

Davis v Khalil

2021 NY Slip Op 33935(U)

December 6, 2021

Supreme Court, Orange County

Docket Number: Index No. EF006842-2019

Judge: Sandra B. Sciortino

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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 ORANGE

-----X

WILLIAM DAVIS,

Plaintiff,

-against-

NICHOLA FARRO KHALIL,

Defendant.

-----X

SCIORTINO, J.

DECISION AND ORDER
INDEX NO.: EF006842-2019
Motion Date: 10/12/2021
Sequence No. 1

The following papers numbered 1 to 12 were considered in connection with the defendant's motion for summary judgment on the issue of liability:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|---|-----------------|
| Notice of Motion/Affirmation (Di Maggio)Defendant Affidavit/ Exhibits A - F | 1 - 9 |
| Affirmation in Opposition (Cambareri)/Plaintiff Affidavit/ Reply Affirmation (Di Maggio) | 10 - 11 12 |

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on December 29, 2018 on Route 300 near its intersection with Route 17K in the Town of Newburgh, County of Orange. Plaintiff commenced this action by filing a Summons and Complaint on August 27, 2019. Issue was joined by defendant's Verified Answer filed on November 14, 2019.

Examinations before Trial were held. Note of Issue was filed on June 3, 2021.

Plaintiff Deposition Testimony

Plaintiff testified that, on December 29, 2018, he was walking along Route 300 between 4:30

p.m. and 5:00 p.m. (13). It was “daytime,” and traffic conditions were “very heavy” (15, 27). He was near the intersection of Route 300 and Route 17K, intending to cross Route 17K. The intersection was controlled by a traffic light on Route 300, with no cross-walk at the intersection. While his testimony regarding where he was standing when the accident occurred was unclear, he testified that he began crossing the road and stood at the double yellow line for approximately twenty seconds (27). The traffic light was red, plaintiff looked both ways, saw no cars coming, and proceeded to cross Route 17K (17, 26). As he was crossing Route 17K, a vehicle struck the left side of his body (27). He had “no idea” where the vehicle came from, and could not identify the vehicle (23).

Defendant Deposition Testimony

Defendant testified that she was traveling in the left lane on Route 300 (13). It was just getting dark and the traffic was “moderate” (*id.*). She approached the intersection of Route 300 and Route 17K, which was controlled by a traffic light, intending to travel straight through the intersection (16). She, and a vehicle which was directly in front of her, were stopped at a red light for a few minutes (20). The light turned green, and the vehicle ahead of her proceeded (24). As she proceeded forward, the vehicle in front of her suddenly swerved to the left, revealing a pedestrian attempting to cross Route 300 in her lane of travel (24-25). Defendant immediately slammed on the brakes, but was unable to stop her vehicle before the front right of her vehicle made contact with the pedestrian (27-29). She testified that her vehicle traveled “a couple of feet” from the time she applied her brakes until her vehicle came to a stop (29). When the police arrived, she told the police that the pedestrian was wearing dark clothing and a dark sweatshirt (34).

Motion for Summary Judgment

By Notice of Motion filed on July 30, 2021, defendant moves for summary judgment on the issue of liability. Defendant argues plaintiff’s decision to cross a busy roadway without looking, and without a crosswalk, and dressed in dark clothing, in a hazardous manner, was the sole proximate

cause of the accident.

Defendant was lawfully traveling within her lane of travel when plaintiff failed to yield the right of way to plaintiff's vehicle in violation of VTL § 1152(a). Further, based on defendant's deposition testimony, plaintiff was hidden from her view by the vehicle in front of her just prior to the point of impact. Defendant argues the emergency doctrine is applicable as there was a sudden and unforeseen circumstances which excuse defendant's actions.

Opposition

In opposition, plaintiff argues there are issues of fact precluding summary judgment. Specifically, the parties' conflicting testimony regarding the circumstances surrounding the accident creates an issue of fact. Plaintiff submits his affidavit in opposition to the motion, in which he states "I did not see a vehicle swerve to its left... I believe that the Defendant started when she got the green light and went straight and struck me" (Davis Affidavit ¶5).

Based on this affidavit, plaintiff's counsel argues there are also issues of fact with respect to the "phantom" vehicle that defendant claims was traveling in front of her, and as to whether defendant exercised due care pursuant to VTL §1146(a). Therefore, summary judgment must be denied.

Reply

In reply, defendant argues plaintiff has failed to raise a triable issue of fact. Plaintiff relies on his recently submitted affidavit which is tailored to create an issue of fact, and is of no probative value. This affidavit directly contradicts his deposition testimony, is not credible, and should not be considered. As there is no evidence that defendant was negligent, defendant has demonstrated entitlement to judgment as a matter of law.

Discussion

Summary judgment is a drastic remedy and is appropriate only when there is a clear

demonstration of the absence of any triable issue of fact (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party" (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]).

A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident (*Leak v. Hybrid Cars, Ltd.*, 132 AD3d 958, 959 [2d Dept 2015]). Where facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, summary judgment must not be granted (*Jastrzebski*, 223 AD2d at 678). "While negligence cases do not generally lend themselves to resolution by summary judgment, such a motion will be granted, ... , where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other" (*Morowitz v. Naughton*, 150 AD2d 536 [2d Dept 1989]).

Here, the defendant established their *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff walked into traffic at a point other than a crosswalk and into defendant's lane of travel when defendant's view of plaintiff was obstructed by a vehicle traveling in front of her, leaving defendant unable to avoid contact with the plaintiff (Vehicle and Traffic Law §1152[a]; *Rosa v. Scheiber*, 89 AD3d 827 [2d Dept 2011]; *Rodriguez v. Catalano*, 96 AD3d 821 [2d Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's affidavit differs substantially from his deposition testimony regarding which road he was crossing, which direction he was traveling, where defendant was, and whether there was a second vehicle. These flat contradictions appear to be submitted in an effort to bolster his vague deposition testimony. "A.

party's affidavit that contradicts [his] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment (*Harty v. Lenci*, 294 AD2d 296 [1st Dept 2002]). Here, plaintiff's self-serving affidavit, tailored to create a triable issue, is insufficient to sustain plaintiff's burden (*Wright v. South Nssau Comm. Hosp*, 254 AD2d 277, 278 [2d Dept 1998]; *Caraballo v. Kingsbridge Apt. Corp.*, 59 AD3d 270 [1st Dept 2009]).

Conclusion

On the basis of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed.

Any matter not addressed herein is denied.

This decision shall constitute the order of the Court.

Dated: December 6, 2021
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*