

Jordan v Singh

2020 NY Slip Op 34830(U)

June 15, 2020

Supreme Court, Orange County

Docket Number: Index No. EF007056-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

TAMIKO JORDAN

Plaintiff,

-against-

INDEX NO.: EF007056-2018

Seq. 2

KANCHANPREET SINGH and
SYNDICATE TAXI, INC.,

Defendant.

-----X

SCIORTINO, J.

The following papers numbered 1 to 12 were read on the motion for an order granting partial summary judgment to the defendant Singh, finding the plaintiff comparatively negligent as a matter of law:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Dwyer affirmation/ Exhibits A - F	1- 8
Cambrieri affirmation/Exhibits 1 - 2	9 - 11
Dwyer reply affirmation	12

This personal injury matter arises out of a motor vehicle incident which occurred on January 7, 2017 in the City of Middletown, Orange County, New York. Plaintiff alleges that, as she was crossing North Street, near its intersection with Wickham Avenue, she was struck by a taxi owned by Syndicate Taxi, Inc.. The cab was being operated by defendant Kanchanpreet Singh. Defendant Singh denies that his vehicle came in contact with the plaintiff.

The action was commenced with the electronic filing of a Summons and Verified

Complaint (Exhibit A) on July 10, 2018. Defendant Singh interposed an answer on October 15, 2018. (Exhibit B) Defendant Syndicate Taxi never appeared and judgment of default was granted on January 14, 2020. (Exhibit C) Note of Issue has not been filed.

The parties to this action concur on some facts:

- The incident occurred on North Street in the city of Middletown;
- The defendant was the driver of a vehicle owned by defendant Syndicate Taxi, Inc.
- The plaintiff was a pedestrian at the time of the incident.
- The plaintiff was crossing North Street at the time of the incident.
- The plaintiff was not at an intersection or a cross walk at the time of the incident.
- The plaintiff walked in front of the vehicle being driven by defendant Singh.
- The plaintiff was in the roadway when the alleged incident occurred.

The parties disagree on at least two major issues:

- The plaintiff says she was hit by the defendant's vehicle (Exhibit 1, page 22); the defendant says his vehicle never came in contact with the plaintiff (Exhibit 2, page 38);
- The plaintiff says there were no vehicles on North Street as she began to cross the street (Exhibit 1, page 24); the defendant says his vehicle was stopped for a red light and there was vehicle stopped ahead of him as the plaintiff began to cross (Exhibit 2, page 33)

The defendant seeks an order finding the plaintiff to be negligent as a matter of law. The defendant relies on Vehicle & Traffic §1152(a) which reads as follows:

(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

The defendant cites only one case in support of his application. In *Pixtun-Suret v Gevinski*, summary judgment was granted upon a finding that the plaintiff “cross[ed] the street at a location other than at an intersection, while emerging from between vehicles in the left lane of eastbound traffic,” (*Pixtun-Suret v Gevinski*, 165 AD3d 715, 715-16 [2d Dept 2018])

In opposing the defendant’s motion, the plaintiff states that issues of fact preclude summary judgment despite Vehicle and Traffic Law §1152(a). She references *Sanclimente v MTA Bus Co.* In *Sanclimente*, the Second Department found triable issues of fact where a “plaintiff ... cross[ed] the street at a point other than an intersection or a crosswalk (citations omitted).” (*Sanclimente v MTA Bus Co.*, 116 AD3d 688, 689 [2d Dept 2014]) (*see also, Billingsy v Blagrove*, 84 AD3d 848, 849 [2d Dept 2011])

The plaintiff cites Vehicle & Traffic Law §1146(a) which reads, in pertinent part:

(a) Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.

The plaintiff points to the defendant’s obligation as a driver. For example, the defendant, should have observed the plaintiff in the roadway. At his deposition, testified that he did not see the plaintiff until she was in front of his car, “on the driver’s side.” (Exhibit 2, page 34)

DISCUSSION

The defendant’s application is denied.

Summary judgment is a drastic remedy and is appropriate only when there is a clear

demonstration of the absence of any triable issue of fact. *Piccirillo v. Piccirillo*, 156 AD2d 748 (2nd Dept 1989), citing *Andre v. Pomeroy*, 35 NY2d 361 (1974). The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957) “A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact.” *Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2nd Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].

The defendant has failed to establish *prima facie* entitlement to a finding of liability of the plaintiff as a matter of law. First, Vehicle and Traffic Law §1152(a) does not expressly preclude crossing outside of a crosswalk. Rather, it puts the burden on the pedestrian to yield to traffic. The plaintiff raises questions as to traffic conditions when she began crossing the roadway. There are also questions raised as to the defendant’s compliance with the provisions of Vehicle and Traffic Law §1146(a).

While the defendant cites only one case to support his argument, there are many other cases which granted summary judgment to a defendant on similar facts. For example, in *Balliet v N. Amityville Fire Dept*, summary judgment was granted due to “the conduct of the plaintiff in crossing the street at a location other than at an intersection, while emerging from between stopped cars,” (*Balliet v N. Amityville Fire Dept*, (133 AD3d 559, 560 [2d Dept 2015]) In *Tyberg v City of New York*, the infant plaintiff “darted out from behind a bus, not within a crosswalk, directly into the path of [the defendant’s] moving vehicle. (*Tyberg v City of New York*, 173 AD3d 1239, 1240 [2d Dept 2019])

Pixtun-Suret v Gevinski, supra, and other such cases, are easily distinguished from the instant matter. The plaintiff in this matter did not “emerge” or “dart” from between parked cars. No evidence has been produced that indicate any cars were parked on the side of the roadway. The defendant makes no mention of such cars; the plaintiff, at her deposition, affirmatively states that there were no cars parked on the side of the street. (Exhibit 2, page 22) The diagram in the police report does not depict cars parked on the side of the road. (Exhibit F).

On the basis of the foregoing, the defendant’s application for summary judgment on the issue of comparative negligence is denied.

The parties shall appear for virtual settlement conference on August 12, 2020 at 9:30 a.m.

This decision shall constitute the order of the Court.

Dated: June 15, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Attorneys of Record via NYSCEF*