

Abreu v Fernandez

2020 NY Slip Op 35671(U)

July 6, 2020

Supreme Court, Bronx County

Docket Number: Index No. 30935/2018E

Judge: John R. Higgitt

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 14**

-----X
ABREU, MILAGROS

Index No. **30935/2018E**

- against -

Hon. **JOHN R. HIGGITT,**

FERNANDEZ, SALSICIO R.
-----X

J.S.C.

The following papers numbered **34** to **47** in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on **June 25, 2020** and duly submitted as No. on the Motion Calendar of **June 25, 2020**

| | NYSCEF Doc. Nos. |
|--|------------------|
| Notice of Motion – Exhibits and Affidavits Annexed | 34-41 |
| Notice of Cross-Motion – Exhibits and Affidavits Annexed | |
| Answering Affidavit and Exhibits | 42-45 |
| Replying Affidavit and Exhibits | 46-47 |
| Filed Papers | |
| Memoranda of Law | |
| Stipulations | |

Upon the foregoing papers, plaintiff’s motion for partial summary judgment on the issue of defendant’s liability for causing the subject accident and dismissal of defendant’s affirmative defense alleging culpable conduct is granted in part, in accordance with the annexed decision and order.

Dated: **07/6/2020**

Hon. 
JOHN R. HIGGITT, J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
MILAGROS ABREU,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30935/2018E

SALSICIO R. FERNANDEZ,

Defendant.
-----X

John R. Higgitt, J.

Upon plaintiff's June 3, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; defendant's June 8, 2020, affirmation in opposition and the exhibits submitted therewith; plaintiff's June 17, 2020 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject accident and dismissal of defendant's affirmative defense alleging culpable conduct is granted in part.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a pedestrian-knockdown accident that occurred on June 19, 2018. In support of her motion, plaintiff submitted the pleadings, the police accident report, and her affidavit.

Plaintiff averred that at the time of the accident she was at the intersection of University Avenue and Boscobel Place. According to plaintiff, traffic on Boscobel Place is controlled by a stop sign. Plaintiff averred that before entering the intersection she checked for traffic and saw defendant's vehicle approaching the intersection. Plaintiff averred that she "observed defendant's vehicle approach the stop sign, slow down and it appeared the vehicle was coming to a full stop several feet before the crosswalk. I began to walk across the street and took approximately five steps before the vehicle suddenly accelerated forward," striking her.

Plaintiff also relied on the police accident report, which contained the following party admission by defendant: "while traveling [eastbound] on Boscobel Place, he stopped on the stop

sign. [W]hile proceeding to make a left turn on University Avenue, he did not see pedestrian and struck her” (*see Thompson v Coca-Cola Bottling Co.*, 170 AD3d 588 [1st Dept 2019]; *Niyazov v Bradford*, 13 AD3d 501 [2d Dept 2004]).

Under Vehicle and Traffic Law § 1142, a driver approaching a stop sign must stop and yield the right of way to any pedestrian legally crossing the roadway on which the driver is driving. A driver that fails to yield the right of way in violation of Vehicle and Traffic Law § 1142(a) is negligent as a matter of law (*see Luke v McFadden*, 119 AD3d 533 [2nd Dept 2014]). Additionally, under Vehicle and Traffic Law § 1151(a), when there is no traffic control signal at an intersection, the driver of a vehicle should yield the right of way to a pedestrian crossing the roadway within the crosswalk. Moreover, a driver has a duty to see what is there to be seen and exercise reasonable care to avoid an accident (*see Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). A pedestrian, however, must still exercise due care and heed any danger by looking both ways before crossing (*see Schmidt v S. M. Flickinger Co.*, 88 AD2d 1068 [3rd Dept 1982]).

In opposition to plaintiff’s prima facie showing of entitlement to judgment as a matter of law on the issue of his liability, defendant failed to raise a triable issue of fact. Defendant’s opposition is limited to asserting that plaintiff bears comparative fault for the subject accident; defendant does not provide a non-negligent explanation for the subject accident. However, the existence of an open question as to plaintiff’s comparative fault does not affect plaintiff’s right to summary judgment on the issue of defendant’s liability (*see Rodriguez v City of New York*, 31 NY3d 212 [2018]).

As to the aspect of plaintiff’s motion seeing dismissal of defendant’s third affirmative defense alleging plaintiff’s comparative fault, defendant asserts that questions of fact exist as to plaintiff’s fault. Defendant asserts that questions of fact exist by virtue of the conflicting set of facts presented by plaintiff’s affidavit, on the one hand, and her deposition testimony and the police accident report narrative, on the other.

Even assuming that plaintiff's evidence was sufficient to establish, prima facie, that she bears no comparative fault (*cf. Quintavalle v Perez*, 139 AD3d 182 [1st Dept 2016]), defendant raised a triable issue of fact. Viewing the evidence in the light most favorable to defendant as the non-moving party and applying the principal that summary judgment is not appropriate if the existence of triable issues is even arguable, plaintiff's deposition testimony (upon which defendant relied) demonstrates the existence of triable issues as to whether plaintiff exercise due care in attempting to cross the intersection. A fact-finder could infer from plaintiff's deposition testimony that defendant did not stop before entering the intersection, that plaintiff knew or should have known that defendant did not stop, and that plaintiff nevertheless attempted to cross the intersection.

Accordingly, it is


ORDERED, that the aspect of plaintiff's motion seeking summary judgment on the issue of defendant's liability is granted; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

The parties are reminded that a compliance conference has been scheduled before the undersigned on July 31, 2020 at 9:30 a.m. in courtroom 407.

This constitutes the decision and order of the court.

Dated: July __, 2020



John R. Higgett, J.S.C.