

Colt v New Jersey Tr. Corp.

2022 NY Slip Op 30122(U)

January 18, 2022

Supreme Court, New York County

Docket Number: Index No. 158309/2017

Judge: Lisa Headley

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
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22

Justice

-----X

JEFFREY COLT, BETSY TSAI,
Plaintiff,

- v -

NEW JERSEY TRANSIT CORPORATION, NJ TRANSIT
BUS OPERATIONS, INC., ANA HERNANDEZ

Defendant.

-----X

INDEX NO. 158309/2017
MOTION DATE 02/15/2021
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 134, 135, 136

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

In this motor vehicle action, plaintiffs Jeffrey Colt (Colt) and Betsy Tsai (Tsai) (collectively, plaintiffs) move for an Order: (1) pursuant to CPLR §3212, for partial summary judgment on the issue of liability against all three defendants in this action, and (2) pursuant to CPLR § 3126, to strike the answer for defendants' failure to produce Anthony Beatrice and Raji Jacobs for examinations before trial, or, pursuant to CPLR § 3124, compelling defendants New Jersey Transit Corporation (NJ Transit Corp.) and NJ Transit Bus Operations, Inc. (NJ Transit Bus) to produce those two witnesses for depositions.

Background

On February 9, 2017 at around 4:00 p.m., a NJ Transit Bus operated by defendant Ana Hernandez (Hernandez) struck Colt, a pedestrian at 40th Street and Dyer Avenue in New York City. The bus was owned, maintained and controlled by NJ Transit Corp. and NJ Transit Bus. The bus was operated by NJ Transit Bus and NJ Transit Bus employed Hernandez, the driver. Plaintiffs served a notice of claim upon NJ Transit Corp and NJ Transit Bus.

On the day of the accident, Colt stepped off the curb when he had a walk signal. He began to walk across the street, and then "it happened very quickly, [he] felt some sort of wallop, and then [he] remember[s] waking up on the ground, and [he] began screaming for help" (Schwarz affirmation, exhibit G at 28-29). When he began crossing the street, he was facing west in the direction of the walk signal at the opposite corner of the street. As he crossed the street, he was looking straight ahead.

While he was lying on the ground, he realized he was hit by a bus, which he did not see until after it hit him. When he woke up, he saw he was on the driver's side, the left side, of the

1 Subsequent to the filing of this motion, these witnesses appeared for depositions on January 15, 2021, making this part of plaintiffs' motion moot.

bus. He screamed for help. A woman came over to tell him he was okay. He told her he was in pain and asked her to call his boss and his wife.

He does not recall whether the walk signal changed to red during the time when he was walking in the crosswalk (*Schwarz affirmation, exhibit G at 52*). He saw that the light directing the bus was green at the time when he was in the crosswalk (*Schwarz affirmation, exhibit G at 52-56*). He testified that just prior to the accident, the bus was making an “improper left-hand turn.”

Q: Okay, the next line says that ‘the bus was making an improper left-hand turn.’

If the light was green facing the bus, as you just testified, why do you say that the bus made an improper left-hand turn.

A: If I was in the crosswalk, then it would seem improper to turn into a crosswalk if the pedestrian – if I was there”

(*Schwarz affirmation, exhibit G at 56*).

During her deposition, Ana Hernandez (Hernandez), the driver of the bus, testified that she was making a left turn from 40th Street to Dyer Avenue when the accident occurred. She testified as to what she saw as she made the left turn:

“Q So, do you recall as you sat at the intersection on 40th Street at that red light being able to see the entire crosswalk on Dyer Avenue?

A Yes.

Q: At that point in time, did you see any persons on the crosswalk walking on the crosswalk?

A No.

Q Did you see any people waiting to cross that crosswalk at that time?

A No”

(*Schwarz affirmation, exhibit H at 39-40*).

At some point, while she was waiting at a red light at 40th Street and Dyer Avenue, Hernandez turned on her left blinker to make the left turn, and then, after making the turn, she intended to get into the right lane immediately. She testified that “if a pedestrian is crossing that crosswalk, they have the right of way when her bus is making a left. As she was making the left turn, she heard an impact and immediately checked the left mirror and saw a man on the ground.” As to what she saw in the mirror, she testified:

“Q When you say that, you’re saying he was in front of the location of the crosswalk?

A He was close to the crosswalk, but not in the crosswalk.

Q Was he north of the crosswalk or was he south of the crosswalk when you saw him in the mirror?

A North.

Q Ok. From what you could see in the mirror, he was about two feet outside of the north portion of the crosswalk?

MR. TURANO: Object to the form. You can answer.

A Yeah, about two feet.

Q Was any portion of his body within the crosswalk when you saw him in the mirror?

A No.

Q So, his entire body was laying outside of the crosswalk when you saw him in the mirror?

A Yes.

Q Do you know if his body moved as a result of the impact?

A I don't know. I wouldn't know.

Q You wouldn't know because you didn't see him before the impact?

A Yes"

(Schwarz affirmation, exhibit H at 59-60).

Hernandez testified that she then stopped the bus. The sound came from the middle of the bus on the left-hand side. At the time she stopped the bus, "half of the bus was beyond the northern portion of the crosswalk—and, half the bus was beyond the southern portion of the crosswalk" (Schwarz affirmation, exhibit H at 47). She brought the bus to a stop "right away" after hearing the impact (Schwarz affirmation, exhibit H at 50).

During her interview with Raji Jacob, an employee at the Safety Department for NJT Corp., Hernandez stated that she did not see Colt before the bus made contact with him.

According to plaintiffs' papers, Antwone Steele, a bus operator employed by New Jersey Transit Corporation, is listed as a witness to the subject accident on the defendants' accident report. However, he testified that he did not see Colt crossing the street nor did he see Colt getting hit by the bus. Further Steele does not know whether Colt was in the crosswalk when the accident occurred.

Plaintiffs move for partial summary judgment on the question of liability only. Defendants oppose this motion. For the reasons set forth herein, the court grants plaintiffs' motion.

Discussion

Plaintiffs seek partial summary judgment on the issue of liability, arguing that there are no issues of fact as to liability. Specifically, plaintiffs argue that "[i]t has been repeatedly held that a plaintiff-pedestrian struck by a vehicle making a turn establishes his prima facie entitlement to summary judgment by presenting that he was walking within the crosswalk, with the traffic control devices in his favor when struck by the defendants' vehicle" (plaintiffs' affirmation in support at 13, citing, inter alia, *Coutu v Santo Domingo*, 123 AD3d 410 [1st Dept 2014]).

In *Coutu*, the Court held:

"Plaintiff established entitlement to partial summary judgment on the issue of liability by demonstrating that he was crossing the street, within the crosswalk, with the light in his favor, and had crossed two lanes of travel, when he was struck by defendant's car, which was making a right turn and moving at a fast rate of speed" (*Coutu*, 123 AD3d at 410).

The Court in *Coutu* found that defendants' speculation that plaintiff was comparatively negligent did not raise an issue of fact that would prevent summary judgment. The Court further found that even if one might assume that plaintiff did not look for traffic before crossing the street, defendant "denied any recollection of the accident and thus, is unable to provide any 'evidence upon which to determine the extent to which such alleged negligence contributed to the accident'" (*id.* at 410 [internal quotation marks and citation omitted]). Likewise, in *Kirchgaessner v Hernandez* (40 AD3d 437 [1st Dept 2007]), the Court found that while both the plaintiff, and the truck that struck her, had a green light, where the plaintiff was crossing in the crosswalk, according to uncontradicted eyewitnesses, and the truck struck the plaintiff, "after making a wide right-hand turn from westbound 55th Street through the crosswalk" there were no issues of fact concerning the truck driver's negligence, as the truck driver was under a duty to yield to the pedestrian. In fact, the Court found that the plaintiff was entitled to partial summary judgment on the question of liability despite the defendant truck driver's testimony that "he had an unobstructed view of the

intersection in clear weather, but claim[ed] that he did not see any pedestrians in the crosswalk, although he was carefully observant” (*id.* at 437-438).

In opposition, defendants argue that plaintiffs are not entitled to summary judgment as there are questions of fact regarding whether Colt obeyed the traffic laws at the time of the accident. Specifically, defendants argue that Colt admits that he did not see the bus that struck him prior to his accident. Further, defendants argue, while Colt claims he was in the crosswalk when the accident occurred, Hernandez testified that the bus had already gone through the crosswalk when the accident took place. Defendants rely on the following testimony from Hernandez:

“Q Can you describe for me the path that you took from the Port Authority location where you dropped off the passengers, that you were going to take to get to the basement of the Port Authority?

A Okay. I went down the ramp, I got on 10th Avenue, drove down to 40th Street. When I got to 40th Street the light was red so I stopped. When the light turned green, I made a left. I checked my right, my left and I made a left. And, when I was like halfway going making the left, I heard a sound in the middle of the bus and I checked my left mirror and I saw a person on the ground. That was right before the basement that I was, you know, going to the basement”

(*Schwarz affirmation, exhibit H at 36*).

“Q When you looked in the left mirror after you heard the sound and you saw the pedestrian, could you see where the pedestrian was lying down in the roadway?

A Yes”

(*Schwarz affirmation, exhibit H at 59*).

“Q Okay. From what you could see in the mirror, he was about two feet outside of the north portion of the crosswalk?

A Yeah, about two feet.

Q Was any portion of his body within the crosswalk when you saw him in the mirror?

A No.

Q So, his entire body was laying outside of the crosswalk when you saw him in the mirror?

A Yes”

(*Schwarz affirmation, exhibit H at 60*).

Defendants additionally argue that the notation in the hospital records that Colt was “clipped,” is consistent with a finding that Colt “essentially walked into the back half of the bus after it properly went through the intersection” (*defendants’ Memo in Opp at 7*).

Defendants conclude that based upon Hernandez’s testimony, Colt violated sections of the Vehicle and Traffic Law and Traffic Rules of the City of New York by walking outside the crosswalk into the path of the bus “making it impractical for the bus driver to yield” (*Memo in Opp at 9*). Finally, defendants argue that these conflicting versions of the facts undermine plaintiffs’ *motion* for summary judgment. According to defendants, triable issues of fact exist as to whether the plaintiff darted out into the street, outside the crosswalk, causing the accident.

In reply, plaintiffs take issue with the cases cited by defendants, as they rely on facts in which plaintiffs darted out from between cars to be struck by defendants' vehicles (*see Brown v City of New York*, 237 AD2d 398, 398 [2d Dept 1997])[The Court granted defendants' motion for summary judgment, stating that "The record herein shows that the injured plaintiff darted out without stopping or looking into a moving lane of traffic, and hit the van after its front had already passed the gap between the cars to its right through which opening the plaintiff came"]; *Carrasco v Monteforte*, 266 AD2d 330 [2d Dept 1999][plaintiff stepped in front of defendant driver's van immediately before the accident]). Plaintiffs argue that, here, there are no facts supporting a conclusion that Colt darted out into the intersection into defendants' bus. According to plaintiffs, Colt testified that he was crossing at the green light and in the crosswalk when he was struck by defendants' bus. Further, plaintiffs argue that the testimony of the NJT investigators undermines the conclusion that Colt darted into the intersection. During his deposition, Raji Jacob, an investigator for New Jersey Transit, testified:

"A Based on what we observed, the pedestrian was in or near the crosswalk, which then would require that the operator yield to the pedestrian.

Q And the operator didn't yield to the pedestrian, did she?

MR. MILLER: Objection.

A The operator did not see the pedestrian to yield to them"

(*Schwarz affirmation, exhibit A at 69*).

After the Court of Appeals decision in *Rodriguez v City of New York*, plaintiffs need not prove a lack of comparative negligence in order to obtain partial summary judgment on the issue of defendant's liability (31 NY3d 312 [2018]). "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" (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020][internal quotation marks and citation omitted]). "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez*, 31 NY3d at 324-325). "The issue of comparative fault should have been left to a jury in determining damages" (*Silverio v Ford Motor Co.*, 183 AD3d 470, 471 [1st Dept 2020]). "Moreover, [a] plaintiff is not required to show that 'defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment'" (*Benny v Concord Partners 46th St. LLC*, 192 AD3d 532, 532 [1st Dept 2021][citation omitted]; *see also Derix v Port Auth. of N.Y. & N.J.*, 162 AD3d 522 [1st Dept 2018]).

Here, Colt's testimony is that he was struck while walking in the crosswalk with the pedestrian signal in his favor. Plaintiffs argue that the defendant bus operator was negligent as she failed to see him and failed to yield to him in violation of *Vehicle and Traffic Law* §§ 1110(a) and 1111 (a) (1), 1111 (a) (3) and 1146. Plaintiffs further argue that there are no questions of fact on this issue. In opposition, defendants attempt to create a question of fact by arguing that Hernandez was not negligent as she did observe the entire crosswalk before proceeding at the green light and saw no one in or near it prior to making the turn. Further, Hernandez testified that when she discovered Colt in her left-hand mirror, he was about two feet outside the crosswalk. In addition, the New Jersey Transit investigators, who were not eyewitnesses to the accident, testified that Colt was "in or near the crosswalk, which then would require that the operator yield to the pedestrian." The parties offer no eyewitness testimony, or any other testimony or evidence concerning the accident.

Conclusion

The court, therefore, finds that there are no facts presented on this motion that undermine Colt's testimony that he was walking in the crosswalk, at the green light, at the time of the accident. Hernandez testified that she did not see where Colt was at the time of the accident, similar to the defendant driver in *Kirchgaessner v Hernandez* (940 AD3d 437). Thus, any statements that Colt darted out into the intersection are pure speculation. Additionally, Hernandez's testimony that she saw Colt within two feet of the crosswalk is consistent with the testimony of the investigators that Colt was either in the crosswalk or near the crosswalk at the time of the accident, creating a duty for Hernandez to yield to Colt. Thus, the court finds that plaintiffs have established that Hernandez was negligent at the time of the accident, by failing to yield to Colt. The court also finds that Hernandez failed to offer a non-negligent explanation for the accident. Hernandez's negligence may or may not have been the sole proximate cause of the accident. Pursuant to the decision in *Rodriguez*, once the plaintiff meets this burden to establish the defendant's negligence, the court need not opine on questions concerning Colt's comparative negligence. Those questions will be addressed at a hearing on damages in this matter.

Accordingly, it is

ORDERED that plaintiffs Jeffrey Colt and Betsy Tsai's motion, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability only (mot. Seq.003) is granted; and it is further

ORDERED that the portion of plaintiffs' motion seeking to strike the verified answer of defendants New Jersey Transit Corporation, ("NJT"), and NJ Transit Bus Operations, Inc., ("NJ Transit Bus Operations), for their repeated failure to produce Anthony Beatrice and Raji Jacobs for examinations before trial and compel defendants NJT and NJ Transit Bus Operations to produce Anthony Beatrice and Raji Jacobs for examination before trial on a date certain is denied as moot, both Anthony Beatrice and Raji Jacobs' Examinations Before Trial took place on January 15, 2021; and it is further

ORDERED that upon the filing of a Note of Issue, this matter shall proceed to trial on the sole issue of plaintiff's damages; and it is further

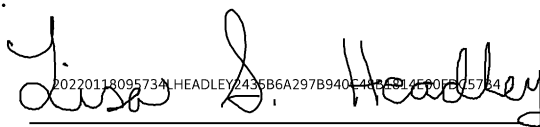
ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further;

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

1/18/2022

DATE


LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE