

Gil v Jewish Bd. of Family & Children's Servs., Inc.

2019 NY Slip Op 35161(U)

November 19, 2019

Supreme Court, Bronx County

Docket Number: Index No. 25788/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 14

-----X
GIL, MARIA

Index No. 25788/2018E

- against -

Hon. JOHN R. HIGGITT,

**JEWISH BOARD OF FAMILY AND CHILDREN'S
SERVICES, INC., et ano**

A.J.S.C.


-----X

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on **October 8, 2019** and duly submitted as No. **48** on the Motion Calendar of **November 12, 2019**

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Exhibits and Affidavits Annexed	55-62
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	65-71
Replying Affidavit and Exhibits	72-73
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject motor vehicle accident and for an order dismissing defendants' first, third, seventh, eighth, ninth, tenth, eleventh and twelfth affirmative defenses is denied, in accordance with the annexed decision and order.

Dated: 11/19/2019

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X

MARIA GIL,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 25788/2018E

JEWISH BOARD OF FAMILY AND CHILDREN'S
SERVICES, INC. and HALEY CLAIBORNE,

Defendants.

-----X

John R. Higgitt, J.

Upon plaintiff's September 24, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' October 28, 2019 affirmation in opposition and the affidavit and exhibits submitted therewith; plaintiff's November 4, 2019 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject motor vehicle accident and for an order dismissing defendants' first, third, seventh, eighth, ninth, tenth, eleventh and twelfth affirmative defenses is denied.

Plaintiff pedestrian alleges that she was injured in a mall parking lot when she was struck by the vehicle owned by defendant Jewish Board of Family and Children's Services, Inc. (Jewish Board) and driven by defendant Claiborne in the course of her employment with defendant Jewish Board.

In support of her motion, plaintiff submits the transcripts of the parties' deposition testimony and an accident report prepared by defendant Claiborne.

Defendant Claiborne testified that the accident occurred while she was backing out of a parking space, and that she did not see plaintiff prior to the accident, despite having checked to her left and right and in the rear-view camera prior to putting the vehicle in reverse gear and continuing to check while backing out. She further testified that she was traveling at a speed of approximately one mile per hour and was unaware of an accident until alerted by noise coming from outside the

vehicle.

Plaintiff asserts that this testimony establishes defendant Claiborne's violation of Vehicle and Traffic Law § 1146(a),¹ requiring drivers to exercise due care to avoid pedestrians on roadways, and that defendant Claiborne's testimony that she did not see plaintiff prior to the accident establishes plaintiff's freedom from negligence as a matter of law.

The aspect of plaintiff's motion for partial summary judgment on the issue of defendants' liability cannot be granted if triable issues of fact remain as to whether defendants failed to exercise due care to avoid the accident (*see Hernandez v N.Y.C. Transit Auth.*, 52 AD3d 367 [1st Dept 2008]).

"Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be" (*Russell v Adduci*, 140 AD2d 844, 845-46 [3rd Dept 1988] [citation omitted]). Negligence does not follow merely from the happening of an accident (*see Marceau v Rutland R. Co.*, 211 NY 203 [1914]). Defendant Claiborne's testimony that she proceeded only after looking for traffic and that she continued to check while backing out of the parking space raises issues of fact as to whether she exercised due care (*see Olson v Dougherty*, 128 AD2d 920 [3rd Dept 1987]), even though she did not see plaintiff.

Notably, the testimony relied upon did not involve defendant Claiborne 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

¹ Vehicle and Traffic Law § 1146(a) is applicable to vehicles traveling in parking lots (*see Vehicle and Traffic Law § 1100[a]*).

accident (*cf. Fried v Misser*, 115 AD3d 910 [2d Dept 2014]) or wholly failing to look for pedestrians prior to moving (*cf. Sarac-Marshall v Mikalopas*, 125 AD3d 570 [1st Dept 2015]). Viewing the evidence in the light most favorable to defendants as the non-moving parties, summary judgment cannot be granted to plaintiff on the issue of defendants' liability.

The aspect of plaintiff's motion with regard to dismissal of defendants' affirmative defenses was premised solely upon reference to defendant Claiborne's deposition testimony,² which testimony was insufficient to affirmatively establish, as a matter of law, plaintiff's freedom from negligence or that plaintiff's negligence, if any, was not a proximate cause of the accident. Plaintiff failed to tender sufficient admissible evidence to eliminate any material issue of fact as to plaintiff's freedom from comparative fault (*see Winegrad v City of New York*, 64 NY2d 851, 853 [1985]), and thus failed to shift the burden on that issue (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject motor vehicle accident and for an order dismissing defendants' first, third, seventh, eighth, ninth, tenth, eleventh and twelfth affirmative defenses is denied.

The parties are reminded of the February 24, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 19, 2019



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

² It is not the court's function or obligation on a summary judgment motion to search for and ascertain the import of any appended document in the absence of movant's affirmative demonstration of a specified relationship between the exhibit and an argument presented to the court (*see e.g. Menda v 12-14 E. 37th Dev. Corp.*, 57 Misc 3d 1219[A], 2017 NY Slip Op 51553[U], at *7 fn 5 [Sup Ct, N.Y. County 2017]).