

Ang v Cesario

2019 NY Slip Op 35100(U)

November 22, 2019

Supreme Court, Queens County

Docket Number: Index No. 703405/19

Judge: Robert I. Caloras

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5/11/2020

9:37 AM

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

COUNTY CLERK

PRESENT: HON. ROBERT I. CALORAS

PART 36 QUEENS COUNTY

Justice

-----X
GEORGE ANG,

Index No. 703405/19
Motion Date: 10/10/19
Motion Cal. No. 2
Seq. No. 1

Plaintiff,

-against-

LOUIS CESARIO and AMY CESARIO,
Defendants.

-----X

The following papers numbered E15-E28 read on this motion by the plaintiff for an order pursuant to CPLR 3212 granting him partial summary judgment on the issue of liability as against the defendants.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits.....	E15-E22
Affirmation in Opposition-Exhibits.....	E23-E26
Reply Affirmation.....	E27-E28

Upon the foregoing papers, it is ordered that plaintiff's motion is granted as follows:

This action arises out of a motor vehicle accident that occurred on January 23, 2019, at the intersection of Parsons Boulevard and Union Turnpike, in the County of Queens, State of New York, wherein plaintiff alleges that the vehicle owned by defendant Louis Cesario and operated by defendant Amy Cesario (Hereinafter "Cesario" or Ms. Cesario") struck him while he was crossing the street within the crosswalk, and with the traffic control light in his favor.

Plaintiff now moves for order pursuant to CPLR § 3212 granting him summary judgment on the issue of liability as against the defendants, dismissing defendants' Affirmative Defenses of comparative negligence, and setting this action down for a trial on an assessment of damages. Plaintiff has submitted the following: Summons and Verified Complaint; plaintiff's deposition transcript; defendant Cesario's deposition transcript; certified police report; and Melissa Maria Matthews' affidavit, notarized on August 22, 2019.

At his deposition, plaintiff testified that he was crossing the street in the crosswalk with the light in his favor, and after he had looked both ways, but before he reached the concrete median, he was suddenly struck by defendants' car that was making a left turn onto Union Turnpike from Parsons Boulevard. During the entire time plaintiff was crossing, the traffic light did not change from green to red. Plaintiff testified that he never saw defendants' car before the accident, despite looking both ways. Plaintiff never heard any horns or brakes screeching prior to impact, and testified that the front of the defendants' car had made contact

with his body. After the impact, plaintiff testified that defendant Cesario came out of her car and told him "I'm sorry, I didn't see you."

At her deposition, defendant Cesario testified that she was the lead vehicle, stopped at the light, waiting to make a left turn. After the light turned green, she began inching her vehicle forward, and continued looking to see if she could make a left turn and if any other cars coming. Ms. Cesario testified that she saw the plaintiff for the first time in the crosswalk "Right as when he was in front of my car. I didn't see him at any point before - - before that point". Ms. Cesario testified that she "slammed on the brake" as soon as she saw the plaintiff in the crosswalk, and that the "very front of the car" had hit the pedestrian."

The certified police report stated the following:

AT TPO DRIVER OF VEHICLE STATES SHE WAS MAKING A LEFT TURN ONTO UNION TURNPIKE FROM PARSONS BVD AND DID NOT SEE THE PEDESTRIAN CAUSING HER TO HIT HIM. PEDESTRIAN STATES HE WAS CROSSING THE INTERSECTION AT THE CROSSWALK WITH THE SIGNAL WHEN THE DRIVER HIT HIM IN THE CROSSWALK.

At her deposition, Ms. Cesario agreed that this statement in the police report fairly and accurately represented what she told the police at the scene of the accident.

In her affidavit, Melissa Maria Matthews, a nonparty witness, stated that her vehicle was the third vehicle in line from the light. Ms. Matthews saw the plaintiff crossing in the crosswalk with the light in his favor, when the defendant Cesario's vehicle struck the plaintiff. Ms. Matthews also stated that after the accident Ms. Cesario was "apologetic", and stated that she was sorry "multiple times."

Based upon the foregoing, plaintiff argues that he is entitled to summary judgment on the issue of liability, because the evidence shows that this accident was the fault of the defendants and plaintiff is free from any comparative fault.

In opposition, defendants have submitted a copy of the decision issued by Hearing Officer Karin Bassemi on March 25, 2019, and Ms. Cesario's affidavit. After a hearing on March 11, 2019, Administrative Law Judge Bassemi determined that Ms. Cesario was not negligent, in that she proceeded with all due care and that she cannot be faulted for a pedestrian that was not waiting at the light and was not visible before the accident. In light of this decision, defendants argue that the doctrine of collateral estoppel applies, and this action should be dismissed.

Defendants also argue that plaintiff failed to submit admissible evidence showing that no issues of fact exist. Defendants claim that pursuant to CPLR 3116, Ms. Cesario's transcript is not admissible because she did not sign it. Defendants also argue that plaintiff's deposition transcript fails to show that he exercised due care, and failed to see what should

have been seen. Defendants further claim Ms. Matthews' affidavit is without merit, because plaintiff testified that the woman he knew from the bank never came to the scene, and she was not listed on the "Certified Police Report" .

Under these circumstances, defendants argue that the plaintiff has not demonstrated a *prima facie* entitlement to summary judgment, as there are triable issues of fact as to how the accident occurred.

In reply, plaintiff asserts, among other things, that he is not collaterally estopped from litigating the issue of defendants' liability and comparative fault, because he did not have a full and fair opportunity to litigate the allegations in the Summons issued to Ms. Cesario before ALJ Bassemi. Plaintiff asserts that he never: received notice about this proceeding; received an opportunity to appear at that prior hearing; appeared at the prior proceeding; hired counsel to represent his interests at the prior proceeding; cross-examined Ms. Cesario at that proceeding; reviewed or presented evidence in that proceeding; and did not have the opportunity to testify or present witnesses in that proceeding. Plaintiff also argues that Ms. Cesario's deposition transcript is admissible, because it was certified by the Court Reporter on August 30, 2019, and was mailed to defendants' counsel for review on September 17, 2019.

To prevail on a motion for summary judgment on the issue of liability in an action alleging negligence, a plaintiff has the burden of establishing, *prima facie*, not only that the defendant was negligent, but that the plaintiff was free from comparative fault, since there can be more than one proximate cause of an accident (see Voskoboinyk v Trebisovsky, 154 AD3d 997 [2d Dept. 2017]; Harth v Reyes, 151 AD3d 1031 [2d Dept. 2017]; Phillip v D & D Carting Co., Inc., 136 AD3d 18, 22 [2d Dept. 2015]). Where the movant has established his or her entitlement to judgment as a matter of law, the opposing party may defeat the motion by submitting sufficient evidence to raise a triable issue of fact as to the movant's comparative fault (see Harth v Reyes, supra at 1032; Zhu v Natale, 131 AD3d 607, 608 [2d Dept. 2015]; Brown v Mackiewicz, 120 AD3d 1172, 1173 [2d Dept. 2014]).

A driver of a motor vehicle has both a statutory duty to use due care to "avoid colliding with pedestrians on the roadway" and a common law duty to "see that which he should have seen through the proper use of his senses" (Barbieri v Vokoun, 900 N.Y.S.2d 315, 318 [2d Dept. 2010]; Sappleton v Metro. Suburban Bus Auth., 140 A.D.2d 684, 684 (2d Dep't 1988)). Section 1146 of the New York Vehicle and Traffic Law ("VTL") provides that all motor vehicle drivers must "exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway." VTL § 1116 also provides that "pedestrians facing any steady green signal . . . may proceed across the roadway within any marked or unmarked crosswalk", and VTL § 1112(a) provides that "Pedestrian facing [walk] signal may proceed across the roadway in the direction of the signal and shall be given the right of way by traffic". Further,

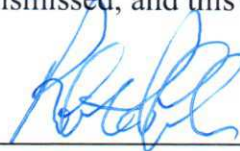
Section 4-04 of Title 34 of the Rules of the City of New York ("RCNY") provides that motor vehicle operators "shall yield the right of way to a pedestrian crossing a roadway within a crosswalk when the pedestrian is in the path of the vehicle or is approaching so closely thereto as to be in danger" when traffic control or pedestrian control signals are either not present or not in operation (34 RCNY 4-0[b]). Section 4-04 further requires that "the operator of a vehicle shall exercise due care to avoid colliding with any pedestrian" (34 RCNY 4-04[d]).

Here, the Court finds that the plaintiff established his *prima facie* entitlement to judgment as a matter of law on the issue of liability through his deposition transcript and Ms. Matthews' affidavit, which indicated that he looked both ways before entering the crosswalk, was not comparatively at fault in the happening of the accident, and that defendant Cesario's failure to yield the right-of-way to him was the sole proximate cause of the accident (see Voskoboinyk v Trebisovsky, supra at 998; Gomez v Novak, 140 AD3d 831, 831-832 [2d Dept. 2016], lv dismissed 28 NY3d 1131 [2017]; Zhu v Natale, 131 AD3d 607, 608 [2d Dept. 2015]; Brown v Mackiewicz, 120 AD3d 1172, 1173 [2d Dept. 2014]; Qamar v Kanarek, 82 AD3d 860, 861 [2d Dept. 2012]). The Court also finds that Ms. Cesario's statement in the police report is admissible under the party admission exception to the hearsay rule (Scott v Kass, 48 AD3d 785 [2d Dept. 2008]; Penn v Kirsh, 40 AD2d 814 [1st Dept. 1972]), and further demonstrated, *prima facie*, that she was negligent, and that plaintiff was not comparatively at fault in the happening of the subject accident.

The Court also finds that defendants have failed to raise a triable issue of fact. Initially, the Court notes that Ms. Cesario's affidavit was not properly notarized. The notary stated that Ms. Cesario's affidavit was "Sworn to me this 30 day of, 2019. The notary did not state the month that this affidavit was notarized on. As such, the jurat is defective, and this affidavit will not be considered by the Court in determining this motion. Even if the Court were to consider Ms. Cesario's affidavit, it merely raises feigned issues of fact and is not sufficient to defeat plaintiff's entitlement to summary judgment (Rosenblatt v Venizelos, 49 AD3d 519 [2d Dept. 2008]). The Court also finds that defendants' claim that the plaintiff is collaterally estopped from litigating this action is without merit. In order to invoke the doctrine of collateral estoppel, otherwise known as issue preclusion, the following two elements must be met: (1) the identical issue must necessarily have been decided in the prior action or proceeding and be decisive of the present action or proceeding, and (2) the litigant against whom preclusion is sought in the present proceeding had a full and fair opportunity to litigate the issue in the prior proceeding (Sucher v Kutscher's Country Club, 113 AD2d 928, 929 [2d Dept. 1985]). Contrary to defendants' contention, the plaintiff did not have a full and fair opportunity to litigate that issue at the Administrative Hearing. Accordingly, plaintiff is not estopped from pursuing this action. The Court also finds defendants' claim that Ms.

Cesario's deposition transcript is not admissible to be without merit. The transcript plaintiff submitted for Ms. Cesario's deposition was certified by the Court Reporter, and plaintiff mailed a copy of the transcript to defendants' counsel for review (Gallway v Muintir, LLC, 142 AD3d 948 [2d Dept. 2016]). Finally, the Court finds that defendants have failed to demonstrate that Ms. Matthews' affidavit is not admissible. Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted, defendants' Affirmative Defenses alleging that plaintiff was comparatively negligent is dismissed, and this action shall be set down for a trial on the assessment of damages .

Dated: November 22, 2019



ROBERT I. CALORAS, J.S.C.

FILED

5/11/2020

9:37 AM

**COUNTY CLERK
QUEENS COUNTY**