintiff served a verified Bill of Particulars in response to defendant's demand.

Plaintiff's contention:

The plaintiff, a pedestrian, contends that she was lawfully crossing St. John's Place at the corner, which street intersects with Troy Avenue. The plaintiff states that she was walking within a marked crosswalk, with a green walk signal at the time of the collision, when the defendant's vehicle struck her. While the police did not come to the accident site and make a report, the plaintiff asserts that the defendant admitted at the scene, following the incident, that she was late for church and she never saw the plaintiff before making contact. Plaintiff asserts that the defendant did not give any warning prior to impact or apply her brakes and she did not

have any time to move out of the vehicle's path.

Plaintiff contends that the defendant breached her statutory duty (Vehicle & Traffic Law [V.T.L. § 1163(a)]), which prohibits a driver from making a turn at an intersection unless such movement can be made with reasonable safety. Plaintiff asserts that the defendant driver neither yielded the right of way to the plaintiff as required, nor did she make the proper determination that she could turn at the intersection with safety. It is further contended that the defendant violated section 4-03 of the New York City Traffic Rules and Regulations by failing to yield the right of way to a pedestrian lawfully within the intersection of an adjacent crosswalk when a green signal is exhibited and a turn (left) is attempted.

Plaintiff further maintains that defendant cannot invoke the defense that the plaintiff violated VTL § 1151, which provides in part that a pedestrian shall not leave a curb and walk or run into the path of a vehicle which is so close that it would make it impractical for the driver to yield, if in fact the claim by defendant is that she was already stopped and had yielded to pedestrians when the plaintiff was crossing the street. VTL § 1151 would only be applicable if defendant's vehicle was in motion and was unable to stop to avoid contact with the plaintiff due to the plaintiff having walked in the path of her vehicle.

Defendant's contention:

The defendant contends that an award of summary judgment would be inappropriate based upon the evidence that is presented to the Court. The plaintiff has failed to submit any evidence that plaintiff exercised due care before attempting to cross the street or that she looked in either direction for oncoming traffic before attempting to cross the street. The affidavit of the plaintiff fails to indicate that she looked right and left for vehicles before attempting to cross the street; whether the plaintiff saw the defendant's vehicle prior to the accident, nor does it address whether the defendant's vehicle was moving or stopped at the moment of impact.

Defendant contends that the plaintiff has a duty to exercise "due care" before attempting

to cross the street. New York V.T.L. § 1151(b) provides that no pedestrian shall leave a curb and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

Counsel for the defendant has submitted an affidavit of his client, in which she states she had her left signal on prior to entering the intersection. It is alleged that when the light turned green, defendant looked and then proceeded into the intersection. After her vehicle entered the intersection, she allegedly brought the vehicle to a complete stop to look for pedestrians. The defendant allegedly waited approximately 15-20 seconds in a stopped position to enable the pedestrians in the cross-walk to cross. Defendant further stated that the last pedestrian to cross the street was the plaintiff who was hurrying and, who while walking, made contact with the defendant's vehicle at the front end of the driver's side. Defendant further asserts that at no time did she tell the plaintiff that she was late for church.

Defendant further contends that plaintiff's motion is premature because depositions have not as yet been conducted. The parties have not been deposed and as a result have not been subject to cross-examination as to the facts of the accident in question (see Bustillo v. Tuckahoe Development, LLC, 300 AD2d 272, 750 NYS2d 767 [2nd Dept. 2002]).

Discussion:

This Court has considered the arguments made by the respective attorneys before the Court on March 5, 2015, and the submissions of the parties as well as the applicable law in making its determination as to whether the plaintiff should be awarded summary judgment on the issue of liability.

The award of summary judgment is a drastic remedy and should only be considered when there is conclusive absence of any triable issue (see Rotuba Extruders v. Ceppos, 46 NY2d 223, 413 NYS2d 223 [1978]). Neither should summary judgment be awarded where there is any doubt as to the existence of a triable issue, or when its existence is arguable (see Alvarez v.

Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 [1986]).

This Court upon review of the submission made by counsel for the plaintiff has considered that the plaintiff, a pedestrian, was walking across St. John's Place, in the cross-walk with a green light, when she was struck by the defendant's vehicle in the intersection. However, what is crucial at this stage of the proceeding in determining whether summary judgment is appropriate and was not addressed in the documents submitted by counsel, was whether the plaintiff looked in either direction for vehicles that may have been turning in her path. This Court is unable to ascertain whether the plaintiff kept the defendant's vehicle under observation, which vehicle was allegedly in the intersection. As such, this Court cannot conclusively determine at this stage of the proceeding whether the defendant violated VTL § 1146, entitled "Drivers to Exercise Due Care", which section provides that every driver of a vehicle shall exercise due care to avoid colliding with a pedestrian; V.T.L. § 1163(a), which prohibits a driver from making a turn at an intersection unless such movement can be made with reasonable safety; as well as section 4-04 of the New York City Rules and Regulations and its applicability to pedestrians.

In Feng v. Oh, 71 AD3d 879, 895 NYS2d 856 (2nd. Dept. 2010), a case with similar facts, the pedestrian was crossing an intersection in a crosswalk with the walk sign in her favor. Plaintiff was about one-third of the way across the street when she was struck by defendant's vehicle that was making a legal left turn with a green light. The Court, in affirming the lower court's ruling of a denial of summary judgment on the issue of liability, determined that although defendant driver had violated VTL § 1112(a), (failing to yield to a pedestrian in the cross-walk), there was a triable issue as to whether the plaintiff was comparatively negligent for not having looked to her left as she crossed the street. Similarly, in Albert v. Klein, 15 AD3d 509, 789 NYS2d 684 (2nd Dept. 2005), the Court in denying a motion for summary judgment on the issue of liability, determined that the plaintiff's admission that she crossed a busy Manhattan intersection while looking straight ahead and walking for the entire time, raises a triable issue of

fact as to whether she acted with reasonable care given all the circumstances.


Based upon the submissions of the parties, this Court is unable to determine at this stage of the proceeding whether the plaintiff bears any responsibility for the happening of the accident. As such, an award of summary judgment to the plaintiff on the issue of liability would be inappropriate and thus plaintiff's motion is denied.

Decision:

The motion by plaintiff for an Order awarding summary judgment to the plaintiff on the issue of liability is denied.

This shall constitute the decision and order of the Court.

Dated: May 20, 2015
Brooklyn, New York



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

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