

Gamer v Melsky

2020 NY Slip Op 31982(U)

June 23, 2020

Supreme Court, New York County

Docket Number: 150820/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

ILYA GAMER

Plaintiff,

- v -

BARNEY MELSKY,

Defendant.

-----X

INDEX NO. 150820/2019
MOTION DATE 11/14/2019
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action for personal injuries allegedly sustained by Plaintiff Ilya Gamer on April 6, 2017, when he was walking within the crosswalk located at Park Avenue and E 37th Street and was struck by Defendant Barney Melsky while operating a motor vehicle. Plaintiff now moves for summary judgment on the issue of liability. Defendant opposes the motion.

DISCUSSION

“A plaintiff makes a prima facie showing of entitlement to summary judgment by offering evidence that they were a pedestrian within a crosswalk, with the light in their favor, when they were struck by a defendant's vehicle.” (*Nannapaneni v Martinez*, 2019 WL 1878127, *1 [Sup Ct, NY County 2019], citing *Beamud v Gray*, 45 AD3d 257 [1st Dept 2007].) Vehicle and Traffic Law § 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrians.

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977.]) The court must view the

evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

A party “opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Here, Plaintiff argues that no triable issue of fact exists because Plaintiff had the right of way and Defendant admitted his liability to the reporting police officer. In support, Plaintiff submits the certified Police Accident Report (the “Report”), which reads as follows:

Operator Veh #1 states he was making a left turn, saw the pedestrian in the crosswalk, and as he was stopping, his foot slipped off the brake pedal and Veh #1 struck the pedestrian. Pedestrian states he was crossing from west to east in the marked crosswalk with the cross signal when Veh #1 struck him on his left knee, causing him to fall to the pavement. Pedestrian’s injuries were to his left knee and left arm. EMS unit 8D on scene. Reporting Officer witnessed accident.
(NYSCEF Doc No. 11 [emphasis added].)

Defendant counters that Plaintiff has failed to make a prima facie showing and submits his own affidavit in support, which reads: “I put my foot on the brake and stopped my vehicle. I saw the pedestrian jump out of the way of my vehicle and I do not believe my vehicle ever made contact with him. On the contrary, I did not feel any impact and I saw the pedestrian walking afterward without showing any sign of being struck by a vehicle.” (NYSCEF Doc No. 20.) Additionally, Defendant argues that the Report is inadmissible because, although it is certified, it fails to state that it was made in the regular course of business. (NYSCEF Doc No. 19 at ¶ 6, quoting *People v Cirilo*, 191 AD2d 342, 342-43 [1st Dept 1993].)

Plaintiff replies that the facts contained in the Report are admissible because they constitute a statement against interest made by the Defendant. Further, Plaintiff argues that Defendant's July 9, 2019 affidavit is a fabrication submitted simply to defeat the motion for summary judgment.

The court finds that Plaintiff has made a prima facie showing of entitlement to summary judgment by offering evidence that he was within the crosswalk with the light in his favor when he was struck by Defendant's vehicle. Plaintiff submits his own sworn affidavit indicating that he entered the crosswalk when the "walk" signal indicated that it was safe to cross the street. (NYSCEF Doc No. 15.) Further, the certified Report is admissible to establish that Defendant struck Plaintiff with his vehicle because it is a statement against interest. (*Penn v Kirsh*, 40 AD2d 814 [1st Dept 1972])

The only evidence offered by Defendant is his own affidavit that serves to entirely contradict his earlier statement to the police officer. However, "it is axiomatic that statements made by a party in . . . a police report . . . that are not denied by the party constitute an admission, and that later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact." (*Estate of Mirjani v DeVito*, 135 AD3d 616, 617 [1st Dept 2016].) This affidavit is insufficient to raise a triable issue of fact to defeat Plaintiff's prima facie showing of entitlement to summary judgment.


CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff Ilya Gamer's motion sequence 001 for summary judgment on the issue of liability is granted; and it is further

ORDERED that within 30 days of entry Plaintiff shall serve Defendant with a copy of this decision and order with notice of entry.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>6/23/20</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE