

Bryan v Kyei-Anti

2019 NY Slip Op 33264(U)

September 18, 2019

Supreme Court, Bronx County

Docket Number: 27184/2018E

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
GAIL-ANN BRYAN,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27184/2018E

AFUA KYEI-ANTI,

Defendant.
-----X

John R. Higgitt, J.

Upon plaintiff's July 31, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendant's August 20, 2019 affirmation in opposition and the exhibit submitted therewith; plaintiff's August 22, 2019 affirmation in reply; and due deliberation; plaintiff's motion for leave to renew the October 23, 2018 decision and order of the undersigned, which denied her motion for partial summary judgment on the issue of defendant's negligence in causing the subject motor vehicle accident, is denied.

On the prior motion, plaintiff submitted an affidavit in which she averred that, at the time of the accident, she was a pedestrian walking within the designated cross walk across Garrison Avenue at its intersection with Barretto Street in the Bronx. She had the walk signal in her favor and proceeded to walk across the street after looking to see if any automobile traffic was approaching. Once she saw the road was clear, she began to walk across Garrison Avenue. She was more than halfway across the street when a vehicle turned from Barretto Street and struck her. She saw the vehicle just before the impact but did not have time to evade the vehicle.

In opposition to plaintiff's prima facie demonstration of entitlement to partial summary judgment, defendant submitted an affidavit in which she averred that she brought her vehicle to a complete stop at a red light at the intersection of Barretto Street and Garrison Avenue with her left directional signal activated. There were no other vehicles in front of defendant at the

intersection. While waiting for the traffic signal to turn green, defendant looked to her left and did not see any pedestrians in the crosswalk. Once the traffic light turned green, defendant turned left into the intersection, still not observing any pedestrians in the crosswalk. Her vehicle then made contact with plaintiff. The first time defendant observed plaintiff was at the point of contact.

The undersigned found that defendant's affidavit was sufficient to raise an issue of fact as to her negligence, and denied plaintiff's motion.

Plaintiff now asserts that defendant's recent deposition testimony that she looked at her speedometer during the course of making the turn and did not recall where she was looking immediately prior to the impact presents new facts that would change the prior determination, because they establish defendant's negligence as a matter of law (*see* CPLR 2221[d][2]).¹

Testimony that is new and noncumulative (*see Tavarez v Herrasme*, 148 AD3d 576 [1st Dept 2017]), or new testimony contradictory to a previously-submitted affidavit (*see Thomas v Gonzalez*, 158 AD3d 531 [1st Dept 2018]), may support a motion for renewal; accordingly, the party moving for renewal will not necessarily be faulted for having failed to wait until after the taking of deposition testimony to move for dispositive relief. Such newly-submitted testimony, however, must be sufficient to change the prior determination and, if it is not, renewal must be denied (*see Elting v Shawe*, 136 AD3d 536 [1st Dept 2016]; *Joplin v City of N.Y.*, 116 AD3d 443 [1st Dept 2014]; *Justino v Santiago*, 116 AD3d 411 [1st Dept 2014]).

¹ Plaintiff asserts that that defendant violated Vehicle and Traffic Law §§ 1111(a)(1) (failing to yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk while turning through green light) (n.b., the court disregards plaintiff's typographical error in identifying the statute [*see* CPLR 2001]), 1146(a) (failing to exercise due care to avoid colliding with, as is relevant here, a pedestrian), and 1163(a) (failing to exercise reasonable safety in turning). Plaintiff also asserts that defendant violated Vehicle and Traffic Law § 1141 (failing to yield to a vehicle); however, this statute is inapplicable because, by its terms, it requires only that a left-turning vehicle yield to another vehicle approaching from the opposite direction. Plaintiff also asserts that defendant violated Vehicle and Traffic Law § 1151(a); however, this statute is inapplicable within the City of New York (*see* 34 RCNY § 4-02[e]).

Plaintiff moved solely for renewal, not reargument; accordingly, because the new testimony relied upon by plaintiff as to where defendant was looking is not instructive on the issue of right of way (*see* Vehicle and Traffic Law § 1111[a][1]), the court's determination is confined to whether the new testimony relied upon by plaintiff warrants renewal, and whether it establishes, as a matter of law, that defendant violated Vehicle and Traffic Law § 1146(a), § 1163(a) or both and that such violation, if any, proximately caused the accident. Plaintiff's motion for partial summary judgment on the issue of defendant's liability cannot be granted if triable issues of fact remain as to whether defendant failed to exercise due care to avoid the accident (*see Hernandez v N.Y.C. Transit Auth.*, 52 AD3d 367 [1st Dept 2008]).

Defendant testified that she activated her left directional control approximately half a block away from the traffic signal, and remained stopped at the red light behind one vehicle for less than 30 seconds before the light turned green. Nothing obstructed defendant's view of the crosswalk to her left. When the light turned green, the vehicle in front of defendant's vehicle proceeded straight through the intersection. Before beginning the turn from Barretto Street onto Garrison Avenue, defendant looked to her left, then to her right. When defendant looked to her left, there were no pedestrians waiting at the corner, entering the crosswalk or in the crosswalk. After looking in both directions, defendant started her turn. The accident happened when the front of defendant's vehicle reached the crosswalk. Defendant's highest rate of speed while making the turn was 5 miles per hour; she knew this because she looked at her speedometer while turning. Defendant did not recall where she was looking immediately prior to the impact and did not see plaintiff at any time prior to the impact; however, defendant was looking to her left as she started her turn. Defendant testified that the accident occurred "a couple of seconds" after the light turned green; however, given the stenographer's transcription of this line of

questioning, this particular answer is not wholly informative on the point.

Defendant's stop at the intersection with the appropriate turn signal engaged and proceeding at a reasonable speed upon the light turning green only after looking to the left and right raises issues of fact as to whether she exercised due care (*see Olson v Dougherty*, 128 AD2d 920 [3rd Dept 1987]), even though she looked at her speedometer during the turn (*see Russell, supra*).

Given that the transcription of the questioning and testimony with regard to the duration of the turning maneuver appears to be problematic, the court is not prepared to state that the mere act -- in the abstract, given the absence of additional details -- of averting one's eyes from a roadway, even if nearing a pedestrian crosswalk, to engage in an act incidental to the operation of a motor vehicle is negligent, given that the testimony alluded to does not establish or permit the court to infer that the diversion of defendant's gaze was of such duration and occurring in a critical point in the maneuver to conclude, as a matter of law, that defendant's conduct fell below the permissible standard of care of a vehicle operator approaching a pedestrian crosswalk from a left turn. Notably, the testimony relied upon did not involve defendant averting her eyes from her path of travel, in heavy traffic, to perform a task unnecessary and unrelated to the act of driving (*cf. Andre v Pomeroy*, 35 NY2d 361 [1974]), continuously failing to observe traffic conditions (*cf. Zhenfan Zhang v Yellow Transit Corp.*, 5 AD3d 337 [1st Dept 2004]), failing to keep a proper lookout for a protracted period of time (*cf. Filippone v All Island Lease A Car*, 201 AD2d 433 [1st Dept 1994]), failing to avoid a pedestrian she had earlier observed (*cf. Arias v Tiao*, 123 AD3d 857 [2d Dept 2014]), failing to recall where she was looking for the interval of time leading up to the accident (*cf. Fried v Misser*, 115 AD3d 910 [2d Dept 2014]) or wholly failing to look for pedestrians prior to turning (*cf. Sarac-Marshall v Mikalopas*, 125 AD3d 570 [1st

Dept 2015]). Viewing the evidence in the light most favorable to defendant as the non-moving party, summary judgment cannot be granted to plaintiff on the issue of defendant's liability.

Accordingly, it is

ORDERED, that plaintiff's motion for leave to renew the October 23, 2018 decision and order of the undersigned, which denied her motion for partial summary judgment on the issue of defendant's negligence in causing the subject motor vehicle accident, is denied.

The parties are reminded of the September 20, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: September 18, 2019



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