

Gomes v Rothman

2016 NY Slip Op 32930(U)

October 20, 2016

Supreme Court, Westchester County

Docket Number: 60146/14

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

[* 1]

DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH
Supreme Court Justice**

-----X
MARIA FATIMA GOMES,

Plaintiff,

**MOTION DATE: 10/14/16
INDEX NO.: 60146/14**

-against-

CRAIG M. ROTHMAN,

Defendant.
-----X

The following papers numbered 1 to 10 were read on this motion by defendant for summary judgment dismissing the complaint, and on this cross-motion for partial summary judgment dismissing the cause of action for serious injury predicated upon the 90/180 day category.

Papers Numbered

Notice of Motion - Affirmation (Kolodny) - Exhs. (A-F)	1-3
Answering Affirmation (Duffy) - Exh.	4-5
Notice of Cross-Motion - Affirmation (Duffy) - Exhs. (A-E)	6-8
Replying Affirmation (Kolodny) - Exh.	9-10

Upon the foregoing papers, it is Ordered and adjudged that this motion and cross-motion are disposed of as follows:

Plaintiff seeks to recover for personal injuries that she allegedly had sustained, on

September 13, 2012, a bright clear morning, at approximately 8:00 a.m., at which time plaintiff had been working as a flag person for a private company, controlling traffic at the work location at North Avenue and Station Place, in New Rochelle, New York, which intersection is controlled by a traffic light. North Avenue is a north-south roadway with two lanes in each direction, each separated by white striping, that on the subject accident date had been merged into one southbound lane at the traffic light due to the ongoing construction work. Station Place ordinarily is an east-west roadway with a single lane in each direction that had been changed into a one-way roadway on the accident date due to the ongoing construction. Plaintiff had been wearing an orange safety vest and a hard hat at the time of the accident.

According to plaintiff, she had not been responsible as a flagger for the merging of the traffic on North Avenue; a posted sign had alerted drivers to the lane closure. While plaintiff had been standing on Station Plaza near the intersection, she had observed to her left, in the as of yet un-merged right southbound lane of North Avenue, a New Rochelle police vehicle, occupied by one officer, stopped at the traffic light; two vehicle had been stopped in front of him and several vehicles had been stopped behind him. Plaintiff had testified that she had observed that the traffic light for North Avenue had changed to green but that the vehicles did not move and she had wondered why. At that point, she had observed in the right most lane on the southbound side of North Avenue, past the traffic light, a stopped school bus with its flashing lights activated. The two vehicles that had been stopped in front of the police vehicle were now through the intersection and stopped behind the school bus. The police vehicle had moved forward into the intersection and stopped but, according to plaintiff, the intersection was not being blocked. Plaintiff then

had stepped from Station Plaza into the intersection because she had noticed that northbound traffic on North Avenue was not stopping and that a woman had been standing across the street with two children waiting to cross. Plaintiff could not recall whether there had been crosswalk at that intersection. Plaintiff had testified that she had looked to her left before crossing and had observed that the southbound traffic had been stopped at a red light and that the police officer's vehicle and all vehicles behind him all still had been stopped and that the other southbound lane had been empty. Plaintiff states that she then had attempted to cross North Avenue, holding the orange flag under her arm; it had been her intention to walk to the double yellow line separating the north and south bound lanes of traffic and to stop the northbound lanes in order to assist the woman and her children to cross the street. Allegedly, as plaintiff had walked one step across the white line striping into the left southbound lane of North Avenue, and before she had reached the double yellow lines, plaintiff had been struck by defendant's vehicle, which had run over her left foot and struck her hip. Plaintiff had described the impact as "very heavy." Plaintiff had testified that she had felt being "thrown," and she "dragging the pavement and hitting [her] head ... on the left side"; her hard hat had flown off. Plaintiff also had testified that, prior to impact, she had not heard any horns blow, nor tires or brakes screeching, and that she "never saw [defendant's vehicle] coming." According to plaintiff, "probably" tall cars and SUV's had obstructed her vision of oncoming southbound traffic, but she does not know.

During her testimony, plaintiff had testified that she and Sergeant Adam Castiglia, the officer in the stopped vehicle who claims to be an eyewitness to the accident, had a conversation after plaintiff had left the hospital, during which time the Sergeant had told

plaintiff that she had run into the traffic. Plaintiff had testified that she had responded to the Sergeant that, "no, [she] didn't," "I never run into traffic. In all my years of work, I never do that, I know better." She had told the Sergeant that she may have "done a fast walk," "a long stride," but "never run." Further, plaintiff had testified that she had asked the Sergeant whether he had observed the stopped school bus and that he had asked, "What school bus?" Plaintiff had testified that "[h]e never paid attention to the school bus. He never saw what it was."

Presently, defendant is moving for summary judgment dismissing the complaint. Defendant's motion is supported by defendant's answer, the parties' deposition testimony, a certified police report and the deposition testimony of Sergeant Castiglia. As correctly noted by plaintiff, no copy of the summons and complaint properly has been included in defendant's moving papers. Consequently, defendant's motion must be and is hereby denied. See CPLR 3212, subdivision (b); Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp., 84 A.D.3d 1153, 1154 (2nd Dept. 2011); Fishkin v. Feinstein, 67 A.D.3d 961 (2nd Dept. 2009); Wider v. Heller, 24 A.D.3d 433 (2nd Dept. 2005); Welton v. Drobnicki, 298 A.D.2s 757 (3rd Dept. 2002); Bonded Concrete, Inc. v. Town of Saugerties, 3 A.D.3d 729, 730 (3rd Dept. 2004), lv. to app. dsmd. 2 N.Y.3d 793 (2004); Hamilton v. City of New York, 262 A.D.2d 283 (2nd Dept. 1999).

Notably, while defendant purports to have corrected his harmless omission error by including copies of the summons and complaint in his replying papers, his claiming that the omission did not result in any prejudice to plaintiff, defendant fails to cite any supporting case law that prejudice must be demonstrated before a motion for summary judgment properly can be denied based upon a failure to submit a complete copy of the pleadings.

In any event, even if a full set of the pleadings properly had been included in defendant's motion, summary judgment dismissing the complaint still would be denied.

Defendant had testified that he had been traveling in the right lane of North Avenue, in an easterly direction,¹ driving his vehicle "cautious[ly]," at approximately 20 miles per hour; he had observed construction ongoing in the area and construction workers on the side of the roadway. Defendant had stated that he had traveled this roadway with the merged traffic lane and ongoing construction "probably" more than twenty times during the approximate 6 months prior to the accident date. As defendant had been driving, he had observed vehicles stopped in the right lane of North Avenue waiting to merge into the left lane and continue on their way. He did not recall seeing at the location construction workers with flags or traffic control devices in their hands, nor did he recall whether any signs had been posted warning drivers to slow down. Defendant had testified that there was no vehicle in front of him in his right lane, nor any vehicle next to him in the left lane, and that he had been the only vehicle moving on North Avenue, "maintaining the speed," and that he had not brought his vehicle to a stop at any time. However, thereafter defendant had testified that he might have been in the left lane as he "was going over the bridge," and that he was passing vehicles on his right. Defendant also had testified that he observed vehicles up ahead lined up in a lane to the right of his vehicle, which he thought were waiting "to get on Huguenot Street" but, after this Court's reading defendant's testimony several times, it remains unclear exactly where the stopped vehicles to defendant's right had been located in relation to him. Defendant had testified that he had

¹This testimony is inconsistent with plaintiff's testimony that North Avenue runs in a north-south direction.

observed a stopped police vehicle in the right lane. According to the Court's reading of defendant's testimony, at one point defendant had testified that there was no traffic control device located where the incident occurred, but at a later point defendant had testified that the accident had occurred as he had approached the traffic light on the bridge.

Defendant had testified that he first had observed plaintiff three seconds before impact when she "dart[ed] through traffic" from his right; "there were cars stopped there, and she just appeared from behind a car." Defendant does not recall whether plaintiff had been wearing an orange vest or carrying an orange flag at that time, but he recalls seeing plaintiff's body moving, facing his vehicle, but her head turned back from where she had come from. Defendant had testified that his vehicle had been traveling at a speed in the "low 20s," and that he "pressed on the brake with [his] foot" but he had no time to stop before striking plaintiff. Plaintiff's body, according to defendant, went up against the passenger side door; he thought that his rear tire may have run over plaintiff's foot. Defendant had brought his vehicle to a stop a couple of feet east of where plaintiff had been laying in the roadway between the two lanes of North Avenue. Defendant had testified to his belief that the traffic light he was approaching had been red at the time that impact had occurred. According to defendant, there had been no damage to his vehicle as a result of its impact with plaintiff.

According to defendant, the stopped police vehicle had been "ahead of where the crash occurred." After the incident, the Sergeant had come over to defendant, stating that he had witnessed the incident, that it had not been defendant's fault, and that plaintiff had come "out of nowhere."

According to Sergeant Castiglia's testimony, he had been on patrol, traveling

northbound on North Avenue, and had stopped at a red light at its intersection with Station Plaza. Sergeant had observed plaintiff wearing a flagger's vest moving in and out of traffic stopping the vehicles with her flag. The Sergeant had testified that he had been watching plaintiff's movements directing the traffic and that it had "appear[ed] to [him] that she was [not] being very safe with what she was doing." Traffic conditions, according to the Sergeant, had been "medium, regular." Sergeant Castiglia had testified that he had observed defendant's vehicle traveling southbound, towards him, and that plaintiff, he "[didn't] think she was really paying attention," "kind of like ran" "into the side of the [defendant's] car." Sergeant Castiglia could not remember from which direction plaintiff had crossed, but he remembers her "look[ing] like she wasn't paying attention and she literally just ran into the side of the [defendant's] car. She hit the car more than the car hit her ..." The impact witnessed by the Sergeant had occurred in "the middle lane," and plaintiff's shoulders or upper torso hit defendant's vehicle; she then had fallen to the ground. According to Sergeant Castiglia, although he could not recall defendant's rate of speed, defendant "was not speeding at all or driving reckless, that's for sure." The Sergeant did not know whether the light at which he had been stopped had turned green at the time of the incident.

Defendant submits that the foregoing demonstrates his entitlement to summary judgment in that there is an absence of any triable issues of fact and no evidence of defendant's negligence, making a trial futile.

Plaintiff opposes defendant's dispositive motion, attaching plaintiff's affidavit, which substantively is consistent with plaintiff's deposition testimony as to the circumstances surrounding this incident, she again reiterating her testimony that she had not run into the

roadway at the time that defendant had struck her. Plaintiff argues that defendant's admissions that he had not observed plaintiff prior to impact even though she was highly visible and that defendant had believed that the vehicles in the right lane had been stopped because they had been waiting to turn rather than in fact due to the presence of the stopped school bus establishes that defendant had not been paying careful attention to the road conditions prior to impact. Additionally, plaintiff submits that defendant had been speeding and not driving 20 miles per hour, as he had testified, because he otherwise "should have been able to stop in time," given that the road was flat, dry and clear.

Plaintiff also cites Sergeant Castiglia's testimony that he had been stopped in the northbound lane of North Avenue, across the street from where the impact had occurred, which differs from both her testimony and defendant's testimony that the police vehicle had been stopped in the right lane of the southbound traffic. Additionally, plaintiff notes that the Sergeant had testified that he did not recall which side of the street plaintiff had come from, or where plaintiff had been immediately before impact, nor could he recall which lanes had been closed. Plaintiff raises the possibility that the Sergeant is confusing this incident with another incident, and urges that the Sergeant's testimony should not sway the Court in depriving her of a jury trial.

Were this Court to reach the substantive issue presented, upon this Court's careful consideration of the record at bar and upon application of the controlling principles of law applicable to summary judgment motions in a negligence action, the Court would deny defendant's motion seeking dismissal of this action. There are a number of triable issues of fact, including but not necessarily limited to what were the prevailing road conditions, including posted signage and lane merging, at the time at the accident site, whether the

impact had occurred in an intersection, whether the intersection had been controlled by a traffic light, whether there had been a stopped school bus with activated flashing lights, whether defendant had been driving at an excessive rate of speed given road conditions and ongoing construction work, whether defendant negligently had failed to see plaintiff and the stopped school bus, if any, whether defendant should have been able to bring his vehicle to a stop without striking plaintiff, whether Sergeant Castiglia's testimony regarding the happening of the incident is reliable, and whether whether plaintiff had walked or run into the intersection and has any comparative negligence.

Addressing next plaintiff's cross-motion for partial summary judgment on the issue of her having sustained a statutory serious injury pursuant to Insurance Law section 5102, subdivision (d), plaintiff argues that her being struck by defendant's vehicle had caused her to sustain medically determined injuries to her back, left foot and left ankle which had prevented plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Plaintiff, presently 49 years of age, avers that, as a result of the injuries she had sustained in this accident, she has been unable to return to work since the September 13, 2012, accident date.

Plaintiff's motion is supported by the Workers' Compensation Board decisions, copies of which have been submitted, confirming that plaintiff had been totally disabled from working for the period of the accident date up to and including March 19, 2013, a total of 176 days out of 180 days immediately following the accident.

Additionally, plaintiff's motion is supported by her treating physician's affirmation wherein he states that he had treated plaintiff over the course of the last four years for her

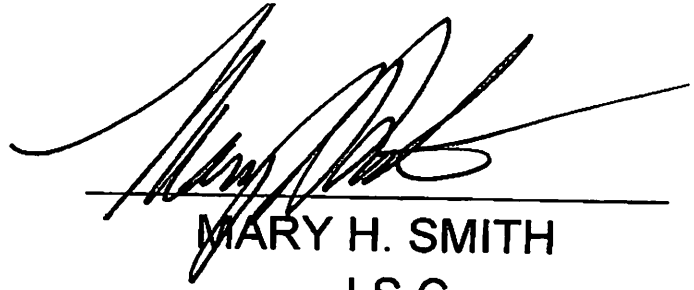
injuries sustained in this accident, and that it is his opinion, stated with reasonable medical certainty, that as a direct result of those injuries to her upper back, lower back, left ankle and left foot, plaintiff has been unable to work since the accident up until the present, and that she had been unable to perform substantially all of her customary and daily activities for the first 180 days following the September 13, 2012, crash and continuing to date.

Further, plaintiff has submitted a copy of the IME report issued by Orthopedic Lisa Nason, M.D., wherein said physician states that she had reviewed plaintiff's medical records, including those relating to plaintiff's operative procedure on plaintiff's left foot for diagnosed post-traumatic tarsal tunnel syndrome, and had examined plaintiff and performed range of motion testing, as well as other tests, upon plaintiff, on February 8, 2016, as specified and indicated in her attached affirmed report. Said report indicates Dr. Nason's founded range of motion limitations beyond minor, as specified, in plaintiff's cervical spine, right hip, left hip, right ankle and left ankle.

The foregoing prima facie demonstrates plaintiff's entitlement to partial summary judgment on the issue of her having sustained a serious injury under the 90/180 category of the Insurance Law, which defendant has not opposed. Accordingly, plaintiff's cross-motion is granted.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:15 a.m. on November 29, 2016.

Dated: October 20, 2016
White Plains, New York



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J.S.C.

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