

Martin v Gelco Corp.
2022 NY Slip Op 35190(U)
October 14, 2022
Supreme Court, Bronx County
Docket Number: Index No. 26191/2017E
Judge: Bianka Perez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

CORNELL MARTIN, individually and SABRINA
WRENICK as parent and natural guardian for A.D.
an infant under the age of 18,

Index №. 26191/2017E

Plaintiff,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

GELCO CORPORATION, ALBERTO OBRIEN,
PRECISION PIPELINE SOLUTIONS, LLC and
PRIMELINE UTILITY SERVICES, LLC,

Defendants.

-----X

The following were read on these motions (NYSCEF **Seq 7**) noticed on **July 01, 2022**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 175- 188
Answering Affidavit and Exhibits	NYSCEF No(s). 189-192
Reply Affidavit and Exhibits	NYSCEF No(s). 194

Upon the foregoing papers, plaintiffs move for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability against defendants, dismissing defendants' affirmative defenses as to culpable conduct and assumption of the risk pursuant to CPLR 3211(b), entering judgement in plaintiffs' favor, and setting this matter down for an assessment of damages. Defendants oppose. For the following stated reasons plaintiffs' motion is granted in part.

This is a negligence action to recover damages for personal injuries plaintiffs allegedly sustained in a pedestrian knockdown accident that occurred on April 17, 2017, at the intersection of Bronxwood Avenue and 230th street, in the Bronx County, State of New York. Plaintiffs now seek summary judgment on the basis that they were pedestrians lawfully crossing in the unmarked crosswalk of Bronxwood Avenue when they were struck by defendants' motor vehicle. In support of their motion, plaintiffs annexed copies of the pleadings, a copy of the now vacated note of issue, the certified police report and the affidavit of pedestrian plaintiff Cornell Martin (Martin). In addition, plaintiffs annexed the deposition transcripts of plaintiff Martin, defendant driver Alberto Obrien (Obrien), pedestrian plaintiff A.D., and of Sabrina Wrenick, mother of A.D. In his affidavit, plaintiff Martin averred that he and plaintiff A.D. were pedestrians crossing over the

intersection of Bronxwood Avenue and 230th Street, at an unmarked crosswalk, when defendants' vehicle made a left turn onto Bronxwood Avenue and collided with plaintiff Martin as he and plaintiff A.D. approached the double yellow lines at the center of the roadway, causing him and plaintiff A.D. to fall and sustain injuries. Further, in the annexed deposition transcript of plaintiff Martin, plaintiff Martin testified that when he and plaintiff A.D. were in the middle of the intersection, "the [defendant] rolled through the stop sign and hit [them]."

In opposition, defendants annexed copies of the amended summons and complaint, verified answer and a copy of a decision and order rendered by the Hon. John R. Higgitt dated July 02, 2019, where Judge Higgitt denied plaintiff Martin's request to dismiss defendants' counterclaim related to negligent supervision of plaintiff A.D., and granted the dismissal of defendants' counterclaim related to breach of warranty.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. (See, *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept. 1988].) To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. (See, *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979].) If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. (See, *Zuckerman v City of New York*, supra.) When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. (See, *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].) Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. (See, *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988].)

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. A driver with a right of way may proceed forward; however, the driver must yield the right of way to pedestrians that are already within the

intersection (*see Kirchgassner v Hernandez*, 40 AD3d 437 [1st Dept 2007]), and the 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]). For his or her part, a pedestrian 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]).

Here, plaintiffs have sufficiently established their prima facie entitlement to summary judgment as a matter of law, by demonstrating that defendants were negligent in failing to yield the right of way to them while they were crossing a street within the crosswalk and further, that the plaintiffs themselves were free from comparative fault. (See, *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 [2d Dept. 2012]; *Cavitch v Mateo*, 58 AD3d 592 [2d Dept. 2009] [holding pedestrian established her prima facie entitlement to summary judgment on the issue of liability by submitting evidence that the driver failed to yield the right of way to her as she proceeded across a roadway in a crosswalk]). The affidavit and deposition transcript of plaintiff Martin were also sufficient to establish, prima facie, that the plaintiffs were not at fault in the happening of the accident. (*see Wray v Galella*, 172 AD3d 1446, 1447-48 [2d Dept. 2019]; *Dunajski v Kirillov*, 148 AD3d 991, 992 [2d Dept. 2017]). Further, pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right of way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate hazard. “A violation of this statute constitutes negligence per se” (*Lindo v. Katz*, 205 AD3d 1016, 1017 [2d Dept 2022]). Here, the fact that defendant Obrien’s deposition transcript states that plaintiff Martin “slapped the front of the truck with his hand, dropped himself to the ground and dragged a little boy down to the ground” does not create a question of fact, as defendants failed to explain their failure to yield to the plaintiffs when turning.

In opposition, the defendants failed to raise a triable issue of fact. A mere “attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance,” and is thus incapable of raising a triable issue of fact (*Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 [2d Dept 2006]). The plaintiffs properly relied upon the certified police report documenting defendant Obrien’s statement against interest, taken shortly after the accident occurred, in addition to plaintiff Martin’s own affidavit of merit, and plaintiff Martin’s deposition transcript. (See, *Buchinger v Jazz Leasing Corp.*, supra; *Nsiah-Ababio v Hunter*, 78 AD3d 672 [2d Dept. 2010]; *Sulaiman v Thomas*, 54 AD3d 751 [2d Dept. 2008].) Therefore,

plaintiffs' motion for an order granting summary judgment in their favor on the issue of liability is granted.

As to the aspect of plaintiffs' motion seeking dismissal of defendants' affirmative defenses of culpable conduct and assumption of the risk, plaintiffs made a prima facie showing that they bear no such fault (*see Soto-Marroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]), and defendants failed to raise a triable issue of fact.

As to the aspect of plaintiff's motion asking this Court to set this matter for an assessment of damages is denied, as discovery is incomplete and the Note of Issue has not been filed.

The court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment on the issue of defendants' liability is granted, and it is further

ORDERED, that defendants' affirmative defenses of culpable conduct and assumption of the risk are dismissed, and it is further

ORDERED, that Clerk of the Court is directed to enter judgment in favor of the plaintiffs and against defendants on the issue of liability, and dismissing defendants' affirmative defenses of culpable conduct and assumption of the risk.

This constitutes the decision and order of the Court.

Dated: October 14, 2022

Hon.


BIANKA PEREZ, J.S.C.

-
- | | | |
|------------------------------|--|---|
| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☐ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |