

Ahmed v Garzon

2019 NY Slip Op 34892(U)

August 28, 2019

Supreme Court, Kings County

Docket Number: Index No. 506052/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 506052/2017

SEP # 002

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

OVE AHMED AND JASIM AHMED,

Plaintiffs,

against

JOSE FERNANDO GARZON AND AMITY HOSIERY, Co.,
INC.,

Defendants.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other	<u> </u>

Plaintiff Ove Ahmed's motion for summary judgment on her negligence claim against defendants is decided as follows:

Factual Background

Plaintiff commenced this action for damages based on injuries she allegedly suffered in an accident on February 12, 2016. Plaintiff testified at her deposition that the accident took place at the intersection of Highland Avenue and 169th Street (plaintiff's deposition transcript at 38).¹ She further testified that, while the green walk sign was active, she and her friend, Ismat Khan, crossed Highland Avenue within the crosswalk (*id.* at 46-51). Plaintiff testified that when they were in the middle of the crosswalk, she saw defendants' van approach from 169th Street (*id.* at 51, 54-44). They both yelled at the van to stop (*id.* at 51-52). Plaintiff testified that defendants' van struck her on her left side (*id.* at 55-56). She further testified that, once she was hit, she fell

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¹ Defendant Garzon and the police report both state that the accident took place at 168th Street. At her deposition, plaintiff testified that the police report was incorrect, and the accident occurred at 169th Street (plaintiff's deposition transcript at 40-41).

and rolled for more than ten feet (*id.* at 62-63). She came to a stop underneath the front of the van (*id.* at 64).

Both plaintiff and Ms. Khan also submit sworn statements in support of plaintiff's motion. In their statements, they provide similar descriptions of the accident that largely match plaintiff's description at her deposition. They both state that Ms. Khan was able to jump out of the way of the van, but that plaintiff was not able to jump out of the way and was hit.

Defendant Garzon testified at his deposition that he turned left from 168th Street on to Highland Avenue (defendant Garzon's deposition transcript at 24, 32). As he did so, he said he saw two people and applied his breaks (*id.* at 33). He claimed that one of the two people jumped as his van came to a stop, and the other stood still (*id.* at 39-40). He initially testified that he did not feel his vehicle hit either person (*id.*) He later admitted that his van hit the person who had not jumped out of the way (*id.* at 62-63). Based on the testimony of plaintiff and Ms. Khan, the person who did not jump out of the way was plaintiff. Defendant Garzon later admitted at his deposition that the first time he saw plaintiff was after the accident, when plaintiff was on the ground (*id.* at 40, 63).²

Plaintiff submits a certified copy of the police report of the accident. In the report, the officer recounts that defendant Garzon admitted to the officer that defendant hit plaintiff in the crosswalk. Defendant Garzon first testified that he did not recall speaking with the officer (*id.* at 49), and did not remember saying what is stated in the report (*id.* at 50). Later in the deposition,

² Earlier in his deposition, defendant Garzon testified that a "woman" was outside of the crosswalk, but he does not say which woman (*id.* at 34). Additionally, it is clear from his testimony that the woman's presence outside the crosswalk was after the accident occurred (*id.* at 34-35).

defendant Garzon admitted to speaking with the officer, and testified that he said only that he “passed the line and [he] saw two people (*id.* at 66-67). He also testified that the officer did not speak with him about hitting anyone (*id.*).

Plaintiff also submits a copy of the traffic summons that the reporting officer issued to defendant. The summons states that plaintiff was cited for violation of New York City Administrative Code § 19-190(b). Defendant verified at his deposition that this was a copy of the summons issued to him (*id.* at 49-50). Plaintiff also submits a document purporting to show the disposition of the summons, but the document is hearsay. The document is not certified, and there is no testimony authenticating or providing foundation for the document, and so it is not admissible (*Cheul Soo Kang v Violante*, 60 AD3d 991, 991 [2d Dept 2009]). Defendant Garzon testified at his deposition that he did not recall pleading guilty to the summons, but he understood that “the company” paid the fine (defendant Garzon’s deposition transcript at 50-51).

Analysis

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff asserts that defendant violated VTL §§ 1111, 1112, and 1146, as well as New York City Administrative Code § 19-190(b). Specifically, plaintiff references the portion of VTL § 1111 that states that traffic, turning left or right from a green signal “shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk”. Plaintiff also argues

that she had the right of way pursuant to VTL § 1112, which states that “[p]edestrians facing [a “walk”] signal may proceed across the roadway in the direction of the signal and shall be given the right of way by other traffic.” Additionally, VTL § 1146 states, in relevant part, “Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.” Finally, New York City Administrative Code § 19-190 states, in relevant part:

a. Except as provided in subdivision b of this section, any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way shall be guilty of a traffic infraction, which shall be punishable by a fine of not more than fifty dollars or imprisonment for not more than fifteen days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall be subject to a civil penalty of not more than one hundred dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, “motor vehicle” shall have the same meaning as in section one hundred twenty-five of the vehicle and traffic law.

b. Except as provided in subdivision c of this section, any driver of a motor vehicle who violates subdivision a of this section and whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than two hundred fifty dollars, or imprisonment for not more than thirty days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall also be subject to a civil penalty of not more than two hundred fifty dollars which may be recovered in a proceeding before the environmental control board. For purposes of this section, “physical injury” shall have the same meaning as in section 10.00 of the penal law.

Based on plaintiff’s testimony, her affidavit, Ms. Kahn’s sworn statement and the police report, plaintiff has made a prima facie case that she was lawfully in the crosswalk with the right of way at the time of impact (*Hollis v Marinelli*, 149 AD3d 922, 923 [2d Dept 2017]; *Huang v Franco*, 149 AD3d 703, 703 [2d Dept 2017]). Defendant’s testimony is not sufficient to rebut

plaintiff's prima facie showing. Defendant testified that he did not see plaintiff until after the accident when she was on the ground. Consequently, he cannot challenge plaintiff's testimony that she was in the crosswalk at the time of the accident, and did not leave the crosswalk until after she was hit and rolled at least ten feet. Accordingly, plaintiff's motion for summary judgment is granted.

This constitutes the decision and order of the court.

August 28, 2019

DATE



DEVIN P. COHEN
Justice of the Supreme Court

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