

Shippy v Lorinda Enters., Ltd.
2017 NY Slip Op 30503(U)
March 20, 2017
Supreme Court, Kings County
Docket Number: 510794/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____ x

SHANA SHIPPY,

Plaintiff,

DECISION / ORDER

-against-

Index No. 510794/16

Motion Seq. No. 1

Date Submitted: 3/9/17

**LORINDA ENTERPRISES, LTD. and
DIEUDONNE PLONQUET,**

Defendants.

_____ x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1-5</u>
Opposition and Exhibits Annexed	<u>6-8</u>
Reply	<u>9</u>
Other: _____	_____

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

Plaintiff moves for summary judgment on the issue of liability in this motor vehicle accident. For the reasons set forth below, the motion is granted.

This accident occurred at around 9:00 A.M. on Tuesday, January 19, 2016, at the intersection of Atlantic Avenue and Crescent Street, in Brooklyn, New York. There was one vehicle and one pedestrian involved in the accident. The vehicle was a yellow school bus/van owned by defendant Lorinda and driven by defendant Plonquet. The plaintiff was the pedestrian, and was crossing Atlantic Avenue, according to her affidavit, in the crosswalk with the pedestrian signal (traffic light) in

her favor. Before she stepped into the street, she looked both left and right for traffic and saw none. Atlantic Avenue has three lanes for travel in each direction and a concrete island in the center. While she was crossing the street and before she reached the center island, Plonquet is alleged to have come along on Crescent Street and then made a sudden left turn toward the plaintiff, hitting her with the front of his school bus/van. She states in her affidavit that she tried to move away and was unable to. After the impact, she states that she was thrown to the ground. This makes out a prima facie case for summary judgment.

In addition to her affidavit, plaintiff provides an uncertified police report and a letter from the New York State Department of Motor Vehicles dated 8/15/16 that states that they were unable to locate a police report for this accident which was filed with them and thus could not provide a certified copy. There is no explanation. The police report indicates that the officer issued a summons to Plonquet for failing to yield the right of way and hitting a pedestrian, a violation of NYC Administrative Code §19-190(b). This is an unclassified misdemeanor. The police report also contains a statement from Plonquet, the defendant driver. It says "driver states [he] was going to make turn onto Atlantic Avenue when he did strike pedestrian." This is an admission against interest, and as such, is admissible even though the police report is not certified. Further, plaintiff has proven that her lawyer attempted to obtain a certified copy a few months after the accident and was unable to. See *Pivetz v Brusco*, 145 AD3d 806 [2d Dept 2016]. In this decision, the Second Department Appellate Division states:

Here, the evidence submitted by the plaintiff in support of her motion, including . . . a copy of the police accident report containing the defendant's admission that his vehicle was inching forward when it

collided with the plaintiff's vehicle, was sufficient to establish, prima facie, that the defendant's negligence in failing to yield the right-of-way was the sole proximate cause of the accident (see Vehicle and Traffic Law § 1142[a]; *Lilaj v Ferentinos*, 126 AD3d 947, 948, 7 N.Y.S.3d 172; *Crowe v Hanley*, 123 AD3d 755, 757, 999 N.Y.S.2d 84; *Luke v McFadden*, 119 AD3d at 534; *Hutton v Whelan*, 104 AD3d 914, 915, 961 N.Y.S.2d 573; *Williams v Hayes*, 103 AD3d at 714). *Contrary to the defendant's contention, the portion of the uncertified police accident report that contained his admission was admissible* (see *Gezelter v Pecora*, 129 AD3d 1021, 1022-1023, 13 N.Y.S.3d 141; *Jackson v Trust*, 103 AD3d 851, 852, 962 N.Y.S.2d 267; *Scott v Kass*, 48 AD3d 785, 851 N.Y.S.2d 649) [emphasis added].

In opposition to the motion, the defendant driver provides an affidavit dated February 28, 2017, which states that he was driving a “van-type school bus” and “after the light turned green, I proceeded forward into the intersection with my left turn signal on at a low rate of speed. As I was turning, I slowed even further to allow pedestrians to cross. . . once I completed my turn and was completely clear of the pedestrian crosswalk, I heard a sound from the rear driver’s side of my vehicle which caused me to stop immediately. . . I did nothing to cause or contribute to the happening of this accident. My vehicle had already cleared the pedestrian crosswalk when I heard the noise from the rear of my vehicle and saw the plaintiff standing in the left lane on Atlantic Avenue.”

Defendant cannot overcome plaintiff’s prima facie case for summary judgment with this affidavit. It was clearly prepared for the lawsuit and contradicts his admission to the police officer at the scene. As the First Department states in *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] “[a] party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment (see, e.g., *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320; *Kistoo v City of New York*, 195

AD2d 403, 404).”

This shall constitute the Decision and Order of the Court.

Dated: March 20, 2017

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**