

Boone v Farley

2020 NY Slip Op 30666(U)

February 26, 2020

Supreme Court, Kings County

Docket Number: 519556/2018

Judge: Bruce M. Balter

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KINGS COUNTY CLERK
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2020 FEB 27 AM 10:00

At IAS Part 13 of the Supreme Court of the State of New York, Kings County, 320 Jay Street, Brooklyn, New York 11201, on the 26th day of February 2020.

PRESENT:

HON. BRUCE M. BALTER,
J.S.C.

DWAYNE BOONE, X

Plaintiff

-against-

CHARLAINE FARLEY,

Defendant.

X

DECISION /ORDER

Index No.: 519556/2018

Motion Date: 02/18/2020

Motion Cal. No: 2

Motion Sequence: 1

Plaintiff's motion for an order, pursuant to CPLR§ 3212 granting summary judgment in favor of plaintiff and against the defendant on the issue of liability, and (2) granting summary judgment in favor of the plaintiff and against the defendant on the issue of damages holding that the plaintiff has sustained a serious injury' within the meaning of the Insurance Law, and (3) granting such other and further relief as to this Court may seem just and proper. Defendant opposes the motion.

FACTS AND PROCEDURAL HISTORY

This action for personal injuries arises out of a motor vehicle accident which occurred on February 21, 2018 at Farragut Road, at or about its intersection with East 93rd Street, in the County of Kings. At the time of the accident, plaintiff was within the crosswalk as he was crossing Farragut Road with the walk sign when he was struck by the defendant's vehicle. Defendant was making a left turn on East 93rd Street and failed to yield the right of way. Defendant concedes that she failed to see plaintiff prior to the accident. As a result of the accident, the plaintiff sustained cervical and lumbar spine injuries resulting in multiple epidural steroid injections, trigger point injections and lumbar discectomy surgery. A summons and complaint was served. An answer was interposed and issue was joined. Both Plaintiff and Defendant presented for deposition testimony.

According to plaintiff's EBT testimony, he had just left work and he was walking to the train to go home. He was crossing the street in the crosswalk on Farragut Road and at either 93rd or 92nd Street. There was a pedestrian signal at the location he was trying to cross and crosswalk with white lines. Approximately a second after he approached the crosswalk the pedestrian signal turned from the red hand "do not walk" to the figure of a person walking "walk" signal. Before

he attempted to cross the street, he looked over to his left and did not see any cars. He was halfway across the crosswalk when the accident happened and he was walking at a slow pace. He felt the contact of the car hitting him. He did not hear horns or screeching tires. The parts of his body that made contact with the vehicle were his left leg, left shoulder, neck and back. As a result to the impact to his body, he was pushed to the ground. According to defendant's EBT testimony, she was operating her vehicle on 93rd and Farragut Road. She approached the intersection to make a left hand turn. The traffic was medium to heavy and she had to wait for five to seven cars to pass her on the opposite side before she could make the left hand turn. Nothing in her vehicle distracted her attention. She did not see anyone walking in the crosswalk and only saw the Plaintiff about a split second before the accident occurred and she stepped on her break and pulled the emergency break. Her vehicle came into contact with the Plaintiff. The middle front of her car came into contact with the Plaintiff. She saw him fall to the ground and she observed that her vehicle hit him on his left side, possibly his left knee. She observed that he was hurt and that he couldn't stand on his leg. She asked the Plaintiff if he was ok and called an ambulance. The Defendant was issued a Summons at the scene of the accident which states "respondent was traveling westbound and while attempting left turn onto East 93 rd Street did strike pedestrian in marked crosswalk causing injury. As per The Office of Administrative Trials and Hearings the Defendant's hearing was held on April 10, 2018. She paid the full amount of the summons of \$250.00 and was charged with Code Section AC 19-190(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.

STATUTORY AUTHORITY AND APPLICABLE CASE LAW

The law is well settled that a pedestrian has the right to lawfully finish crossing a street and that the vehicle around him must yield to him and allow him to finish (New York Vehicle and Traffic Law, §§ 1111,1151). Section 1151(a) of the Vehicle and Traffic Law states that:

(a) When traffic control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling or when the pedestrian is approaching so closely from the opposite half of the

roadway as to be in danger, except that any pedestrian crossing a roadway at a point where a pedestrian tunnel or overpass has been provided shall yield the right of way to all vehicles.

It is the law in New York that a driver must yield to a pedestrian when they are in the crosswalk. Vehicle and Traffic Law § 1151 requires vehicles to yield the right-of-way to a pedestrian within a crosswalk (*Fan v. Buzzitta*, 42 A.D.2d 40, 344 N.Y.S.2d 788).

Section 4.-03 entitled Traffic signals' (34 RCNY § 4-03) states that

(a)(1) Green alone: (i) Vehicular traffic facing such signals may proceed straight through or turn right Or left unless a sign at such place prohibits any such movement. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.

(e)(1) WALK, green hand symbol or green walking figure. Pedestrians facing such signal may proceed across the roadway in the direction of the signal in any crosswalk. Vehicular traffic shall yield the right of way to such pedestrians.

ANALYSIS

It is clear that the defendant violated the sections of applicable law. The plaintiff testified that he was within the crosswalk, in favor of a WALK sign and the driver failed to yield to him. The defendant herself admitted that she still had the green light as she was making the left turn and at themoment of Impact, meaning that the plaintiff still had the walk sign on 93rd Street. Therefore, plaintiff clearly had the right of way and the defendant violated the above laws.

Not only is this violation negligence, but as the cases below clearly show, with these set of facts, plaintiff is entitled to summary judgment on the issue of liability. The plaintiff pedestrian was crossing the street in a crosswalk with the traffic signal in his favor when, as he was about half of the away across the street, he was struck on his left side by the defendants' vehicle as it was making a left turn. The evidence submitted by the plaintiff established, as a matter of law, that the defendant driver violated Vehicle and Traffic Law § 1112(a) and that the plaintiff was free from comparative negligence. See *Klee v. Americas Best Bottling Co., Inc.* (2009 NY Slip Op).

Plaintiff has made a prima facie showing of his entitlement to judgment as a matter of law by demonstrating he Was crossing the street, within the crosswalk, with the light in his favor, when he was struck by defendant's vehicle, which was making a left turn. See *Zabusky v Cochran*, 234 AD2d 542 (1996). Defendant's speculation as to plaintiffs' alleged comparative negligence is unsupported and is insufficient to raise an issue of fact. See *Jefmin v. APA Truck*

Leasing Co., 237 AD2d 255 (1997).

It is uncontested that plaintiff was within the crosswalk when he was hit. Even more, plaintiff diligently crossed the street when looked left and only then proceeded to cross the street. Further, as shown above, the defendant had a duty to yield the right of way to the plaintiff, but she clearly failed to do so. In fact, the defendant failed to keep a reasonably careful look out for pedestrians. As stated above, the defendant testified that she never saw the plaintiff pedestrian prior to a second before the impact in which he fell to the ground. Had the defendant kept a reasonably careful look out for pedestrians, she would have seen the plaintiff crossing the street. Defendant's violation of statute, designed to protect the public against injury, makes defendant absolutely liable to Plaintiff, Defendant's violation of statutes creates a cause of action not dependent on proof of specific acts of negligence of defendant, nor is the cause of action affected by the plaintiffs lack of care. *Van Gaasbeck v. Webatuck Cent. School Dist.* 21 N.Y.2d 239, 287 N.Y.S.2d 77, 234 N.E.2d 243 (N.Y. Ct. of Appeals, 1967). *Koenig v. Patrick Const. Corp.* 298 N.Y. 313, 33 N.E.2d 133 (N.Y. Ct. of Appeals, 1948). *Deutsch v. Davis*, 750 N.Y.S.2d 84 (App. Div. 2nd Dep't., 2002) (violation of ordinance which imposes a duty which may give rise to tort liability proximately caused by its violation). Accordingly, in this case, summary judgment is the appropriate remedy as against defendant, for his multiple statutory violations. Defendant's failure to allow the plaintiff to exit the cross-walk amounted to a violation of statute and was negligence "per se" and merits a grant of summary judgment. See New York Vehicle and Traffic Law, §§ 1111, 1151. See *Baldwin v. Degenhardt*, 1993, 82 N.Y.2d 867, 609 N.Y.S.2d 563, 631 N.E.2d 569 (N.Y. Ct. Of Appeals, 1993). See also *Gadon v. Oliva*, 294 A.D.2d 397, 742 N.Y.S.2d 122 (2nd Dept. 2002).

Regarding plaintiff's alleged comparative negligence, there is no evidence that plaintiff was negligent. However, even if we assume that a question of fact exists, such question of fact does not prevent summary judgment on liability to be granted to the plaintiff. The Court of Appeals in *Rodriguez v. City of NY*, 31 NY3d 312 (Ct. of Appeals 2018); 2018 NY Slip Op 02287, stated as follows:

This appeal requires us to answer a question that has perplexed courts for some time: Whether a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability, when, as here, defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence. Stated differently, to obtain partial summary judgment in a comparative negligence case, must plaintiffs establish the absence of their own comparative negligence. We hold that a plaintiff does not bear that burden. "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." *Rodriguez v. City of NY*, 31 NY3d 312 (Ct. of Appeals 2018); 2018 NY Slip Op 02287.

Therefore, summary judgment on liability should be granted, summary judgment holding plaintiff free of comparative negligence should be granted and affirmative defense contained in defendant's answer should be stricken. Even if this court finds that a question of fact as to

whether plaintiff was comparatively negligent exists, summary judgment on liability as against the defendant should be granted. Therefore, summary judgment on liability should be granted. In sum, plaintiff is entitled to summary judgment on the issue of liability, since he had the right of way and could not avoid the subject accident.

CONCLUSION

Plaintiff has clearly established his entitlement to an order, pursuant to CPLR§ 3212 granting summary judgment in favor of plaintiff and against the defendant on the issue of liability, and accordingly, that branch of the motion is GRANTED. However, Plaintiff has failed to establish his entitlement to summary judgment against the defendant on the issue of damages holding that the plaintiff has sustained a serious injury' within the meaning of the Insurance Law, and that branch of the motion is denied without prejudice with leave to renew.

This constitutes the DECISION and ORDER of this Court.

February 26, 2020



BRUCE M. BALTER, J.S.C.

HON. BRUCE M. BALTER
JUSTICE SUPREME COURT

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