

Kim v Mak
2020 NY Slip Op 33434(U)
October 13, 2020
Supreme Court, Kings County
Docket Number: 501330/19
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 501330/19

Motion Date: 9-14-20

Mot. Seq. No.:2

-----X
KAREN KIM AND PATRICIA CHOI,

Plaintiffs,

-against-

DECISION/ORDER

GEORGE MAK and BROOKLYN COMMUNITY
DEVELOPMENT CORP.,

Defendants.
-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:

Numbered:

Notice of Motion/Order to Show Cause
Affidavits/Affirmations/Exhibits/Memo of Law.....1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....3
Other.....

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a pedestrian knockdown accident, the plaintiffs move for an order pursuant to CPLR 3212, granting them partial summary judgment on the issue of liability against defendants GEORGE MAK and BROOKLYN COMMUNITY DEVELOPMENT CORP. and striking defendants' defense that plaintiffs' negligence contributed to the accident.

The accident giving rise to his lawsuit occurred on September 10, 2018. In support of the motion, the plaintiff submitted, among other things, the affidavit of plaintiff KAREN KIM who averred that she and her sister in law, plaintiff, PATRICIA CHOI, were crossing Shore Road in a cross-walk at its intersection with Bay Ridge Avenue in Brooklyn, when a motor vehicle operated by defendant George Make and owned by defendant Brooklyn Community Development Corp. suddenly turned from Bay Ridge Avenue onto Shore Road and struck them.

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She averred that at the time of the accident, the pedestrian signal was in his favor. Plaintiffs also submitted a copy of the certified police report in which the reporting police officer stated as follows:

AT TPO V1 STATES WHILE TURNING ONTO SHORE ROAD FROM BAY RIDGE AVENUE, HE DIDNT SEE P1 OR P2 ON AND HIT THEM. P1 & P2 STATE WHILE CROSSING STREET V1 STRUCK THEM. ...

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries” (*Tsyganash v. Auto Fleet Mall Mgt., Inc.*, 163 A.D.3d 1033, 1033–1034, 83 N.Y.S.3d 74; *see Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366). “To be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault” (*Rodriguez v. City of New York*, 31 N.Y.3d at 324–325, 76 N.Y.S.3d 898, 101 N.E.3d 366; *see Odetalla v. Rodriguez*, 165 A.D.3d 826, 826, 85 N.Y.S.3d 560; *Outar v. Sumner*, 164 A.D.3d 1356, 1356, 81 N.Y.S.3d 751; *Edgerton v. City of New York*, 160 A.D.3d 809, 811, 74 N.Y.S.3d 617). Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227).

A pedestrian who has the right of way is entitled to anticipate that motorists will obey the traffic laws that require them to yield” (*Huang v. Franco*, 149 A.D.3d 703, 703, 51 N.Y.S.3d 188). Nevertheless, a pedestrian who crosses in a crosswalk with the right-of-way may still be held comparatively negligent if he or she failed to notice an oncoming vehicle that could have

been seen by the exercise of ordinary care (*see Quintavalle v. Perez*, 139 A.D.3d 182, 30 N.Y.S.3d 81).

Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting the affidavit of plaintiff Kim which demonstrated that she and plaintiff Choi were walking within a crosswalk, with the pedestrian signal in their her favor, when the defendant failed to yield the right-of-way and struck her (*see Lazarre v. Gragston*, 164 A.D.3d 574, 575, 81 N.Y.S.3d 541; *Torres v. Werner Bus Lines, Inc.*, 157 A.D.3d 624, 624, 67 N.Y.S.3d 635; *Hines v. New York City Tr. Auth.*, 112 A.D.3d 528, 529, 977 N.Y.S.2d 238; *Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489, 490, 961 N.Y.S.2d 384).

The affidavit of plaintiff Kim was also sufficient to establish, prima facie, that the plaintiffs were not at fault in the happening of the accident and it demonstrated that before she began cross with plaintiff Choi, she exercised due care by confirming that she had the pedestrian signal in her favor and by looking for oncoming traffic before entering the crosswalk and that the collision occurred without warning (*see Wray v. Galella*, 172 A.D.3d 1446, 1447–48, 101 N.Y.S.3d 401, 402–03; *Dunajski v. Kirillov*, 148 A.D.3d 991, 992, 49 N.Y.S.3d 751; *Gomez v. Novak*, 140 A.D.3d 831, 831, 32 N.Y.S.3d 623).

In opposition to the plaintiff's prima facie showing, the defendants failed to raise a triable issue of fact as to his negligence or whether the plaintiffs were comparatively at fault in the happening of the accident. The defendants also failed to show that that the motion was not premature, as the defendants failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the

plaintiffs control (*see* CPLR 3212[f]; *Yiming Zhou v. 828 Hamilton, Inc.*, 173 A.D.3d 943, 103 N.Y.S.3d 472).

Accordingly, it is hereby

ORDRED that plaintiffs' motion is **GRANTED** in its entirety,

This constitutes the decision and order of the Court.

Dated: October 13, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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