

Montague v T&W Rest., Inc.

2020 NY Slip Op 32988(U)

September 10, 2020

Supreme Court, New York County

Docket Number: 159324/2017

Judge: Frank P. Nervo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

-----X

ANTIONETTE MONTAGUE,

DECISION AND ORDER

Plaintiff,

Index Number

-against-

159324/2017

T&W RESTAURANT, INC. d/b/a SHUN LEE PALACE
RESTAURANT, INC. and "JOHN DOE", first and last
name being fictitious and unknown representing that
of the operator,

Defendants.

-----X
FRANK P. NERVO, J.S.C.

Plaintiff moves, pursuant to CPLR § 3212, for summary judgment in her favor. Movant previously sought identical relief in motion sequence 001; however, that motion was denied without prejudice to renew upon the completion of discovery. Plaintiff now renews contending, inter alia, that she was struck by defendant's employee while he was making deliveries on a bicycle, the employee was negligently operating the bicycle against the direction of travel on a one-way street – a violation of the Vehicle and Traffic Laws (VTL), and that she is not required to prove she was free from contributory negligence on this summary judgment motion.

Defendants oppose contending plaintiff "jay-walked" mid-block – a violation of the New York City Traffic Rules and Regulations (NYCTRR), that plaintiff was the proximate cause of her own injuries, that plaintiff's affidavit in support of her motion is contradictory to her examination before trial, that a question of fact exists as to whether the deliveryman was acting outside the scope of his employment, and plaintiff relies on inadmissible evidence in support of her motion.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing that they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As an initial matter, and as the Court held on plaintiff’s earlier summary judgment motion, the voicemail message purportedly left by defendant’s employee on plaintiff’s phone is unsworn and not properly considered on a summary judgment motion (June 28, 2019 Decision and Order at 2). It will not be considered here.

NYCTRR § 4-04(c)(3) forbids a pedestrian from crossing a New York City roadway where traffic signals “are in operation at both intersections bordering the block,” except at a crosswalk. VTL § 1127 requires that vehicles be driven “only in the direction designated” on one-way streets.

The violation of a state statute imposing a specific duty constitutes negligence per-se (*Van Gaasbeck v. Webatuck Cent. School Dist. No. 1*, 21 NY2d 239 [1967]); however, the unexcused violation of a local regulation is only some evidence of negligence, provided that such violation was a proximate cause of the accident (*Elliot v. New York*, 95 NY2d 730 [2001]). Violations of the VTL, state statutes, constitute negligence per-se (see e.g. *Devoe v. Kaplan*, 278 AD2d 734 [3d Dept 2000]). Violations of the NYCTRR, a local ordinance, constitute only some evidence of negligence, not negligence per-se (*Schneider v. Diallo*, 14 AD3d 445, 446 [1st Dept 2005]).

A plaintiff moving for summary judgment under a theory of negligence must prove the defendant(s) owed plaintiff a duty of care, breached that duty, and said breach proximately caused the plaintiff's injuries (*Palsgraf v. Long Is. R.R. Co.*, 248 NY 339 [1928]; see also *Kenny v. City of New York*, 31 AD3d 261 [1st Dept 2006]). To hold a defendant-employer vicariously liable for its employee's negligent action, a plaintiff bears the additional burden of establishing that the employee's negligent act was within the scope of his or her employment (*Riviello v. Waldron*, 47 NY2d 297 [1979]; *N.X. v. Cabrini Medical Ctr.*, 97 NY2d 247 [2002]).

Here, the uncontroverted evidence establishes that the defendant deliveryman violated VTL § 1127 in traveling down a one-way street against the flow of traffic, constituting negligence per-se. Likewise, plaintiff does not dispute she violated NYCTRR § 404(c)(3) by crossing a city street, bookended by traffic signals, outside of a crosswalk. However, plaintiff's violation does not constitute negligence per-se, but

rather is some evidence of negligence should a jury find plaintiff's violation proximately caused her injuries (*Schneider, supra*).

Notwithstanding, defendants' per-se negligence does not necessarily establish that their negligence was the proximate cause of an accident; here, the issue of proximate causation remains unsettled (*see e.g. Burghardt v. Cmaylo*, 40 AD3d 468 [2d Dept 2007]). Both plaintiff and the defendants contend the other violated traffic laws and ordinances, and both contend that the other's violation caused the accident. Thus, the issue of causation of plaintiff's accident remains a question of fact, which is a question reserved for the jury (*see e.g. Luis v. Church of St. Angela Merici*, 52 AD2d 352 [1st Dept 1976]). Under these circumstances, defendants' violation of VTL § 1127 may render them totally at fault, partially at fault, or not at fault at all (*id.*). While a plaintiff's own negligence no longer bars summary judgment under *Rodriguez*, the Court of Appeals has not vitiated the summary judgment requirement that a plaintiff establish causation (*Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

Defendants' argument that the deliveryman was acting outside the scope of his employment by traveling against one-way is academic in light of plaintiff's failure to establish causation. Were the Court to reach this issue, it would find issues of fact likewise preclude summary judgment.

An employer is liable for the negligence of an employee when the employee acts within the scope of the employment at the time the tort is committed (*Ramos v. Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005]; *see also Ramirez v. Elias-Tejada*, 168 AD3d

401 [1st Dept 2019]). This scope of employment includes acts which are reasonably incidental or attributable to the act directed by the employer (*Riviello v. Waldron*, 47 NY2d 297 [1979]). Stated differently, an employer is no less liable because the employer has not specifically directed the employee's negligent or wrong action, if the employee has taken an action reasonably related to the employee's employment (*Jones v. Weigrand*, 134 App Div 644 [2d Dept 1909]). An employer is liable for the employee's act done in the scope of his or her employment, no matter how irregularly (*id.*). Thus, the issue becomes one tied to foreseeability – whether the employee's "general type of conduct may have been reasonably expected" by the employer, although the precise act or manner of injury need not be foreseeable (*O'Boyle v. Avis Rent-A-Car*, 78 AD2d 431 [2d Dept 1981]). Such inquiry is inherently fact specific and therefore, generally, the scope of employment is a question left to the jury (*Riviello v. Waldron*, 47 NY2d at 303]; *see also Ramos v. Jake Realty Co.*, 21 AD3d at 746). Thus, the jury must determine whether the defendant deliveryman was acting within the scope of his employment when he was traveling on the roadway in question.

Accordingly, it is

ORDERED the motion is denied; and it is further

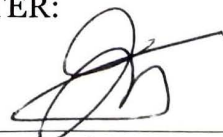
ORDERED to the extent defendants' opposition cross-moves to dismiss the complaint, such relief is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated:

Sept. 10, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.