

Leathers v Approved Oil Co. of Brooklyn, Inc.

2021 NY Slip Op 33836(U)

November 29, 2021

Supreme Court, Bronx County

Docket Number: Index No. 31903/2018E

Judge: Ben R. Barbato

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EMILE LEATHERS, as Administrator of the
ESTATE OF DANIELLE MONIQUE LEATHERS,
Deceased,

Index No. 31903/2018E

-against-

Hon. **BEN R. BARBATO**

APPROVED OIL CO. OF BROOKLYN, INC. and
ATALLAH DEEB

Justice Supreme Court

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The following papers numbered 1 to 8 were read on this motion (Seq. No. 002)
for **SUMMARY JUDGMENT (DEFENDANT)** noticed on February 1, 2021.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4,5,6
Replying Affidavit and Exhibits	No(s).	7,8

Upon the foregoing papers, the defendants Approved Oil Co. of Brooklyn, Inc. ("Approved Oil") and Attaleh Deeb (individually, "Deeb") (collectively, "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Emile Leathers, as Administrator of the Estate of Danielle Monique Leathers, deceased (hereinafter, "Plaintiff"). Plaintiff opposes the motion and cross-moves for an order granting Plaintiff summary judgment on the issue of liability pursuant to CPLR 3212, and denying Defendants' summary judgment motion. Defendants oppose the cross-motion.

The motion and cross-motion are submitted to this Court based upon the unavailability of the Hon. Mary Ann Briganti, J.S.C.

Background

This matter arises out of a fatal motor vehicle accident that occurred on March 23, 2017, between Danielle Monique Leathers (hereinafter, "Decedent"), a pedestrian, and a vehicle owned and operated by Defendants. Defendants support their summary judgment motion with *inter alia*, a copy of the pleadings, and the deposition transcript of Deeb, the operator of their vehicle.

Deeb testified that at the time of the accident, he was employed by Approved Oil as a truck driver (Deeb EBT at 7), and he was driving a Mack truck weighing approximately 50,000 pounds (*id.* at 17-18). The accident took place on Bruckner Boulevard near its intersection with East 138th Street (*id.* at 21). When he first turned onto Bruckner Boulevard up until the time the accident took place, there was nothing obstructing his vision (*id.* at 25-26) and traffic was light (*id.* at 26). Deeb testified that there was a traffic signal controlling the subject intersection, and when he first noticed the light, it was green (*id.* at 29). The remained green up until the time of the accident and never changed (*id.* at 31). When asked when he first observed the pedestrian that was involved in this accident, Deeb testified: "[a]ctually when she came from behind the truck. In a split second" (*id.* at 31). He said that the woman "came from behind

Motion is Respectfully Referred to Justice:
Dated:

a truck, there was a truck making a turn blocking two lanes, one left and going straight, he came from my left and made the turn instead of being in the other island, that's why he was blocking the intersection" (*id.* at 33). Deeb explained that Bruckner Boulevard at this location was a two-way street with more than six lanes of travel in both directions, separated by concrete traffic islands and broken white lines (*id.* at 34). Before the accident, the truck that he referenced was located to his left, and attempting to turn from Bruckner Boulevard onto East 138th Street (*id.* at 36).

Deeb did not hear or feel the impact- he became aware of it when he saw the pedestrian fall face-down (*id.* at 45). Deeb testified that he stopped the moment the contact occurred, and when he got out of his truck he saw that the pedestrian was not in the crosswalk (*id.* at 48). Deeb testified that he only saw the pedestrian a split second prior to the contact (*id.* at 51), and he was traveling at 20 miles per hour, below the posted 30 mile per hour speed limit (*id.*). He stated that he was looking straight and "she jumped from behind the truck that was making the turn" and was "running across the street" (*id.* at 53). Deeb testified that he received no summonses or tickets after the accident (*id.* at 56-57). He later attended a wrongful death hearing conducted by the New York State Department of Motor Vehicles ("DMV"), and it was deemed that he did nothing wrong (*id.* at 60).

Relying on the above, Defendants argue that they are entitled to summary judgment, since Decedent unexpectedly emerged from behind a white box truck and was running across the street, outside of the crosswalk and against the traffic signal when the accident occurred. Defendants contend that Deeb only saw Decedent for a "split second" prior to the impact, and he was only able to stop at the moment he hit her. At a minimum, Defendants contend that they are entitled to partial summary judgment on the issue of Decedent's fault, as it is clear that she violated Vehicle and Traffic Law ("VTL") §1152(a) and 1151(b).

In opposition to the motion and in support of the cross-motion, Plaintiff submits *inter alia* the wrongful death Department of Motor Vehicles ("DMV") hearing transcript, surveillance footage of the accident, a certified copy of the police accident report, the motor vehicle collision and mechanism report (CIS Report), Deeb's MV-104 report, and affidavits from Nicholas Bellizzi, P.E. and digital video analyst Robert Frein.

At the DMV hearing, Deeb testified that the Bruckner Expressway consisted of six lanes of travel going south and he was in the "third lane" with the median divider to his right (DMV Hearing at 12) and the traffic light was green (*id.*). Deeb testified that he never saw the pedestrian at any point prior to the collision (*id.* at 13). Deeb testified that there were no cars in front of him, and he was proceeding at about 25 miles per hour and traffic was light (*id.*). Deeb then said that there was "congestion traffic making a left and a box truck blocking from the right lane blocking the left" (*id.* at 14). The box truck was "blocking the lady" (*id.*). He first saw her at the last second (*id.* at 15). Deeb testified that he struck the pedestrian with the "left nose" of the truck - or its driver's side (*id.* at 24). The contact occurred beyond the crosswalk (*id.* at 25).

Investigation Squad, also testified at the hearing. Det. Jarvis testified that the police conducted an on-scene investigation and their preliminary findings were that the Defendants' vehicle struck a pedestrian who was attempting to cross the roadway from East to West inside the crosswalk and against the pedestrian signal (*id.* at 32-33). The pedestrian was struck, thrown to the pavement and suffered severe injuries (*id.* at 33). He collected a video which was downloaded from a gas station nearby (*id.* at 34). The video footage is included in Plaintiff's submissions. Det. Jarvis testified that it showed southbound traffic on the Bruckner and East 138th Street. He states that vehicle #1 (Defendants' truck) is observed on the time stamp of the video at 11:57 hours and 47 seconds (*id.* at 35). He testified that the truck appeared to have a green traffic signal, and the pedestrian is barely observed in the shadows, running from east to west (*id.* at 35). The actual impact was not visible due to the camera angle (*id.*). He testified that it appeared that the Defendants' vehicle had the green traffic signal (*id.* at 36-37) and he initially believed that the impact occurred within the crosswalk because one of Decedent's shoes was located there (*id.* at 39). Det. Jarvis further conceded that they did not look into the location of the impact any further once it was determined that no criminal charges were being filed (*id.* at 40).

The surveillance footage of the accident does not show the actual impact. The vantage point is from a nearby gas station looking at the subject intersection. At a certain point, Defendants' truck can be seen moving from left to right, with no traffic appearing around it. The truck eventually comes to a stop near a concrete support post. No actual contact is seen and the Court is unable to discern whether a pedestrian is seen before the truck comes to a stop. There is no white box truck moving in or around the Defendants' truck before it comes to a stop. The only white box truck in the video appears completely stationary, located well in front of the intersection. Defendants' truck passes it without incident and continues for several more feet before coming to a stop.

Plaintiff points out, as noted above, that there was no white box truck involved in this accident. Plaintiff argues that Deeb's testimony contradicts his own MV-104 report, submitted with the opposition, wherein he does not state anything about a white box truck. Plaintiff argues that Deeb consistently testified that he never saw Decedent prior to the impact, and he did not even apply his brakes until the moment the impact occurred. Plaintiff further argues that prior to the impact Deeb was looking straight ahead and it is evident that traffic was light and nothing was obstructing his view. Plaintiff notes that contrary to his testimony, Deeb never wrote in his MV-104 report that Decedent was not in the crosswalk. The MV-104 report states that the accident occurred when Deeb was traveling with the green light and the "pedestrian attempted to cross street against pedestrian signal."

Plaintiff argues that the evidence shows that no white truck obstructed Deeb's view and therefore his version of events is a complete fabrication. Plaintiff further contends that the evidence, including the certified police report, CIS Report, and testimony from the investigating detective, establish that Decedent

contradicts Deeb's prior testimony, as it makes no mention of Decedent being outside of the crosswalk.

Plaintiff also contends that Defendants' speeding was a substantial factor in this fatal accident. Plaintiff relies on an affidavits from experts who examined the accident location as well as the video footage. Plaintiff's engineer and accident reconstructionist Mr. Bellizzi alleges that based on his frame-by-frame analysis of the video, Deeb was traveling over the 25 miles-per-hour speed limit and despite having nothing obstructing his view, he failed to timely apply his brakes. He alleges that had Deeb been alert and attentive, he had ample time, distance, and opportunity to observe Decedent walking in the white painted high visibility crosswalk, and bring his truck to a complete stop before reaching the point of impact. He further notes that the surveillance footage clearly shows that the white box truck that was to the left of Defendants' vehicle was 104 feet away from the point of impact. The box truck and was fully stopped and not impeding Deeb's line of sight approach to the intersection. Mr. Bellizzi thus contends that Defendants' speed was a substantial factor in causing this collision.

In light of the above, Plaintiff seeks summary judgment on the issue of Defendants' liability, as they contend that any issue as to Decedent's comparative fault does not preclude a finding that Defendants were liable for this accident.

In opposition to the cross-motion and in further support of their motion, Defendants contend that Decedent was negligent *per se*, as it is not disputed that he was running across the street against the pedestrian signal. Defendants further argue that they are entitled to summary judgment because Decedent's negligence was the sole proximate cause of the accident, and Plaintiff's cross-motion seeking summary judgment is untimely. Defendants assert that whether Decedent was in the crosswalk should have no bearing on their motion, since regardless, it is evident that Decedent was running across the street against the pedestrian signal. Defendants dispute Plaintiff's contention as to whether the responding police investigation concluded that Decedent was within the crosswalk. They note that Detective Jarvis made no determination, and the information contained in the CIS Report and police report constitute inadmissible hearsay since those officers did not witness the accident.

Defendants assert that the video footage does not show the entire incident, and it does show that Defendants had the green light. Defendants further argue that Deeb was driving under the posted speed limit, which was 30 miles per hour - the affirmation includes "Google map" images purportedly showing a 30 miles per hour speed limit sign at the subject intersection.

In response to Plaintiff's expert affidavits, Defendants submit an affidavit of Conor McCourt, a video analyst. Mr. McCourt reviewed the affidavits of Plaintiff's experts as well as the surveillance footage, and opined that there is no way to determine based on the video how the police acquired the video from the gas station, whether digital compression was used in that process, or what chain of custody process was used or how many copies were made. He alleges that the video produced does not meet

using unknown methodology renders the video unreliable. He notes that Plaintiff's experts mis-counted the number of extractions or still images taken from the footage. He further notes that the "frames per second" used to make the calculations clearly fluctuates as the video records in a variable frame rate, therefore to use it for speed analysis is not acceptable in forensic science. Mr. McCourt ultimately concludes that Mr. Frein's analysis of how he tracked the subject vehicle is not scientific and is speculative, and so is Mr. Bellizzi's analysis since it was based on Mr. Frein's conjecture and multiple errors.

Defendants also argue that Mr. Bellizzi used the wrong measurement and wrong number of images when performing his calculations, and wrong number of frames per second. Nevertheless when using Mr. Bellizzi's own formula, Defendants assert that their vehicle was traveling at 29.7 miles per hour, which is under the speed limit of 30 miles per hour. Mr. Bellizzi's affidavit is also deficient because it used an average walking speed for someone of Decedent's age, when Deeb's testimony, and the testimony of a witness that was identified at the DMV hearing, established that Decedent was running across the street. Defendants also note that Mr. Bellizzi's affirmation contained no light-of-sight calculations or measurements to establish what Deeb saw or could see at the time of the accident or how long Decedent was his line of sight, and he did not take into account any other factors that would have affected Deeb's perception/reaction time. Defendants thus contend that the opinions of Plaintiff's experts are conclusory and speculative, and without probative value.

Defendants further reiterate their contention that Deeb exercised reasonable care and could not avoid this accident, as he was driving the speed limit with the green light and only saw Decedent at the moment of impact.

In reply and further support of their cross-motion, Plaintiff submits photographs of the subject intersection that demonstrate that the posted speed limit was in fact 25 miles per hour, not 30 as testified by Deeb and argued by Defendants. Plaintiff notes that Defendants have "abandoned" any contention that a white box truck was involved in the accident, which was the entire predicate of their motion. Plaintiff further submits supplemental affidavits from their experts, both responding to Defendants' contentions, and correcting "minor mistakes" in counting the number of still image slides that was set forth in their original video breakdown analysis. Mr. Bellizzi also recalculates the speed of Defendants' vehicle and he now concludes that Defendants' speed was in fact 32.66 miles per hour as it entered the intersection, in excess of the speed limit. Plaintiff further contends that Decedent was in the crosswalk, and this was established by post-accident investigation conducted by the police. Even if Decedent was outside of the crosswalk, Plaintiff contends that they are entitled to summary judgment on the issue of Defendants' liability.

Standard of Review

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]).

Applicable Law and Analysis

Defendants’ Motion

Vehicle and Traffic Law § 1146(a) provides in pertinent part, “[n]otwithstanding 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.” In this case, issues of fact preclude entry of summary judgment in Defendants’ favor on the issue of their liability. Defendants’ motion is largely premised on the fact that Deeb testified that he did not see Decedent until moments before the impact, because she suddenly emerged from behind a white box truck that was turning left. However, the video footage submitted in opposition demonstrates that there was no box truck in the vicinity of Defendants’ vehicle before it came to a stop after the accident occurred. Instead, the video confirms that Defendants’ truck had not encountered any traffic congestion and appeared to have a clear line of sight up until the time that it comes to a stop. Plaintiff also submitted a certified copy of the police report, a CIS Report, and a copy of an MV-104 report drafted by Deeb himself. None of these documents make any mention of a white box truck. The submissions in opposition essentially disprove Deeb’s description of how the accident occurred, therefore it cannot be held as a matter of law that Defendants’ collision with the Decedent was unavoidable, or entirely Decedent’s fault. Even if the Court were to credit Deeb’s testimony that he had the green light, and that Decedent was outside of the crosswalk, and running across the street, such would only go to Decedent’s potential comparative fault and would not compel a finding that Defendants bear no liability for the accident (*see, e.g., Simmons v Bergh; Sylvester v. Velez*, 146 A.D.3d 599 [defendant not entitled to summary judgment even where the plaintiff pedestrian

conceded that she did not have the right of way when she entered the street]; *see Santo-Perez v. Emergency Leasing Co.*, 126 A.D.3d 621 [1st Dept. 2015]).

Defendants' alternative request for summary judgment on the issue of Decedent's comparative negligence is also denied. Again, Defendants' motion was only supported by Deeb's deposition testimony, and for the reasons stated above, Plaintiff's submissions in opposition create a bona fide issues as to Deeb's credibility (*see Muhammad v. George Hyman Const.*, 216 A.D.2d 206 [1st Dept. 1995]; *see also Rodriguez v. Forest City Jay Street Associates*, 234 A.D.2d 68, 69-70 [1st Dept. 1996][genuine credibility question raised where, for example, an injured party's version of the accident inconsistent with either his own previous account or that of another witness]). Accordingly, this Court cannot make a determination as a matter of law as to crucial facts and circumstances, such as Plaintiff's location within the roadway at the time of the accident, whether she was observable by Deeb, and for how long she was observable prior to the collision. Accordingly, it cannot be stated that Decedent's purported negligence in crossing the street against the traffic signal, and outside of the crosswalk, was a proximate cause of the accident (*see generally Gerald v. Damiano*, 128 A.D.3d 500 [1st Dept. 2015]).

Plaintiff's Cross-Motion

Plaintiff's cross-motion for summary judgment on the issue of Defendants' liability is also denied. Initially the Court finds that the untimely cross-motion may be considered on its merits. The cross-motion seeks a determination that Defendants were negligent was a matter of law, thus it seeks relief "nearly identical" to that sought by the timely motion (*see Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 [1st Dept. 2006][internal citations and quotation marks omitted]). Nevertheless, Plaintiff's own submissions, including the DMV hearing transcript, police report, MV-104 report, and CIS Report, raise fact issues as to whether the accident was solely attributable to Plaintiff's negligence. Detective Jarvis testified that, following an investigation at the scene, including the location of Decedent's clothing in the roadway, and review of the video footage of the incident, it was evident that Decedent was "attempting to cross a very, very large street against a pedestrian signal." He testified that the accident was caused in part by "pedestrian error." Although not visible in the footage submitted to the Court, Detective Jarvis also testified that the video depicted the Decedent, "barely observed in the shadows, running from East to West." Plaintiff argues that the post-accident investigation revealed for certain that Decedent was within the crosswalk at the time of the accident, however Detective Jarvis conceded that no definitive findings were made on that subject. The detective testified that an initially he believed that Decedent was within the crosswalk because one of her shoes was inside it, and usually when a pedestrian is struck they are pulled out of their shoes, and the shoes are left behind at the point of impact (DMV Hearing at 39). However upon additional questioning he stated that no further conclusions were made on that issue since criminal charges were not being pursued (*id.* at 39-40). The certified police report, insofar as it states that Decedent

officers did not witness the accident (*see Roman v. Carbrera*, 113 A.D.3d 541, 542 [1st Dept. 2014]).

Plaintiff's cross-motion is also supported by affidavits from engineer Mr. Bellizzi and video analyst Mr. Frein. Mr. Bellizzi inspected the accident scene and reviewed police reports, deposition testimony, and a frame-by-frame analysis of the surveillance video footage. He initially concluded that the truck was traveling at a speed of 31.34 miles per hour as it approached the intersection, in excess of the 25 miles per hour speed limit. Mr. Bellizzi alleged that if Deeb had been alert and attentive, and maintained a proper lookout, he had ample time, distance, and opportunity to observe Decedent walking in the white painted high visibility crosswalk and could have brought his truck to a complete stop before reaching the point of impact. He also noted that, contrary to Deeb's testimony, the surveillance footage showed that no white box truck was obstructing his view prior to the collision. In reply and response to contentions made by Defendants in opposition, Plaintiff submits supplemental reports from their experts acknowledging that certain calculation errors were made, and Mr. Bellizzi re-calculates Defendants' speed as 32.66 miles per hour as it approached the intersection. The expert also offers "line of sight" analysis concerning the Defendant-driver's reaction time to demonstrate that, had Deeb been driving at the posted 25 miles-per-hour speed limit, he would have been able to stop in time and avoid the accident.

The Court finds that Plaintiff's expert analysis fails to eliminate fact issues as to Defendants' negligence, or whether that negligence was a proximate cause of the accident. Mr. Bellizzi's calculations as to Decedent's position within the crosswalk are based in part upon an assumption that Decedent was walking at a speed of 5.3 feet per second, the average walking speed of a 49-year-old female. But this calculation ignores the testimony from Detective Jarvis that, upon review of the video footage, Decedent was "running" across the street. Moreover the expert fails to acknowledge that whether Decedent was within the crosswalk at the time of the collision is not settled. Where an expert's testimony is without a sufficient factual basis it is given no probative force (*see Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]).

Mr. Bellizzi initially alleges that Defendants' truck was proceeding at 31.34 miles per hour, in excess of the 25 miles per hour speed limit, then he corrects purported mis-calculations to arrive at a speed of 32.66 miles per hour. In a supplemental affidavit, Mr. Bellizzi provides "reaction time" analysis in support of his contention that, had Deeb been driving at the posted speed limit and maintaining a proper lookout, the accident could have been avoided. Even assuming that Plaintiff's expert calculation of Defendants' speed is accurate, in light of the other unresolved factual issues, such as Decedent possibly running across several lanes of traffic, against the pedestrian signal, and outside of the crosswalk, it cannot be stated that Defendants traveling at 6.34 or 7.66 miles per hour over the posted speed limit was a cause of the accident (*see, e.g., Martinez v. Cofer*, 128 A.D.3d 421, 422 [1st Dept. 2015])[that plaintiff may have been driving five miles per hour over the posted speed limit of 30 miles per hour insufficient to raise fact

