

Quintavalle v Perez

2015 NY Slip Op 32550(U)

July 30, 2015

Supreme Court, Bronx County

Docket Number: 303665/2014

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.

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Denied

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
PATRICK QUINTAVALLE,

Index No: 303665/2014

Plaintiff,

-against-

DECISION AND ORDER

NESTOR PEREZ, III and GOLDEN TOUCH
TRANSPORTATION OF NY, INC.,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants. X

The following papers numbered 1 to 3 read on this motion for summary judgment

No	On Calendar of June 26, 2015	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
	Answering Affidavit and Exhibits-----	2
	Replying Affidavit and Exhibits-----	3
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability against defendants. This action arose as a result of personal injuries sustained by plaintiff in a collision between a coach bus operated by defendant, Nestor Perez, III, (Perez) and plaintiff's person. It is undisputed that plaintiff was in a crosswalk at the time of the collision.

Plaintiff argues that Perez is 100% negligent in causing the collision on grounds that Perez failed to yield to plaintiff when plaintiff was properly within the crosswalk with a green hand symbol indicating that plaintiff had the right of way. VTL 1160(c) and 34 RCNY 4-03. However, "[p]laintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care." (*Thoma v Ronai*, 82 N.Y.2d 736, 737 [1993]). Plaintiff attempts to distinguish *Thoma* by reasoning that since plaintiff was crossing Third Ave. by walking in the crosswalk on east 41st street in an easterly direction and Perez turned his coach bus left from an easterly direction on east 41st street, plaintiff could not see the bus as the bus

was behind plaintiff out of his field of vision. However, Perez testified at his EBT that plaintiff hit the driver's side door of the coach bus. A jury could determine that plaintiff had an opportunity to have avoided colliding with the bus as it was at least momentarily in front of plaintiff.

On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." (*Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." (*Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

Accordingly, plaintiff's motion is denied.

The foregoing shall constitute the decision and order of the Court.

Dated: JUL 30 2015



KENNETH L. THOMPSON JR. J.S.C.