

Laven v City of New York
2020 NY Slip Op 33840(U)
November 19, 2020
Supreme Court, New York County
Docket Number: 156803/2012
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **52**

Justice

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DANA LAVEN,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY
DEPARTMENT OF DESIGN AND CONSTRUCTION

Defendant.

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INDEX NO. 156803/2012

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of injuries sustained by plaintiffs as a result of a hit and run motor vehicle collision. Plaintiffs were pedestrians crossing at the intersection of 69th Street and Broadway, in the City, County and State of New York. Plaintiffs allege that traffic signal for vehicular traffic was red and the pedestrian signal allowed plaintiffs to begin crossing the street. Plaintiffs were struck by a motor vehicle that failed to obey the red traffic signal. An investigation by the New York City Police Department did not reveal the identity of the driver.

Defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, collectively hereinafter "City", move for summary judgment on the grounds that the location where the accident occurred is reasonably safe and the City is not the proximate cause of the accident. Plaintiffs oppose the motion on the grounds that a question of fact exists

as to the cause of the accident with respect to foliage growth blocking the traffic control device. For the reasons set forth below, the City's motion is granted, and the complaint is dismissed.

Summary Judgment Standard

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331[1st Dept 1984] *aff'd* 65 NY2d 732 [1985].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman*, 3 NY2d 395 [1957]).

Discussion

In support of its motion the City relies on the deposition testimony of the plaintiffs, as well as record searches conducted by the Department of Transportation. The City avers that no records were recovered that put the City on notice of the dangerous condition alleged by plaintiffs. Moreover, pursuant to a search conducted by the New York State Department of Motor Vehicles, there are no records of similar accidents at the location in question.

In opposition, plaintiffs rely heavily on the expert affidavit of Dr. Robert T. Hintersteiner. Dr. Hintersteiner opines that the DOT was responsible for the accident because there was a sight distance problem for the signals at West 70th Street, the trees were not properly trimmed and pedestrian signal heads were not provided on the center median island to increase visibility of the allotted time when it was safe to cross Broadway. The City argues that any arguments regarding foliage obstructing signals must be disregarded because this theory was not previously disclosed by plaintiffs.¹ In support of his opinions, Dr. Hintersteiner relies upon traffic studies of the area in question as well as surrounding locations.

Preliminarily, it is important to emphasize that the driver of the vehicle that struck plaintiffs indisputably entered the intersection against the red light. Of equal importance is that this driver is unknown and has never been located. It is this Court's position that considering the evidence submitted, any attempt to identify the cause of the accident would be complete speculation. This is equally true with the respect to the argument of overgrown foliage. The City has established its entitlement to judgment as a matter of law by submitting evidence that there was no notice of any dangerous or defective condition at the location of the accident. The record has established, as in *Lekutanovic*, that "the thoroughfare was reasonably safe to those who followed the rules of the road." *Lekutanovic v City of New York*, 44 AD3d 461 [1st Dept 2007] Plaintiffs have failed to rebut this prima facie showing. Plaintiffs reliance on the expert's opinion that overgrown foliage blocked the traffic signal causing the hit and run driver to strike the plaintiffs is mere speculation and insufficient to defeat this motion. See *Santiago v City of New York*, 61 AD3d 574 [1st Dept 2009]. Accordingly, it is hereby

¹ It should be noted that plaintiffs cross moved to amend the complaint to amplify and clarify those allegations. Accordingly, for the sake of judicial economy the Court will address that allegation.

ORDERED that defendants motion is granted in its entirety and the complaints are dismissed; and it is further

ORDERED that plaintiffs cross motion is denied as moot.

11/19/2020
DATE


LYLE E. FRANK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

**HON. LYLE E. FRANK
J.S.C.**

APPLICATION:

CHECK IF APPROPRIATE: