

<b>Jones v Gonzalez-Vargas</b>
2019 NY Slip Op 32129(U)
May 13, 2019
Supreme Court, Bronx County
Docket Number: 26310/2018E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
BUNNIE JONES,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 26310/2018E

RUBEN A. GONZALEZ-VARGAS,

Defendant.  
-----X

John R. Higgitt, J.

Upon plaintiff's April 4, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendant's April 18, 2019 affirmation in opposition; plaintiff's April 29, 2019 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject motor vehicle accident is granted.

In support of the motion, plaintiff submits the transcripts of the parties' deposition testimony and a certified copy of the police accident report. The report does not contain any statements qualifying as admissions or other admissible statements. Plaintiff also submits a Google Maps photograph, purportedly of the intersection, captured in September 2018, approximately 10 months after the accident.

Plaintiff testified that while crossing Webster Avenue from east to west in her wheelchair within the pedestrian crosswalk with the light in her favor, defendant's vehicle struck the right side of her wheelchair, knocking it, and plaintiff, over. Plaintiff testified that she waited on the sidewalk for the pedestrian signal to change, and that when it changed in her favor, she entered the roadway to cross. Plaintiff further testified that she did not see defendant's vehicle prior to the accident.

Defendant testified that he was at least the fourth vehicle stopped at the red traffic signal

at the intersection of East 189th Street and Webster Avenue. After the light turned green, he turned left from westbound East 189th Street onto southbound Webster Avenue, when his vehicle made contact with plaintiff's wheelchair. Defendant further testified that he did not see plaintiff prior to the accident.

This proof was sufficient to meet plaintiff's prima facie burden on the issue of defendant's negligence (*see Torres v Werner Bus Lines, Inc.*, 157 AD3d 624 [1st Dept 2018]; *Ewart v Terzi*, 150 AD3d 514 [1st Dept 2017]; *Hines v N.Y.C. Transit Auth.*, 112 AD3d 528 [1st Dept 2013]).

Plaintiff, under the apparent assumption that she still bore the pre-*Rodriguez v City of New York*, 31 NY3d 312 (2018), burden of also demonstrating of her freedom from comparative fault, asserted that she was not comparatively negligent for failing to see defendant's vehicle, because defendant's vehicle approached her from behind her and to her right, where it was outside her field of vision and could not be observed through the reasonable use of her senses (*see Quintavalle v Perez*, 139 AD3d 182 [1st Dept 2016], *lv den* 28 NY3d 1068 [2016]).

In this regard, plaintiff testified that she waited for the pedestrian signal in her favor before entering the roadway, and that the accident happened when she was approximately two-thirds of the way across the street. In opposition, defendant asserts that plaintiff's testimony that she did not see defendant's vehicle prior to the accident indicates that she failed to see what there was to be seen, and raises an issue of fact as to her comparative negligence. Defendant did not assert that there was a question of fact as to his own negligence.

Plaintiff was not required to establish her freedom from comparative negligence to be granted summary judgment on the issue of defendant's negligence (*see Rodriguez, supra*). Ostensibly because of her misapprehension of her burden of proof, plaintiff did not seek

dismissal of defendant's affirmative defense regarding plaintiff's culpable conduct (*see* CPLR 2214[a]; *cf. Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]).

To the extent both parties addressed the issue of plaintiff's comparative fault, "one who crosses a city street without any exercise of his [or her] faculty of sight, is negligent as a matter of law" (*Thoma v Ronai*, 189 AD2d 635, 636 [1st Dept 1993], *aff'd* 82 NY2d 736 [1993]). A pedestrian fails in his or her prima facie burden with respect to comparative fault when he or she fails to demonstrate that he or she looked for approaching traffic before beginning to cross a street (*see Day v MTA Bus Co.*, 94 AD3d 940 [1st Dept 2012]; *Garcia v El-Zien*, 90 AD3d 601 [2d Dept 2011]; *Yi Min Feng v Jin Won Oh*, 71 AD3d 879 [2d Dept 2010]; *Yuen Lum v Wallace*, 70 AD3d 1013 [2d Dept 2010]; *Cator v Filipe*, 47 AD3d 664 [1st Dept 2008]). To be relieved of the consequences of such failure, "he or she must prove that even if he or she had looked, the accident would still have happened" (*Thoma*, 189 AD2d at 636).

Here, there is no testimony from plaintiff that she attempted to observe traffic prior to entering the roadway or at any time thereafter (*cf. Richards v Burch*, 132 AD3d 752 [2d Dept 2015]; *Chou v Ocean Ambulette Serv., Inc.*, 131 AD3d 1091 [2d Dept 2015]; *Tsang v N.Y.C. Transit Auth.*, 125 AD3d 648 [2d Dept 2015]). Viewing the facts in the light most favorable to defendant as the non-movant (*see Matter of N.Y.C. Asbestos Litig.*, 33 NY3d 20 [2019]), and given the lack of more complete testimony from the parties, the court cannot infer the parties' relative positions within the intersection prior to impact so as to conclude, as a matter of law, that plaintiff's failure to look for oncoming traffic before or during her entry onto the roadway could not have been a proximate cause of her injuries, or that plaintiff's avoidance of the accident would have required more than "the exercise of ordinary attention and the exercise of ordinary caution" (*Quintavalle*, 139 AD3d at 186).

The court notes that plaintiff did not seek (and the court has not addressed) relief with respect to her claims of “serious injury.”

Accordingly, it is

ORDERED, that plaintiff’s motion for partial summary judgment on the issue of defendant’s liability for causing the subject motor vehicle accident is granted.

The parties are reminded of the May 31, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: May 13, 2019

  
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John R. Higgitt, A.J.S.C.