

Goetz v Madler

2020 NY Slip Op 35192(U)

November 10, 2020

Supreme Court, Westchester County

Docket Number: Index No. 56104/2019

Judge: Terry Jane Ruderman

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.

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 WESTCHESTER

-----X
DEBORAH A. GOETZ and MICHAEL GOETZ,

Plaintiffs,

DECISION and ORDER
Motion Sequence No. 1
Index No. 56104/2019

-against-

LUCIA J. MADLER,

Defendant.

-----X

RUDERMAN, J.

The following papers were considered in connection with plaintiffs' motion for an order granting them summary judgment on the issue of liability, and dismissing defendant's first, second and fourth affirmative defense as to culpable conduct, comparative negligence, and assumption of risk:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits A - F	1
Affirmation in Opposition	2
Reply Affirmation	3

This personal injury action involves a pedestrian knockdown accident that occurred on February 14, 2019, at approximately 4:00 p.m. Plaintiff Deborah Goetz (hereinafter, "plaintiff") asserts in her complaint that she was crossing Saw Mill River Road within a marked crosswalk at its intersection with Center Street in the Village of Ardsley, New York, when she was struck by a vehicle owned and operated by defendant Lucia Madler who was turning right from Center Street onto Saw Mill River Road northbound. In response to the complaint in this action, defendant's answer includes affirmative defenses that include culpable conduct and comparative negligence.

In support of the present motion for partial summary judgment on the issue of defendant's liability, and to dismiss the affirmative defenses relating to culpable conduct on plaintiff's part, plaintiff provides an affidavit in which she attests that before she began to cross Saw Mill River Road, she looked in both directions for traffic; as she was approximately halfway into the northbound lane, she was struck from behind by defendant, who was turning right onto Saw Mill River Road from Center Street. She states that she could not see defendant's vehicle before it struck her. It is undisputed that a stop sign controlled traffic turning from Center Street onto Saw Mill River Road, and that plaintiff, as a pedestrian, had the right of way. It is also undisputed that defendant was ticketed for a violation of Vehicle and Traffic Law § 1151 (a), failure to yield to a pedestrian in a crosswalk, for which she pleaded guilty and paid a fine.

Defendant testified at her deposition that she believed plaintiff "wasn't really at the crosswalk[,] [because] [i]f she was at the crosswalk, I would have seen her." Defendant suggested that plaintiff "just walked off the curb without looking."

Defendant has not submitted any evidentiary materials in opposition; she relies on the affirmation of counsel, who offers general rules about the legal standards for granting summary judgment. Counsel adds that defendant must be entitled to defend the case on the issues of damages and serious injury.

Analysis

In order to be awarded summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, with evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The evidence must be viewed in the light most favorable to the opponents of the motion, and every favorable inference must be afforded to the non-movants (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]). Here, viewing

the evidence in the light most favorable to defendant, and affording her every viable favorable inference, a right to partial summary judgment on the issue of defendant's liability has been demonstrated, as has a right to dismissal of the affirmative defenses relating to culpable conduct on plaintiff's part.

“[P]laintiff established, prima facie, [her] entitlement to judgment as a matter of law on the issue of liability by presenting proof that [she] was walking within a crosswalk and that [she] looked for approaching traffic before [she] began to cross” (*Hamilton v Kong*, 93 AD3d 821, 821-822 [2d Dept 2012]; see also *Gaston v Vertsberger*, 176 AD3d 919, 919-920 [2d Dept 2019]). Defendant did not submit any evidentiary materials in opposition to this motion, and although the court may consider defendant's deposition testimony which was submitted by plaintiff, defendant's testimony does not create any issues of fact that would warrant denial of plaintiff's motion. Specifically, defendant's reasoning, during her deposition, that plaintiff must not have been in the crosswalk because defendant did not see her there, amounts to mere unsupported speculation (see *Hamilton v Kong*, 93 AD3d at 822). Defendant's failure to see plaintiff before the collision does not in itself provide an evidentiary basis from which to infer that she was not there to be seen. As in *Domanova v State of New York* (41 AD3d 633, 634 [2d Dept 2007]), where the driver who struck a pedestrian in a crosswalk testified at trial that he did not see anyone in the crosswalk, “the fact that the driver never saw the [plaintiff] does not excuse [her] conduct” (*id.*). Moreover, since defendant pleaded guilty to a violation of Vehicle and Traffic Law § 1151 (a), which charge was based on her failure to yield to a pedestrian in a crosswalk, she cannot now be heard to contradict her own legal admission so as to deny plaintiff's presence in the crosswalk, especially in the absence of any explanation for her change of position, and absent affirmative proof supporting her assertion.

Plaintiff's submitted affidavit also makes a prima facie showing of her lack of comparative negligence or culpable conduct, and nothing in any evidence submitted to this Court demonstrates the existence of any issue of fact on those points. Nor is there any factual basis for an assumption of risk defense.

This determination does not eliminate defendant's right to a trial on damages, including the right to challenge whether plaintiff's injuries satisfy the serious injury threshold.

Based upon the foregoing, it is hereby

ORDERED that the motion for an order pursuant to CPLR 3212 granting partial summary judgment to plaintiffs and against defendant on the issue of liability, and dismissing defendant's affirmative defenses raising the issues of culpable conduct, comparative negligence, and assumption of the risk, is granted, and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part, at a time and manner of which they will be notified by that Part.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
November 10, 2020


HON. TERRY JANE RUDERMAN, J.S.C.