

Seelye v Osterby

2020 NY Slip Op 35360(U)

November 17, 2020

Supreme Court, Orange County

Docket Number: Index No. EF002642-2020

Judge: Catherine M. Bartlett

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**SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY**

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
MARY A. SEELYE and STEVE D. SEELYE,

Plaintiffs,

-against-

EILEEN V. OSTERBY,

Defendant.

To commence the statutory time period 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.

Index No. EF002642-2020
Motion Date: November 9, 2020

-----X

The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on the issue of liability only:

Notice of Motion - Affirmation / Exhibits - Affidavit	1-3
Affidavit in Opposition	4
Reply Affirmation	5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a personal injury action arising out of a pedestrian knock-down accident that occurred on February 6, 2020 shortly after 5:00 p.m. in the Village of Chester, New York. Plaintiff moves, prior to depositions, for an order granting her partial summary judgment on liability and dismissing Defendant's comparative fault defense.

A. Pertinent Facts**1. Plaintiff's Affidavit**

Plaintiff Mary A. Seelye's affidavit states:

2. On February 6, 2020, I was involved in a motor vehicle accident on West Avenue, in the Village of Chester, County of Orange, State of New York. At that time, I was a pedestrian, and I was struck by a white SUV owned and operated by the defendant.
3. Prior to the accident, I was walking on the sidewalk alongside West Avenue until the sidewalk transitions through the driveway entrance and exit to the Orange County Bank & Trust, to and from West Avenue. I proceeded to cross the driveway entrance after looking to see whether there were any vehicles coming into the intersection of the driveway and West Avenue. There weren't any coming....
4. I have reviewed the Video secured by the police, taken from the Orange County Bank & Trust....
5. As can be seen in the video, prior to being struck by defendant's vehicle, I was walking across the threshold from one end of the sidewalk, toward the other. While I was crossing the intersection, the defendant slowed her vehicle as if she was going to stop as required. The defendant had a stop sign governing her entrance onto West Ave. I thought she was going to obey the law because she slowed down. However, the defendant did not stop, and turned her vehicle into me as she began to make her left turn. After slowing down to presumably permit me to proceed, she sped up so quickly, and turned her vehicle into me, there was nothing I could do to avoid being run over.

(Seelye Aff. ¶¶ 2-5)

2. Videotape of Accident

The Bank videotape shows that (1) it was rainy and dark when the accident occurred, and Plaintiff, wearing dark clothing, was using her umbrella; (2) as Plaintiff steps from the sidewalk into the intersection Defendant's vehicle is proceeding toward the intersection from the parking lot, still a distance away; approximately two-three seconds later, (3) Plaintiff is about one-third of

the way across the intersection, and (4) Defendant's brake light comes on as she approaches the intersection, but she never brings her vehicle to a complete stop; (5) another two-three seconds later, Defendant turns left directly into Plaintiff, who is now about one-half of the way across.

3. Police Report

According to the police report, Defendant stated that she never saw Plaintiff, and that Plaintiff told her that she thought Defendant had stopped to let her cross the intersection.

4. Defendant's Proffer

Defendant submitted no affidavit in opposition to Plaintiff's motion for partial summary judgment, asserting instead that there remain triable issues of fact, that depositions are required, and that Plaintiff's motion is premature.

B. Legal Analysis

1. Plaintiff Established *Prima Facie* Entitlement to Summary Judgment

Vehicle and Traffic Law §1151(a) provides in pertinent part that

...the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling...

The term "crosswalk" is defined to mean "[t]hat part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway between the curbs, or in the absence of curbs, between the edges of the traversable roadway." VTL §110(a).

The videotape shows that Plaintiff was in the "crosswalk" thus defined at the time the accident occurred. Per VTL §1151(a), then, Plaintiff enjoyed the right of way, and Defendant was required to yield the right of way to Plaintiff, at the time the accident occurred. In addition,

VTL §1146(a) imposes upon every driver the duty to “exercise due care to avoid colliding with any ... pedestrian ... upon any roadway...”

The Second Department has consistently held that a pedestrian who, like Plaintiff here, produces evidence that she checked for traffic before entering an intersection on a crosswalk and was thereafter struck while in the crosswalk, has established *prima facie* entitlement to judgment as a matter of law. In *Cavitch v. Mateo*, 58 AD3d 592 (2d Dept. 2009), for example, the Second Department awarded a pedestrian summary judgment, writing:

The plaintiff pedestrian was crossing Ashford Avenue in the Village of Ardsley, when she was struck by a motor vehicle operated by the defendant Sterling A. Mateo (hereinafter the driver)....The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence showing that the driver violated Vehicle and Traffic Law §1151(a) by failing to yield the right of way to her as she proceeded across the roadway of Ashford Avenue in a crosswalk. The evidence submitted by the defendants in opposition failed to raise a triable issue of fact (*see* CPLR 3212[b]). Notably, the driver, in opposition to the motion, did not submit his own affidavit setting forth his version of how the accident occurred.

Cavitch v. Mateo, *supra*, 58 AD3d at 592-593. *See also*, *Garcia v. Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 1297-98 (2d Dept. 2014); *Martinez v. Kreychmar*, 84 AD3d 1037, 1038 (2d Dept. 2011); *Rosenblatt v. Venizelos*, 49 AD3d 519, 520 (2d Dept. 2008); *Zabusky v. Cochran*, 234 AD2d 542 (2d Dept. 1996).

2. Defendant Failed To Show The Existence of Any Material Issue of Fact With Respect To Her Own Negligence

Defendant proffered no affidavit setting forth her version of the accident. She admitted to the police that she never saw Plaintiff. Although her failure to observe Plaintiff walking in the middle of the intersection right in front of her may have been attributable in part to the rain, to the dark, and/or to Plaintiff’s dark clothing, it is also fairly attributable to her own negligence in

failing to bring her vehicle to a complete stop before entering the intersection in violation of VTL §1173, which provides:

The driver of a vehicle emerging from an alley, driveway, private road or building shall stop such vehicle immediately prior to driving onto a sidewalk extending across any alleyway, building entrance, road or driveway, or in the event there is no sidewalk, shall stop at the point nearest the roadway to be entered where the driver has a view of approaching traffic thereon.¹

See, Ferrara v. Castro, 283 AD2d 392, 392-393 (2d Dept. 2001). Moreover, “[a] driver is bound to see what is there to be seen through the proper use of her senses [cit.om.], and is negligent for the failure to do so [cit.om.]” *Shui-Kwan Lui v. Serrone*, 103 AD3d 620 (2d Dept. 2013). *See, Domanova v. State of New York*, 41 AD3d 633, 634 (2d Dept. 2007) (that driver failed to see pedestrian in crosswalk did not excuse his striking her in course of attempted left turn).

In short, the evidence demonstrates that Defendant was negligent in failing to bring her vehicle to a complete stop, in failing to observe Plaintiff on the crosswalk in the intersection, and in failing to yield the right of way to Plaintiff, and on none of those counts has Defendant demonstrated the existence of any triable issue of fact.

3. Defendant Failed To Show The Existence of Any Material Issue of Fact With Respect To Plaintiff’s Alleged Comparative Fault

To be sure, a pedestrian must exercise due care for her own safety, and “use [her] eyes, and thus protect [herself] from danger” (*Knapp v. Barrett*, 216 NY226 [1915]; *Pecora v. Marique*, 273 AD 705, 707 [1st Dept. 1948]), and her failure to observe the vehicle that struck

¹According to the police report, Defendant also disregarded a stop sign on the right hand side of the intersection. However, it appears from a photograph proffered by Plaintiff that this stop sign faced in a different direction and instead governed traffic emerging from a drive-up banking facility at the Orange County Bank & Trust. Hence, the Court does not rely on the existence of the stop sign.

her may depending on the circumstances raise a factual question whether she exercised reasonable care. *See, Thoma v. Ronai*, 82 NY2d 736 (1993). Here, however, Plaintiff checked for traffic before proceeding across the intersection. Plaintiff was entitled to assume that Defendant would observe the rules of the road, which required her to stop and yield the right of way to Plaintiff. Indeed, Plaintiff had good reason to believe, when Defendant applied her brakes and slowed down, that Defendant would in fact stop and allow Plaintiff to finish crossing the intersection. Under the circumstances, Defendant has failed to demonstrate the existence of any triable issue of fact with respect to Plaintiff's alleged comparative fault.

4. Plaintiff's Motion Was Not Premature

Contrary to Defendant's contention, Plaintiff's motion was not premature. CPLR §3212(f) states:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

A party who contends that a summary judgment motion is premature is required "to offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Garcia v. Lenox Hill Florist III, Inc., supra*, 120 AD3d at 1297-98; *Martinez v. Kreychmar, supra*, 84 AD3d at 1038; *Cavitch v. Mateo, supra*, 58 AD3d at 593. *See, Singh v. Avis Rent A Car System, Inc.*, 119 AD3d 768, 770 (2d Dept. 2014). Defendant though an eyewitness has proffered no affidavit concerning the circumstances surrounding the accident, and the accident in its entirety was captured on videotape. Under the circumstances, Defendant

has failed to make the showing requisite to invoke CPLR §3212(f). The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to defeat the motion.” *Martinez v. Kreychmar, supra; Cavitch v. Mateo, supra.*

It is therefore

ORDERED, that Plaintiff’s motion is granted in its entirety, and it is further

ORDERED, that Plaintiff is awarded partial summary judgment on the issue of liability,

and Defendant’s comparative fault defense is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: November 17, 2020
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE