

**Muth v Corwin**

2020 NY Slip Op 35337(U)

June 30, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 601791/2020

Judge: Paul J. Baisley Jr

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SHORT FORM ORDER

INDEX NO. 601791/2020

SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:****Hon. Paul J. Baisley, Jr., J.S.C.**

KATHRYN MUTH,

Plaintiff,

-against-

NATHAN T. CORWIN and NATHAN TAFT  
CORWIN, III, LAND SURVEYOR, P.C.,

Defendants.

**ORIG. RETURN DATE:** March 20, 2020**FINAL RETURN DATE:** June 3, 2020**MOT. SEQ. #:** 001 MG**PLTF'S ATTORNEY:**JOHN COCO, PLLC  
54 SUNNYSIDE BLVD, STE I  
PLAINVIEW, NY 11803**DEFTS' ATTORNEY:**MAZZARA & SMALL, P.C.  
1698 ROOSEVELT AVENUE  
BOHEMIA, NY 11716

Upon the following papers read on this motion for partial summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated March 2, 2020; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers by defendants, dated May 27, 2020; Replying Affidavits and supporting papers by plaintiff, dated June 1, 2020; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by plaintiff for, inter alia, partial summary judgment on the issue of liability is granted; and it is

**ORDERED** that a preliminary conference is scheduled for September 25, 2020.

This is an action to recover damages for injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on August 31, 2019, at the intersection of Washington Avenue and Peconic Bay Boulevard in Riverhead, New York. Plaintiff alleges that, at the time of the accident, she was walking southbound on Washington Avenue and crossing Peconic Bay Boulevard when she was struck by a vehicle operated by defendant Nathan T. Corwin and owned by defendant Nathan Taft Corwin III, Land Surveyor, P.C.

Plaintiff now moves for partial summary judgment in her favor on the issue of liability, and for dismissal of defendants' affirmative defense alleging culpable conduct. In support of her motion, plaintiff submits, inter alia, copies of the pleadings, a copy of the certified police report, her own affidavit, and an affidavit by a non-party witness to the accident. Plaintiff's affidavit states that the accident occurred at approximately 5:00 p.m. on August 31, 2019, as she was walking south on Washington Avenue at its intersection with Peconic Bay Boulevard. Plaintiff states that the intersection

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“has a four way stop.” She further states that, upon arriving at the northeast corner of Washington Avenue and Peconic Bay Boulevard, she stopped at the corner and looked for oncoming traffic. After observing no traffic, plaintiff began to cross Peconic Bay Boulevard. As she was crossing the street, plaintiff observed defendants’ vehicle traveling west on Peconic Bay Boulevard. Defendants’ vehicle was approximately three or four car lengths away from plaintiff when she first observed it. Plaintiff’s affidavit states that defendants’ vehicle appeared to slow down as it approached the stop sign governing its direction of travel at the intersection, but that she then observed the vehicle accelerate through the intersection. She states that the front bumper of defendants’ vehicle struck her, causing her injury.

An affidavit by nonparty witness Joseph Scott was also submitted in support of plaintiff’s motion. Scott states that he was driving west on Peconic Bay Boulevard, behind defendants’ vehicle, at the time of the accident. Scott further states that, prior to the accident, he observed plaintiff walking south on Washington Avenue. Plaintiff stopped at the corner of Washington Avenue and Peconic Bay Boulevard, prior to the time that defendants’ vehicle reached the intersection. Scott states that he observed defendants’ vehicle begin to slow down as it approached the stop sign, and plaintiff then began to cross the street. He further states that defendants’ vehicle then accelerated, striking plaintiff as she crossed the street.

Defendants oppose plaintiff’s motion, contending that plaintiff’s submissions are insufficient to establish a prima facie case of negligence and that it is premature. In opposition, defendants submit, inter alia, an affidavit by Nathan Corwin, a statement by Joseph Scott, and a video of the incident. Defendants assert that there are inconsistencies between the affidavits of plaintiff and Scott, and the prior statement by Scott and video of the incident, which present questions of fact regarding the manner in which the accident occurred. In his affidavit, Corwin states that he came to a complete stop at the intersection of Peconic Bay Boulevard and Washington Avenue, and looked right and left, prior to the accident. Corwin further states that there was ornamental grass at the intersection which limited his view, but that he did not see any vehicles or pedestrians approaching the intersection from either direction. He began to proceed into the intersection when “plaintiff crossed into the path of [his] vehicle and the incident occurred.” Defendants note that the police accident report submitted by plaintiff states that a video of the incident shows that defendants’ vehicle stopped at the stop line, and they attach a copy of the video to their opposition. Defendants also submit a statement obtained from Scott, in which he states that defendants’ vehicle stopped at the stop sign prior to entering the intersection and striking plaintiff as she crossed the street.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). A party opposing a motion for summary judgment must proffer evidence of material issues of fact requiring a trial (*see Zuckerman v City of New York*, 49 NY2d at 562). 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 (*see Rodriguez v City of New York*, 31 NY3d 312, 319, 76 NYS3d 898 [2018]; *Wray v Galella*, 172 AD3d 1446, 1447, 101

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NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). 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 (*see Rodriguez v City of New York*, 31 NY3d at 324-325; *Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 789, 111 NYS3d 92 [2d Dept 2019]; *Wray v Galella, supra*).

Drivers have a statutory duty to use due care to avoid colliding with pedestrians on the roadway, as well as a common-law duty to see that which he or she should have seen through the proper use of his or her senses (*see Vehicle and Traffic Law § 1146; Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d at 790). Drivers also have a statutory duty to yield the right of way to a pedestrians crossing a roadway within a crosswalk where traffic control signals are not in place (*see Vehicle and Traffic Law § 1151 [a]*).

Here, plaintiff has sustained her burden of establishing prima facie entitlement to summary judgment on the issue of liability through the submission of the certified police report, her own affidavit and the affidavit of non-party witness Scott (*see Higashi v M&R Scarsdale Rest., LLC, supra; Wray v Galella*, 172 AD3d at 1448; *Lazarre v Gragston*, 164 AD3d 574, 575, 81 NYS3d 541 [2d Dept 2018]; *Huang v Franco*, 149 AD3d 703, 703, 51 NYS3d 188 [2d Dept 2017]; *Gomez v Novak*, 140 AD3d 831, 831-832, 32 NYS3d 623 [2d Dept 2016]). The affidavits and police report establish that, while plaintiff was crossing Peconic Bay Boulevard she was struck by defendant Corwin, who failed to yield the right-of-way.

Plaintiff having made the requisite prima facie showing of entitlement to summary judgment, the burden shifted to defendants to submit evidentiary proof in admissible form raising a triable issue of fact as to Corwin's negligence (*see Zuckerman v City of New York, supra; Wray v Galella, supra*). Defendants, however, failed to come forward with sufficient evidence to rebut the inference of negligence and to raise a triable issue of fact (*see Higashi v M&R Scarsdale Rest., LLC, supra; Wray v Galella, supra; Lazarre v Gragston, supra; Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 1297, 993 NYS2d 86 [2d Dept 2014]; *Cavitch v Mateo*, 58 AD3d 592, 593, 871 NYS2d 372 [2d Dept 2009]). Regardless of whether Corwin came to a full stop at the stop sign governing his direction of travel, the evidence establishes that he did not observe plaintiff prior to the accident, and that he failed to yield the right of way to plaintiff as she crossed at the intersection. In addition, Corwin's unsupported speculation in his affidavit that plaintiff "crossed into the path of his vehicle" is insufficient to raise a triable issue of fact in opposition to plaintiff's motion for summary judgment (*see Garcia v Lenox Hill Florist III, Inc., supra; Hamilton v King Tung Kong*, 93 AD3d 821, 822, 940 NYS2d 901 [2d Dept 2012]).

Defendants also failed to demonstrate that plaintiff's motion was premature, as they "failed to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Pierre v Demoura*, 148 AD3d 736, 737, 48 NYS3d 260 [2d Dept 2017]; *see also Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1034, 83 NYS3d 74 [2d Dept 2018]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621, 858 NYS2d 258 [2d Dept 2008]; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760, 825 NYS2d 516 [2d Dept 2006]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez*

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*v WS Distrib. Inc., supra; see also Cavitch v Mateo, supra; Conte v Frelen Assoc., 51 AD3d at 621).* Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability is granted.

Although a plaintiff is no longer required to show the absence of his or her comparative fault to establish prima facie entitlement to judgment as a matter of law as to the issue of defendant's negligence (*see Rodriguez v City of New York, 31 NY3d 312, 76 NYS3d 898*), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion (*see Higashi v M&R Scarsdale Restaurant, Inc., supra; Wray v Galella, supra; Poon v Nisanov, 162 AD3d at 808*). As previously indicated, plaintiff's submissions establish that she was struck by the vehicle operated by Corwin as she crossed Peconic Bay Boulevard, and that Corwin failed to yield the right-of-way. In opposition, defendants failed to raise any triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident (*see Higashi v M&R Scarsdale Restaurant, LLC, supra; Wray v Galella, supra*). In light of the foregoing, the branch of plaintiff's motion to dismiss defendants' affirmative defense alleging culpable conduct is granted.

Dated:

6/30/20

  
HON. PAUL J. BAISLEY, JR., J.S.C.