

Rossi v Benlevy

2016 NY Slip Op 31438(U)

July 26, 2016

Supreme Court, New York County

Docket Number: 154628/14

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
KRISTIN M. ROSSI,

Plaintiff,

Index No. 154628/14

- against -

Motion Seq. No. 001

ZKIYAHN M. BENLEVY and ADVANCE TRANSIT
CO., NEW YORK CITY TRANSIT AUTHORITY,
THE METROPOLITAN TRANSIT AUTHORITY
and ACCESS-A-RIDE,

Decision and Order

Defendants.
-----X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff Kristin M. Rossi alleges that, on December 17, 2013 at approximately 8:00 p.m., she was traveling east on East 23rd Street through the intersection with Lexington Avenue when she was struck by a left-turning Access-A-Ride van leased by defendant Advance Transit Co. and operated by defendant Zkiyahn M. Benlevy. (O'Connor Affirm., Ex. 1 [Complaint] ¶¶ 12, 16-17, 27; Ex. 4 [Amended Bill of Particulars] ¶¶ 2-3, 6; Ex. 13 [Corrected Rossi EBT, NYSCEF Document No. 55] at 18:22-37:08.) Plaintiff further alleges that the subject Access-A-Ride vehicle was owned by New York City Transit Authority, Metropolitan Transportation Authority

(sued incorrectly as Metropolitan Transit Authority) and / or Access-A-Ride.
(Compl. ¶¶ 40, 56, 73.)

Plaintiff now moves for partial summary judgment on the issues of (1) liability and (2) whether plaintiff has sustained a “serious injury” pursuant to Insurance Law 5102 (d). Defendants oppose the motion.

BACKGROUND

Plaintiff asserts that, on December 17, 2013 at around 8 p.m., she was bicycling eastbound along East 23rd Street, having recently left her workplace and intending to meet a friend near her home in Brooklyn. (Amended Bill of Particulars ¶¶ 2-3, 6; Rossi EBT at 18:18-20:07.) Plaintiff states that as she was traveling eastbound through the intersection of Lexington Avenue and East 23rd Street with a green light, an Access-A-Ride vehicle traveling along East 23rd Street in the opposite direction turned left at the intersection and struck her. (Rossi EBT at 23:08-30:18, 32:16-34:06.) Plaintiff further states that, as she was moving through the intersection, she was traveling less than ten miles per hour, and that she spotted the Access-A-Ride vehicle just seconds before it struck her. (Rossi EBT at 25:18-26:17, 68:05-18.)

Plaintiff states, and defendant does not contest, that she suffered a fracture of the distal third of her radial diaphysis as a result of this incident.

(See O'Connor Affirm. ¶ 25; Rossi EBT at 52:24-53:10; Ex. 16 [Rossi Medical Records]; Jayson Opp. Affirm. ¶ 30 ["Defendants do not dispute that Plaintiff sustained a fracture and that such injury meets the statutory definition of a 'serious injury.'"].)

New York City Transit Authority admits ownership of the subject Access-A-Ride vehicle. (*Compare* Complaint ¶ 40 *with* O'Connor Affirm., Ex. 2 [Answer].) In addition, Yvonne Cordero—who was Benlevy's supervisor on the day of the accident—testified that the subject Access-A-Ride vehicle was leased by defendant Advance Transit Co. (O'Connor Affirm., Ex. 9 [Cordero EBT] at 7:04-11, 10:14-11:13, 16:10-18:13, 58:22-25.)

ARGUMENTS

Plaintiff argues that the Court should grant partial summary judgment in her favor on the issues of (1) liability and (2) whether plaintiff has sustained a "serious injury" pursuant to New York State Insurance Law § 5102(d), because she has established a prima facie case with regard to each branch of her motion; and because defendant cannot raise a triable issue of fact regarding either branch of her motion.

Defendants argue that the Court should deny plaintiff's motion on the issue of liability because there are material issues of fact regarding whether

plaintiff was comparatively negligent. In particular, defendants argue that plaintiff may be comparatively negligent for failing to wear reflective clothing (Jayson Opp. Affirm. ¶ 7), failing to notice the oncoming Access-A-Ride vehicle (*id.* ¶¶ 23-24), cycling too fast (*id.* ¶ 26), and failing to “maneuver to avoid the collision” (*id.* ¶ 29).

In addition, while defendants “do not dispute that Plaintiff sustained a fracture and that such injury meets the statutory definition of a ‘serious injury’”, defendants argue that plaintiff’s motion for summary judgment on the issue of serious injury is premature because discovery is not complete and plaintiff has not yet filed her note of issue. (*Id.* ¶¶ 30-31.) In particular, defendants contend that plaintiff has not yet complied with 22 NYCRR 202.17 (b) (1) by providing “narrative reports from her treating doctors” (*Id.* ¶ 32.)

DISCUSSION

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.”

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations, emendation, and quotation marks omitted].) Furthermore, on a motion for

summary judgment, “facts must be viewed in the light most favorable to the non-moving party.” (*Id.* [internal quotation marks omitted].)

Plaintiff’s motion is granted. Concerning the issue of liability, plaintiff’s counsel has submitted evidence showing that she was traveling under the speed limit at the time of the accident and that she saw the oncoming Access-A-Ride only seconds before she was struck. (Rossi EBT at 25:18-26:17, 68:05-18.) Plaintiff’s deposition testimony meets the prima facie burden that that Benlevy negligently made a left-hand turn when it was not safe to do so, in violation of Vehicle and Traffic Law §1141. (See *Sarac-Marshall v Mikalopas*, 125 AD3d 570, 571 [1st Dept 2015].) Plaintiff’s testimony also establishes a prima facie case that plaintiff was free from comparative negligence. (See *id.* [affirming summary judgment in favor of plaintiff where the submitted evidence showed that plaintiff “was traveling below the speed limit in his lane of travel at the time of the accident, and that he saw the vehicle driven by defendant to his left for a ‘brief second or two’ before the collision, giving him no time to react”].)

Defendants’ attempts to raise triable issues of fact are unavailing. Defendants’ argument that plaintiff was not wearing reflective clothing is immaterial and based on speculation. Plaintiff testified at her deposition that her bicycle was equipped with working reflectors at the time of the

accident. (Rossi EBT at 22:16-24.) Although defendants did question plaintiff about the clothes and backpack that she was wearing (see Rossi EBT at 38:03-39:24), defendants did not ask her about the color of her clothing; neither did they ask whether she had any reflective item or material on her clothing. (See Jayson Opp. Affirm. ¶ 7.) Moreover, defendants' attempts to assert material issues of fact fail because they are unable to come forward with any evidence contradicting plaintiff's version of events, such as a differing version by defendant driver Zhiyahn M. Benlevy—who never appeared for his deposition. Defendants' speculation that plaintiff might have been traveling too fast or that she could have done more to avoid the accident does not raise a material issue of fact. (*Warden v Orlandi*, 4 AD3d 239, 242 [1st Dept 2004] ["[R]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment."].)

Therefore, plaintiff is granted summary judgment in her favor as to liability, jointly and severally, against defendants Benlevy, New York City Transit Authority, and Advance Transit Co. Under Vehicle and Traffic Law § 388 (1) and (3), the New York City Transit Authority and Advance Transit

Co. are jointly and severally liable as the admitted owner and lessee, respectively, of the subject vehicle.

However, plaintiff's motion is denied as against defendants Metropolitan Transportation Authority and Access-A-Ride. "[T]he functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2d Dept 1984].) In addition, plaintiff has presented no evidence of a connection between a supposed entity named "Access-A-Ride," and has not even presented evidence that such an entity exists—as opposed to being a program or division within one of the municipal defendants. Indeed, this Court's own research did not find an entity named "Access-A-Ride" listed with the Secretary of State's Division of Corporations.

Defendants also fail to raise a material issue of fact concerning whether plaintiff suffered a serious injury under Insurance Law § 5102 (d). Summary judgment on the issue of serious injury is not premature. Defendants concede that Plaintiff "sustained a fracture and that such injury meets the statutory definition of a 'serious injury.'" (Jayson Opp. Affirm. ¶ 30.) Additional discovery will not alter the undisputed fact that plaintiff suffered a fracture.

CONCLUSION

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability is granted, and plaintiff is granted summary judgment as to liability in her favor and jointly and severally against defendants Zhiyahn M. Benlevy, Advance Transit Co., and New York City Transit Authority; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability is denied as against defendants Metropolitan Transit Authority and Access-A-Ride; and it is further

ORDERED that the seventh affirmative defense, that plaintiff did not suffer a "serious injury" under Insurance Law § 5102 (d), is stricken; and it is further

ORDERED that for all purposes of the action that plaintiff sustained a fracture of her left radial shaft as a result of the subject accident on December 17, 2013.

Dated: July 26, 2016
New York, New York

ENTER: 

J.S.C.

HON. MICHAEL D. STALLMAN