

Khanam v Polanco
2023 NY Slip Op 35204(U)
April 6, 2023
Supreme Court, Bronx County
Docket Number: Index No. 800006/2022E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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ANJUMAN KHANAM,

Index No. 800006/2022E

Plaintiff,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

EDMUNDO MARICHAL POLANCO,
Defendant.

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The following were read on these motions (NYSCEF **Seq 1**) noticed on **January 23, 2023**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 9-19
Answering Affidavit and Exhibits	NYSCEF No(s). 20-23
Reply Affidavit and Exhibits	NYSCEF No(s). 24

Upon the foregoing papers, plaintiff moves for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability against defendant, dismissing defendant's affirmative defenses as to comparative negligence and/or to CPLR 3126 precluding defendant from contesting liability for failure to appear at a deposition. Defendant opposes.

Background

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a pedestrian knockdown accident that occurred on October 16, 2019, at the intersection of East 163rd Street and Washington Avenue, County of Bronx, State of New York, Plaintiff now seeks summary judgment on the basis that she was a pedestrian who was crossing 163rd Street from the north east corner to the south east corner in the crosswalk with the right of way when defendant's vehicle struck her.

Standard of review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. N. Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985][citations omitted]). 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].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*id.* [citations omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). “On a motion for summary judgment, facts must be viewed “in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012][internal citation and quotations omitted]). 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].)

Applicable Law and Analysis

A pedestrian with a steady walk signal in his or her favor may cross the intersection and should be given the right of way by vehicular traffic (*see Counihan v J. H. Werhelovsk's Sons, Inc.*, 5 AD2d 80, 80 [1st Dept 1957]). Pedestrians 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]; *Counihan. supra*). Vehicle and Traffic Law § 1141 provides that the “driver of a vehicle intending to turn to the left within an intersection ... shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard” (VTL § 1141). While a driver is required to “see that which through proper use of [his or her] senses [he or she] should have seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield” (*see Vainer v. DiSalvo*, 79 A.D.3d 1023 [2d Dept 2010]).

In support of her motion, plaintiff annexed copies of the pleadings, an uncertified copy of police report, discovery stipulations, emails with defendant counsel, and Plaintiff’s deposition transcript, where she states she was crossing the street at the crosswalk when she was struck by

defendant's vehicle. The plaintiff established prima facie, her entitlement to summary judgment by submitting her deposition transcript which demonstrated that the sole proximate cause of the accident was the negligence of the defendant in failing to yield the right of way to the plaintiff who was crossing at the crosswalk, with a pedestrian signal in her favor and exercised due care for her safety before beginning to cross (see 34 RCNY § 4-03[a][1][i]; *Cavitch v Mateo*, 58 AD3d 592 [2009]; *Beamud v. Gray*, 45 A.D.3d 257 [1st Dept 2007]). Furthermore, plaintiff has sufficiently established her prima facie entitlement to summary judgment as a matter of law, by demonstrating that defendant was negligent in failing to yield the right of way to her while she was crossing a street within the crosswalk and further, that the plaintiff was free from comparative fault. (See, *Buchinger v Jazz Leasing Corp.*, 95 A.D.3d 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]). Thus, the burden shifted to Defendant to provide "a non-negligent explanation for the accident" (*Rodriguez*, 161 A.D.3d at 577).

In opposition, Defendant has failed to raise a triable issue of fact as to their liability or as to the affirmative defenses of comparative negligence. Defendant did not submit feasible evidence that demonstrates he is not liable for striking the Plaintiff when Defendant's vehicle attempted to make a left turn while Plaintiff was crossing the street (see *Bokum v Sera Security Services, LLC*, 165 A.D.3d 535 [1st Dept 2018]).

As to the aspect of plaintiff's motion seeking dismissal of defendant's affirmative defense as to comparative negligence, plaintiff made a prima facie showing in its deposition transcript that they bear no such fault (see *Wray v Galella*, 172 AD3d 1446, 1447-48 [2d Dept. 2019]; *Dunajski v Kirillov*, 148 AD3d 991, 992 [2d Dept. 2017]; *Soto-Marquin v Mellet*, 63 AD3d 449 [1st Dept 2009]), and defendant failed to raise a triable issue of fact.

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

Accordingly, it is hereby

ORDERED, that the branch of plaintiff's motion for summary judgment on the issue of defendant's liability is granted, and it is further

ORDERED, that defendant's affirmative defense of comparative negligence is dismissed, and it is further

ORDERED, that Clerk of the Court is directed to enter judgment in favor of the plaintiff and against defendant on the issue of liability, and dismissing defendant's affirmative defenses of comparative negligence, and it is further

ORDERED, that the branch of plaintiff's motion to preclude the defendant from contesting liability is denied as moot.

This constitutes the decision and order of the Court.

Dated: April 6, 2023

Hon.



BIANKA PEREZ, J.S.C.

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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