

Sanchez v Flores
2019 NY Slip Op 32267(U)
June 6, 2019
Supreme Court, Bronx County
Docket Number: 300987/2016
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

-----X
 YOLANDA SANCHEZ

Index No. 300987/2016

-against-

Hon. MARY ANN BRIGANTTI

MELISSA FLORES, et al.

Justice Supreme Court

-----X
 The following papers numbered 1 to _____ were read on this motion (Seq. No. 2)
 for **SUMMARY JUDGMENT** noticed on October 18, 2018 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3
Replying Affidavit and Exhibits	No(s). 4

Upon the foregoing papers, the plaintiff Yolanda Sanchez ("Plaintiff") moves for summary judgment against the defendants Melissa Flores ("Flores") and Selby Transportation Corp., (collectively, "Defendants") on the issue of liability, and finding that Plaintiff is free from comparative negligence as a matter of law. Defendants oppose the motion.

I. Background

In support of her motion, Plaintiff submitted her testimony wherein she testified that at the time of this accident which took place in New York County, she was a pedestrian walking northbound along Second Avenue, crossing 102nd Street, in the crosswalk, with the pedestrian signal in her favor, when she was struck by a short yellow school bus (Pl. EBT at 63, 70-72, 95). Plaintiff stated that prior to this accident she was walking northbound along the east side of Second Avenue, and intended to cross the street to the west side of Second Avenue once she reached 104th Street to visit a check-cashing facility (*id.* at 55-56, 70). Plaintiff described Second Avenue as a one-way southbound road with approximately three lanes of travel, and 102nd Street as a one-way eastbound road with one lane of travel (*id.* at 63-64, 67).

Plaintiff testified that at the intersection of Second Avenue and 102nd Street there is a traffic control device, and that at the time she continued walking northbound along the east side of Second Avenue to cross over 102nd Street she observed a "green" signal along Second Avenue, and a "little white man" indicating that she was allowed to continue walking northbound along Second Avenue (*id.* at 71-72, 75, 85). Plaintiff first observed the pedestrian signal as she was "[s]ix to eight steps" from the corner of Second Avenue and the east side of 102nd Street, and continued to observe this signal as she walked into

the intersection (*id.* at 72, 75). Plaintiff did not observe any vehicles coming toward her as she entered the intersection (*id.* at 85). Plaintiff further testified that she took "[s]ix to eight steps" "into the roadway as of when the accident happened" (*id.* at 73).

Plaintiff claimed that the first time she noticed the school bus that struck her was when she was "already in the middle of the street," approximately "six to eight steps" into the crosswalk, as the school bus was "[m]aking a left turn" from "Second Avenue" (*id.* at 75-76, 79-80, 86). Plaintiff clarified that when she first noticed the school bus she attempted to "move[] away inside the block to avoid getting hit" but that "it was too late" (*id.* at 80). Plaintiff stated that she did not hear or see any honking or flashing lights warning her of an impending contact with the school bus (*id.* at 91). From the time Plaintiff first noticed the school bus, to the time she attempted to move away from the school bus approximately "[t]wo, three seconds" had passed (*id.* at 80-81). Plaintiff testified that the "big mirror" on the school bus struck her left arm as it made contact, resulting in Plaintiff falling to the floor (*id.* at 82, 87-88, 99). No other part of the school bus made contact with Plaintiff (*id.* at 88-89). Additionally, Plaintiff testified that she was not using her cell phone or listening to music at the time of this accident (*id.* at 60-61).

Plaintiff also submitted Flores's testimony wherein she testified that at the time of this accident she was operating a mini school bus when she was involved in an accident with a pedestrian at the intersection of Second Avenue and East 102nd Street (Flores EBT at 20, 28, 56). Flores testified that prior to this accident she was traveling along southbound Second Avenue in the far left lane and intended to make a left turn onto 102nd Street (*id.* at 29, 32, 36). There was a traffic control device at this intersection, and Flores had a green light leading up to the accident (*id.* at 29, 30-31, 42). Flores did not see or observe a pedestrian walk signal at this intersection (*id.* at 42).

The first time that Flores noticed Plaintiff in the intersection of East 102nd Street was when her vehicle had "already begun" to turn, and "was almost a full turn" into 102nd Street (*id.* at 38). Flores clarified that Plaintiff was "walking" "in the street" when she "first observed" her, "[a]s opposed to on the sidewalk," and that during this first observation Plaintiff was approximately "[a] foot" away from the school bus (*id.* at 39, 41). When Flores first saw Plaintiff walking in the intersection she "stopped [her] vehicle as soon as [she] saw her" and "pressed on the brakes... very firmly, and the bus did stop, but the pressure from pressing the brake jerked the car forward which made the left side of the mirror basically push her over" (*id.* at 37). Flores acknowledges that the "left-hand" mirror struck Plaintiff's left shoulder (*id.* at 40-41, 50). Flores claims that Plaintiff was "on a cell phone at the time" of this accident (*id.* at 52).

In addition, Plaintiff submitted a surveillance video of the accident scene on a DVD format.

II. Standard of Review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal citation and quotations omitted]).

III. Analysis

A pedestrian crossing the street will make his or her prima facie case by showing that he or she crossed the street within a crosswalk and with the walk signal in his or her favor (*see e.g., Torres v Werner Bus Lines, Inc.*, 157 A.D.3d 624, 625 [1st Dept 2018]; *Krieger v Glatter*, 129 A.D.3d 536 [1st Dept 2015] [plaintiff established prima facie case as he was crossing the street, within the crosswalk, with the signal in his favor]). In this case, Plaintiff has established her prima facie entitlement to summary judgment as she testified that as she crossed the intersection of 102nd Street, with the signal in her favor, she was struck by a vehicle as she was six to eight steps into the intersection (*see Bermeo v Time Warner Entertainment Co.*, 162 A.D.3d 404 [1st Dept 2018]; *Perez-Hernandez v M. Marte Auto Corp.*, 104 A.D.3d 489, 490 [1st Dept 2013]). Plaintiff additionally showed, through her submission of a properly authenticated surveillance video, that as she crossed the intersection of 102nd Street, she had seconds to react to the school bus that fast approached her (*see Pl. EBT at 101-102, 109; see also Zegarelli v. Hughes*, 3 N.Y.3d 64, 69 [2004] [internal citations and quotations omitted] [a plaintiff's testimony may "establish that a videotape truly and accurately represents what was before the camera"])). The burden, therefore, shifts to Defendant to raise a triable issue of fact (*see Evart v. Terzi*, 150 A.D.3d 514 [1st Dept 2017] [citation omitted]).

Defendants have failed to carry this burden. Viewing the evidence in the light most favorable to Defendant and affording her the benefit of every reasonable inference (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 N.Y.3d 1048, 1049 [2016]), the Court grants Plaintiff's motion for summary judgment, as Flores's testimony does not directly "contradict Plaintiff's testimony" with respect to Plaintiff being struck by a vehicle while crossing in an intersection, in the crosswalk, and with the signal in her favor

(see *Torres v Werner Bus Lines, Inc.*, 157 A.D.3d 624, 624-625 [1st Dept 2018]; compare Weinberger affirmation, ¶27), thus, failing to raise "alternative theories as to the cause of the accident" (*Evert*, 150 A.D.3d 514). Moreover, and contrary to Defendants' assertion (Weinberger affirmation, ¶30), by striking a pedestrian crossing in an intersection with the signal in their favor, Flores failed to see "what was there to be seen through the ordinary use of h[er] senses" (*Bunn v City of New York*, 166 A.D.3d 491, 492-493 [1st Dept 2018]).

Flores's testimony that Plaintiff was "on a cell phone" at the time of this accident does not raise an issue of fact as to Defendants' negligence, as arguments relating to a plaintiff's possible comparative negligence "goes to damages and is not a defense to plaintiff's prima facie case" (*Bokum v Sera Sec. Servs., LLC*, 165 A.D.3d 535 [1st Dept 2018], citing *Rodriguez v City of New York*, 31 N.Y.3d 312 [2018]).

Plaintiff also moves this Court to find that Plaintiff is free from comparative negligence as a matter of law. Plaintiff testified, without contradiction, that as she was walking in the crosswalk, with the pedestrian signal in her favor, she was struck by Defendants' turning vehicle without warning. In addition, while the authenticated video that Plaintiff submitted does not clearly show whether or not she was using her phone, it does show that Plaintiff had seconds to react to the school bus that fast approached her. -

This Court finds that Defendants' assertion that Plaintiff was "on a cell phone" at the time of this accident fails to raise an issue of fact as to Plaintiff's alleged comparative fault. To raise an issue of fact, Defendants had to submit evidence that Plaintiff "could have avoided the accident through the exercise of ordinary attention and the exercise of ordinary caution" (*Quintavalle v. Perez*, 139 A.D.3d 182, 187 [1st Dept 2016]). Flores's bare testimony does not constitute such evidence. First, there is no indication from Flores's testimony in what manner Plaintiff was using her cell phone. For example, Flores's testimony does not indicate whether Plaintiff was looking at her cell phone for text messaging purposes or using her cell phone for a phone call. Second, even assuming Plaintiff was using her cell phone in any manner at the time of this accident, Flores admitted that the first time she saw Plaintiff walking in the intersection was when she was approximately "[a] foot" away from her vehicle, and thus, Flores could not stop her vehicle in time to avoid striking Plaintiff with the "left side of the mirror" (Flores EBT at 37, 41). Furthermore, Plaintiff asserts that she did not hear or see any honking or flashing lights warning her of an impending contact, and the video, coupled with Plaintiff's testimony, shows that Plaintiff had seconds to react to the school bus that fast approached her as she walked in the intersection of 102nd Street with the signal in her favor.

Moreover, the case *Polanco v Alhassan* (104 A.D.3d 543 [1st Dept 2013]), relied upon by Defendants in their opposition papers is distinguishable to this case as Plaintiff made clear why she was not within the crosswalk as she was struck by Defendants' vehicle. Plaintiff testified that when she first noticed a mini school bus approaching her it was making a left turn from Second Avenue onto 102nd Street, and thus, in attempting to avoid being struck by this vehicle, Plaintiff "moved away inside the block to avoid

getting hit" but that "it was too late" (Pl. EBT at 80). Thus, on this record, there is no indication that Plaintiff had any opportunity to avoid this accident (*see Perez-Hernandez*, 104 A.D.3d at 490 [plaintiff pedestrian not comparatively negligent as he could not have avoided the accident given his testimony that he noticed the car moments before being struck]; *Cartagena v Girandola*, 104 A.D.3d 599, 599-600 [1st Dept 2013] [plaintiff pedestrian not comparatively negligent where she crossed the street in the crosswalk, with the signal in her favor, and after looking for oncoming traffic]; *Hines v. New York City Tr. Auth.*, 112 A.D.3d 528, 529 [1st Dept 2013] [same]; *cf Carswell v. Banda*, 88 A.D.3d 604 [1st Dept. 2011] [issue of fact raised as to plaintiff pedestrian's liability where defendant claimed that he had a "green light with a left-turn signal" and plaintiff was "distracted by talking on her cell phone"]). In this case, there is no testimony claiming that Flores had a green light with a left-turn signal.

IV. Conclusion

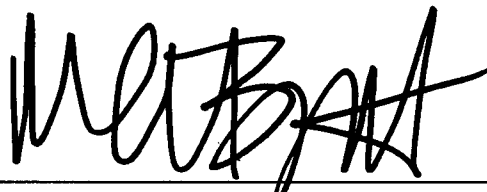
Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendants' liability is granted, and it is further,

ORDERED, that Plaintiff is deemed free from comparative negligence as a matter of law, and thus, any affirmative defenses alleging comparative fault on the part of Plaintiff is dismissed.

This constitutes the decision and order of this Court.

Dated: 6/6/19

Hon. 

Hon. Mary Ann Brigantti

J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☒ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |