

Kaur v Reynoso
2016 NY Slip Op 31721(U)
September 14, 2016
Supreme Court, New York County
Docket Number: 151260/12
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

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JASPREET KAUR,

Plaintiff,

Index No. 151260/12

- against -

Motion Seq. No. 001

FERNANDO REYNOSO, PTM MANAGEMENT
CORP., MTA, NEW YORK CITY TRANSIT
AUTHORITY,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiff Jaspreet Kaur alleges that, on August 4, 2011 at approximately 9:30 a.m., she was struck by an Access-a-Ride vehicle operated by defendant Fernando Reynoso and owned by defendant PTM Management while she was attempting to cross West 34th Street, near Herald Square.

Defendants Fernando Reynoso, PTM Management Corp., MTA, and New York City Transit Authority move for summary judgment dismissing the complaint, arguing that “plaintiff cannot show that any act by the defendant [*sic*] was the proximate cause of her alleged injuries.” (Def. Affirm. ¶ 9.) In addition, defendants argue that plaintiff “dart[ed] into traffic . . . making it impossible for defendants to have time to react and avoid her[.]” and therefore appear to invoke the emergency doctrine. (*Id.*)

BACKGROUND

At his deposition, Reynoso testified that he was traveling westbound on West 34th Street (Pl. Opp. Aff., Ex 2 [Reynoso EBT], at 19.) Reynoso stated that, when the accident occurred, his vehicle was traveling “in the second lane from my right”, “next to the bus lane.” (*Id.* at 23, 25.)

According to Reynoso, the traffic was light, and he was heading towards Sixth Avenue at “[a]bout 20, 25” miles per hour. (*Id.* at 26, 27.) Reynoso claims that, as he was approaching Sixth Avenue, the traffic light was green. (*Id.* at 26.) Reynoso testified that he went through the intersection (*Id.* at 27), and then he took his foot off the gas pedal and stepped on the brake when he saw plaintiff. (*Id.* at 28, 43.) Reynoso could not recall whether he was able to hit the brakes before the point of impact. (*Id.* at 43.)

According to Reynoso, he first saw plaintiff “on my right side”, in the bus lane, walking south across West 34th Street. (*Id.* at 38, 41.) When asked approximately how much time elapsed from when he first saw plaintiff until the contact, Reynoso answered, “A second maybe.” (*Id.* at 42.) According to Reynoso, he was travelling between 20 and 25 miles per hour at the time of impact. (*Id.* at 42.)

At plaintiff’s deposition, she testified that she exited the subway at West 34th Street and Broadway, and went directly to the H&M store with

her friend, Sukhjeet Kaur. (Plaintiff Opp. Affirm., Ex 1, at 25, 33.) According to plaintiff, they left the H&M store about 10 minutes later (*Id.* at 33), and “I was gonna go across the street to Forever 21.” (*Id.* at 25.) Plaintiff testified as follows:

“There was traffic, but the traffic was going and when—when I was crossing, there was a red light so traffic was stopped there on the—on the light and I was behind the—a few cars was on my right side and there was a red light and the cars were standing and I was right in the middle right there and there was like a big—

Q. Hold on. When you say you were in the middle, were you in the middle of the block?

A. Yeah—not in the middle, because that block was huge. Not far from the walk sign. It was a couple of cars in front, like say five—three—four to five.

Q. Four to five cars from you until the light?

A. Yeah.”

(*Id.* at 34-35.) Thus, according to plaintiff, she was “somewhere between four to five cars or car lengths away from the light at 34th Street and Sixth Avenue.” (*Id.* at 36.) Plaintiff claims that the traffic was stopped. (*Id.* at 47.)

Plaintiff testified that she walked across West 34th Street, passing in front of a black, “double bus” (i.e., a double-decker bus) to her left and a “MTA bus” “3, 4 feet” to her right. (*Id.* at 39, 43-44.) Plaintiff testified as follows:

Q. So tell me exactly what you did. You stopped, you looked to your left and what else did you do before you started moving again?

A. I first peeked on this side and then I was—(Indicating.)

Q. When you say this side, you're referring to your left?

A. Left. There was nothing so I kept walking and—because this side (indicating) was a red light so I didn't have to worry and then I walked near the yellow lines and there was another—no traffic, you know. I don't—when I was near it, like on the yellow lines or middle of the way, the—that thing—bus came, the Access-A-Ride, and hit me on my left knee and the mirror of his—his car hit me on the—my head and like it—it like touched all my front and I fall on the ground.”

(*Id.* at 47-48.) Plaintiff was asked, “At what point did the light turn from red to green? Had you already been hit at that point?” (*Id.* at 55.) Plaintiff answered, “I think when I was hit, the—the car—the light was green. After I hit [*sic*], it was green.” (*Id.* at 55.)

The bill of particulars state that the accident occurred “near Broadway” (Def. Affirm. Ex. C [Verified Bill of Particulars] ¶ 3.) A police accident report states that the accident occurred at the intersection of West 34th Street and Broadway. (Def. Affirm. Ex. G [Police Report].)

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].)

Defendants assert that plaintiff was entirely at fault for the accident. First, they argue that plaintiff was crossing midblock, not at a crosswalk, when oncoming traffic had a green light. (Def. Affirm. ¶¶ 12, 14.) Second, they assert that plaintiff was “wearing an all black outfit” and, that before she crossed the street, plaintiff was standing next to a “black bus,” which thus must have “obscured her from the view of oncoming motorists.” (Def. Affirm. ¶ 13.)

Defendants point to a police accident report which states, “Pedestrian was not paying attention and ran into Bus while trying to cross street in the middle of the block. Officer did not observe.” (Def. Affirm. Ex. G [Police Report]).) Because of conditions created by plaintiff, defendants argue, defendant Reynoso had “[a] second, maybe two, maybe less” to react, and therefore cannot be held liable for the accident as a matter of law. (See Def. Affirm. ¶ 16 [quoting Ex. E [Reynoso EBT] at 43].)

In response, plaintiff maintains that she began crossing the street when oncoming traffic had a red light. (See Pl. Affirm. ¶¶ 24-28 [quoting various portions of plaintiff's EBT].) Plaintiff's friend, Sukhjeet Kaur, who claims to have witnessed the accident, avers that "[f]rom the time that [plaintiff] began to cross 34th Street's intersection up until the time she was hit, cars traveling on 34th Street had a red light at 34th Street's intersection with 6th avenue." (Pl. Affirm. Ex. 3 [Sukhjeet Aff.] ¶ 7.)

In addition, plaintiff disputes defendants' counsel's theory that the placement of plaintiff's black attire against a black bus made her less visible to defendant Reynoso, arguing that "there is absolutely no testimony that the defendant driver's view of plaintiff Kaur was obscured" and that defendant Reynoso "never testified that [plaintiff] was standing next to a black bus." (Pl. Affirm. ¶ 30.)

Plaintiff admittedly attempted to cross all of the traffic lanes of West 34th Street without using the crosswalk. (Def. Affirm. Ex. E [Kaur EBT] at 36.) However, Reynoso still had a duty, under Vehicle and Traffic Law § 1146 to "exercise due care to avoid colliding" with pedestrian plaintiff, irrespective of where she attempted to cross the street. Thus, it is well established that the fact that a pedestrian was struck outside the crosswalk goes to comparative fault at trial—rather than barring defendant driver's

liability. (See, e.g., *Santo-Perez v Enter. Leasing Co.*, 126 AD3d 621 [1st Dept 2015] ["While the fact that plaintiff was crossing the street on foot outside of the crosswalk, in violation of Vehicle and Traffic Law § 1152(a), is evidence of negligence on his part, the record presents a triable issue of fact whether defendant Hill, operating a vehicle, contributed to the accident by failing to exercise due care to avoid a collision with plaintiff."]; *Ryan v Budget Rent a Car*, 37 AD3d 698, 699 [2d Dept 2007] ["Triable issues of fact exist as to whether the plaintiff was comparatively negligent for, inter alia, failing to exercise due care when crossing the street at a point other than an intersection or a crosswalk, and whether the defendant Anna Sharman contributed to the accident by failing to exercise due care in operating her vehicle."]; see also *Deitz v Huibregtse*, 25 AD3d 645, 646 [2d Dept 2006] ["Vehicle and Traffic Law § 1146 imposes a superseding duty on a motorist to exercise due care to avoid hitting a pedestrian. . . . [A] driver is under a duty to keep a reasonably careful look out for pedestrians, to see what is there to be seen, and to use reasonable care to avoid hitting any pedestrian on the roadway."].)

The Court agrees with plaintiff that the conflicting accounts of the accident raise triable, material issues of fact, including questions of credibility, as to whether plaintiff suddenly stepped into the path of

Reynoso's vehicle, leaving him unable to avoid contact. Reynoso testified that the accident took place after he passed through the intersection of West 34th Street and Sixth Avenue (Reynoso EBT, at 27), whereas plaintiff testified that she was struck before Reynoso's vehicle had crossed the intersection. (Kaur EBT, at 64-65.) Reynoso testified that the light at the intersection was green; plaintiff and her friend insisted that the light for westbound traffic along West 34th Street was red. Plaintiff apparently testified she saw no westbound, oncoming traffic after she crossed the bus lane of West 34th Street, which be viewed as inconsistent with Reynoso's testimony that only a second had passed before his vehicle struck plaintiff. Therefore, defendants' motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment, dismissing the complaint, is DENIED.

Dated: September 14, 2016
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.