

Amparo v Morel
2023 NY Slip Op 35162(U)
June 9, 2023
Supreme Court, Bronx County
Docket Number: Index No. 33119/2019E
Judge: Patsy Gouldborne
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 13

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EDWARD AMPARO,

Index No. 33119/2019E

Plaintiff,

-against-

Hon. PATSY GOULDBORNE

Justice Supreme Court

ORLANDO MOREL,

Defendant.

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The following were read on this motion (NYSCEF Seq #1) noticed on **January 27, 2023**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF Doc. No(s). 22-32
Answering Affidavit and Exhibits	NYSCEF Doc. No(s). 35
Reply Affidavit and Exhibits	NYSCEF Doc. No(s). 39-41

Upon the foregoing papers, Plaintiff's motion pursuant to CPLR § 3212, for summary judgment on this issue of liability and striking Defendant's affirmative defenses relating to the Plaintiff's alleged comparative fault is granted.

Plaintiff's Contention

Plaintiff's Statement of Material Facts that are admitted on behalf of the Defendant are as follows: The subject motor vehicle accident occurred on December 21, 2018. On December 21, 2018, Defendant owned the motor vehicle that struck the plaintiff. On December 21, 2018, Defendant operated the motor vehicle that struck the plaintiff. Plaintiff was a pedestrian. The plaintiff was crossing Broadway at 162nd street in New York County.

In addition, the Defendant admits to the extent that same is claimed by the Plaintiff as follows: Plaintiff was in the crosswalk. Plaintiff was crossing with the green light. Plaintiff was lawfully crossing the aforesaid intersection in the crosswalk when he was struck by Defendant's vehicle. The defendant's counsel admits that Defendant is precluded from testifying at trial and from offering an affidavit for any purpose, and states that Defendant's Counsel is not prevented from defending this action.

Plaintiff testified that he was involved in an accident on December 21, 2018, at around 10:30 p.m. (tr at 50, 51). The accident occurred on 162nd Street and Broadway. (tr at 51). The weather was cold and clear, and the sidewalks were dry. There were bright streetlights at the intersection. (tr at 51, 52). At the time of the accident, he was a pedestrian. At the time of the accident, he was not eating or drinking and was not using his cell phone. (tr at 53). He was carrying a bag. (tr at 53). Prior to the accident he had not taken any drugs or medication or had not failed to take any medication. He was coming from work and heading home.

Plaintiff testified that prior to the accident he had waited by the cross walk for about 22 to 25 seconds because the light was red. (tr at 57, 58). While waiting he did observe vehicles passing by. (tr at 59 , 60). Thereafter the crosswalk signal turned in his favor and he began to cross Broadway. (tr at 60, 68, 69). He testified that he began to cross in the crosswalk. (tr at 60). Broadway was described as a two-way roadway, with an island in the middle and 162nd Street is one-way. While crossing Broadway the traffic on 162nd Street came towards the Plaintiff. While crossing Broadway he was looking straight ahead to the light and a little to the left.

Plaintiff testified that the first time he saw the vehicle that hit him, it was stopped on Broadway and the island separated the plaintiff and the vehicle defendant operated. (tr at 61, 62, 63, 64, 65). When the light changed in his favor the plaintiff began to cross. (tr at 60, 64). Plaintiff testified that he saw the car before he crossed when he was stopped, that was the first time he saw defendant. (tr at 65). He was first aware of the accident on impact, he saw the car when it hit him. (tr at 65, 66). Plaintiff felt the impact on his left knee, the left side of his head. (tr at 66). Plaintiff testified that the middle of the bumper hit his knee and the front of the car, the hood, hit his head. (tr at 67). Plaintiff testified that he was completely in the crosswalk when he felt the impacts. (tr at 67). The left side of Plaintiff's body went on top of the car and he landed on the ground on his right side. (tr at 67, 68). When he hit the ground he was entirely in the crosswalk. (tr at 68).

Defendant's Counsel Contention

Defendant's counsel affirmation states Plaintiff testified that before he crossed the street at the subject intersection, he saw the Defendant's vehicle stopped on the other side of the street. Plaintiff testifies that

Defendant's vehicle was on the other side of the island in the middle of Broadway when he first saw it. Plaintiff testified that he was struck before he reached the island in the middle of the intersection. Defendant's counsel argues a motion for Summary Judgment is not the proper time to determine Plaintiff's credibility, or whether he was able to avoid being struck by a vehicle. Counsel further argues that there is a question of fact as to the very location of the accident, and where Defendant's vehicle was at the time. Defendant's counsel argues that there is a material question of fact if Plaintiff is to be absolved of all potential contributory negligence.

Discussion

The plaintiff commenced this action on November 6, 2019 with the filing of the Summons and Verified Complaint. The Defendant filed a Verified Answer on December 11, 2019 and a Verified Amended Answer on June 11, 2020. The plaintiff submits in support of his motion for summary judgment the aforementioned, the verified bill of particulars, the stipulation precluding the defendant from testifying at trial and from offering an affidavit, and the Plaintiff's Deposition transcript.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposition papers. *Winegrad*, supra at 853. In the instant matter, the uncontroverted testimony of the Plaintiff demonstrates that he was struck by the defendant's vehicle while crossing over Broadway that intersects with 162nd Street, New York County. Plaintiff testified that there were bright lights at the crosswalk where he was struck. Plaintiff testified that he was struck by defendant's vehicle while crossing within the crosswalk with the traffic signal in his favor. New York Vehicle and Traffic Law § 1112 states in relevant part, that "...Pedestrians facing such signal may proceed across the roadway in the direction of the signal and shall be given the right of way by other traffic. While a plaintiff is not required to demonstrate the absence of fault on his or her own part, nor is plaintiff required to establish that defendant's conduct was the sole proximate cause of the accident

(*Simmons v Bergh*, 192 AD3d 547 [1st Dept 2021], citing *Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Also see, New York Vehicle and Traffic Law § 1151 directs that “ the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling.” Moreover, a driver shall exercise due care to avoid colliding with a pedestrian. *See* N.Y. Veh. & Traf. Law § 1146. The Plaintiff has met his prima facie burden of entitlement to summary judgment and the burden shifts to the Defendant.

In opposition the Defendant’s Counsel submits his affirmation as the Defendant was precluded from testifying at trial and from offering an affidavit for any purpose. Defendant’s Counsel affirmation is insufficient to rebut the documentary evidence proffered by the Plaintiff. It is well settled law, that the affirmation of an attorney who possesses no first-hand knowledge of the event lacks probative value. (*Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 A.D.3d [1st Dept. 2004]). In addition, contrary to Defendant Counsel’s assertion, questions of credibility are on the sole province of a jury.

Accordingly, it is hereby:

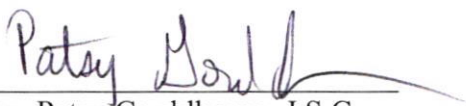
ORDERED that the Plaintiff’s motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that Plaintiff’s application seeking to dismiss Defendant’s affirmative defense of comparative negligence is granted; and it is further

ORDERED that the movant shall serve a copy of this order, together with notice of entry, upon the Defendant within 20 days.

This constitutes the Decision and Order of this Court.

Dated: June 9, 2023


Hon. Patsy Gouldborne, J.S.C.