

Jin Zheng v Jinghui Xie
2020 NY Slip Op 31214(U)
May 5, 2020
Supreme Court, Kings County
Docket Number: 502507/2018
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of May, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

-----X

JIN ZHENG,

Plaintiff,

DECISION AND ORDER

Index No. 502507/2018

- against -

JINGHUI XIE,

Defendant.

-----X

The following papers numbered 1 to 4 read herein	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2
Answers/Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4

Upon the foregoing papers, defendant Jingui Xie ("Xie") moves for an order, pursuant to CPLR 3212 dismissing the Complaint and granting him summary judgment on the issue of liability, on the basis plaintiff, Jin Zheng ("Zheng"), failed to establish liability on the part of defendant for the accident. Plaintiff opposes the motion.

Background

This is an action to recover damages for injuries allegedly sustained by plaintiff Zheng on August 4, 2015, when his left foot was run over by a vehicle owned and operated by the defendant. At the time of the accident, the plaintiff claims he was in the parking lane portion of the crosswalk, attempting to cross 60th Street at its intersection with 8th Avenue, in Brooklyn, New York. The defendant now moves for summary judgment on the issue of liability contending he bears no fault for the accident.

In support of the motion for summary judgment, defendant submits the Examination Before Trial (EBT) of both plaintiff and defendant, a copy of an uncertified Police Accident Report, and a copy of the MV-104. Plaintiff testified at his EBT on October 9, 2018, that while the red, "do not walk" hand signal was displayed, he was standing on the crosswalk in the parking lane (Zheng EBT at 39). He looked to his left and saw defendant's vehicle a block away moving slowly (Zheng EBT at 37-38). He took one step forward with his left foot, less than one second before contact was made between his foot and the defendant's vehicle (Zheng EBT at 44-45). He was not sure if he heard a horn sound or screeching tires before the impact (Zheng EBT at 47). The front right tire of the vehicle stopped on his left foot, where it remained for approximately a few seconds to a minute, then moved backwards (Zheng EBT at 48). Plaintiff further testified to his belief that the car stopped either because it had hit him, or the light had just turned red (Zheng EBT at 49).

Defendant testified at his EBT on June 7, 2019, that traffic was slow, and the light was red when he reached the crosswalk at 60th Street and 8th Avenue (Xie EBT at 16). He brought his car to a complete stop at the red light. (*id.*), with the front of his vehicle was

right at the beginning of the crosswalk (Xie EBT at 19). The impact occurred a few seconds after the light turned green (see Xie EBT at 30). He stopped his vehicle immediately when he saw the plaintiff looking at the bus and turning his body to the left (Xie EBT at 23). He was unsure of his exact speed at the time of the accident but knew that he was driving slowly because he had just started moving (*id*). Had the accident not happened he was headed right across 8th Avenue, to the dispatch company door, to pick up a passenger (Xie EBT at 8).

In the instant motion, defendant claims entitlement to summary judgment as to liability as a matter of law, because there are no material issues of fact. Defendant contends there is clear evidence that indicates that the fault does not lie with the defendant, but with the plaintiff. Specifically, defendant contends that plaintiff's sudden attempt to cross the street while the defendant had a green light is the proximate cause of this motor vehicle accident. Defendant additionally contends he was lawfully proceeding in the proper lane of traffic and obeying traffic signals.

In opposition, plaintiff asserts that defendant failed to submit admissible evidence in support of the motion. Plaintiff argues that defendant's EBT transcript is inadmissible as the defendant, who cannot read English, did not execute his transcript. Additionally, plaintiff argues, at his deposition defendant testified that he did not complete, read or understand the MV-104 (Xie EBT at 33-34) although it is signed by the defendant. Plaintiff next argues that even if admissible, defendant's EBT testimony is materially inconsistent and creates issues of fact as to the credibility of defendant's allegation that he was proceeding with a green light at the point of impact. Plaintiff points out that defendant also testified that he was not moving at the time of impact. Plaintiff further argues that based

on the photo marked at defendant's EBT, the admission that the impact occurred within the middle of the moving lane raises an issue of fact as to whether the defendant should have avoided the impact or honked to warn plaintiff. Finally, plaintiff argues that there is an issue of fact as to who had the right of way.

In reply, defendant contends that his EBT transcript is admissible as it was certified by the court reporter who took down the testimony. Defendant also contends that the defendant's signed MV-104 states that defendant was proceeding straight through a green light when plaintiff rushed out in front of defendant's vehicle, without paying attention to traffic; while attempting to catch a bus. Therefore, defendant contends, plaintiff is the proximate cause of the accident as he suddenly attempted to cross the street while defendant had the green light. In support defendant points to plaintiff's EBT testimony that (a) the pedestrian traffic control device was red for "Do Not Walk;" (b) he was standing in the parking lane, which is in the street; and (c) he was looking straight ahead, not to his left or right, when the accident occurred.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (see CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that when faced with a motion for summary judgment, a court's

task is issue finding, not issue determination (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]).

A motion for summary judgment should not be granted where “the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Scott v Long Is. Power Auth., 294 AD2d 348 [2d Dept 2002]). In deciding the motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party (Nash v Port Washington Union Free School Dist., 83 AD3d 136, 146 [2d Dept 2011]). However, the court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are feigned and not genuine and any conflict in the testimony or evidence presented merely raises an issue of fact (Pryor & Mandelup, LLP v Sabbeth, 82 AD3d 731, 732 [2d Dept 2011]).

“In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident” (Ellis v. Vazquez, 155 AD3d 694, 63 [2 Dept 2017], citing Topalis v. Zwolski, 76 AD3d 524 [2 Dept 2010]). Vehicle and Traffic Law § 1146(a) provides that “every driver of a vehicle shall exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway and shall give warning by sounding the horn when necessary.” “Although a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk” (Barbieri v. Vokoun, 72 AD3d 853 [2 Dept 2010]). Defendant driver also has the common law duty “to see that which he should have seen through the proper use of

his senses” (*id.*, citing *Domanova v. State of N.Y.*, 41 AD.3d 633 [2 Dept 2007]). Vehicle and Traffic Law § 1152(a) provides that “a pedestrian crossing a roadway at any point other than within a marked crosswalk . . . shall yield the right of way to all vehicles upon the roadway.” An unexcused violation of the statutory standard of care is negligence and can create liability if found to be a proximate cause of the accident *Cordero v City of New York*, 112 AD2d 914, 916 [2d Dept 1985]; (see also *Solomon v Green Bay Sanitation Corp.*, 164 AD3d 854, 855 [2d Dept 2018];

Contrary to the plaintiff’s contention, the unsigned but certified deposition of the defendant was admissible under CPLR 3116(a), since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent” (*David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]. However, the uncertified and unsworn police report submitted by the plaintiff in support of the motion is inadmissible (see *Adobea v Juenele*, 114 AD3d 818 [2d Dept 2014]).

Here, the defendant fails to establish prima facie entitlement to summary judgment as a matter of law. In support of his motion, the defendant submits the deposition transcripts of both parties, which contain conflicting testimony as to how the accident occurred including whether defendant had stopped for a red light just prior to the accident. Given the conflicting testimony of the parties as to the happening of the accident, defendant has failed to eliminate all triable issues of fact as to whether he was at fault in the happening of the accident (*Kaziu v Human Care Services for Families & Children, Inc.*, 167 AD3d 588 [2d Dept 2018]). Furthermore, the defendant has failed to eliminate triable issues of fact as to whether he kept a proper lookout and exercised reasonable care to avoid a collision with the plaintiff (*Elkholy v Dawkins*, 175 AD3d 1487, 1488 [2d


Dept 2019)). As such, there are issues of credibility which should be determined by the trier of fact rather than on a motion for summary judgment. (Kaziu v Human Care Services for Families & Children, Inc., 167 AD3d at 588).

Accordingly, it is

ORDERED that defendant Xie's summary judgment motion on the issue of liability is denied.

The foregoing constitutes the decision and order of this Court.

E N T E R,



J. S. C.