

Fortson v Thompson

2025 NY Slip Op 32732(U)

January 9, 2025

Supreme Court, Bronx County

Docket Number: Index No. 31232/2019E

Judge: Patsy Gouldborne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA 13



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BEVERLY ANN FORTSON,

Index No. 31232/2019E

Plaintiff(s),

-against-

Hon. PATSY GOULDBORNE

Justice of the Supreme Court

JUNIOR A. THOMPSON and ACTION CARTING
ENVIRONMENTAL SERVICES, INC.,

Defendant(s).

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The following papers were read on this motion (Seq No. 2) for **SUMMARY JUDGMENT** submitted on **SEPTEMBER 21, 2023**.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 29-40
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 47-54
Affirmation in Reply	NYSCEF Doc. # 57-58

Upon the foregoing papers, defendants JUNIOR A. THOMPSON (“Thompson”) and ACTION CARTING ENVIRONMENTAL SERVICES, INC., (“collectively Defendants”) seek an order pursuant to CPLR 3212 granting summary judgment to defendants dismissing the complaint in its entirety. BEVERLY ANN FORTSON (“Plaintiff”) opposes.

In this personal injury action, Plaintiff alleges that on August 30, 2019, at approximately 1 pm, on Eighth Avenue at or near the intersection of West 126th Street, Plaintiff was injured when she was struck by Defendants vehicle operated by Thompson. Thompson had been stopped at a red traffic light at the intersection of 126th Street. When the light turned green, he proceeded and allegedly struck Plaintiff as she was attempting to cross 8th Avenue at 126th Street.

In support of the motion Defendants submit, inter alia, the pleadings, Plaintiff’s deposition testimony, Thompson’s deposition testimony, an affidavit and report of John Desch, Professional Engineer. (“Desch, P.E.”), and videos.

Plaintiff testified that at the time of the subject accident she was going to Beth Israel Hospital for medication (Plaintiff tr at 39). She stated that she uses a rolling walker for scoliosis (*id* at 42). She testified that on the day of the accident she was walking south with traffic on the side street of Eighth Avenue next to the parked cars, she was not on the sidewalk (*id* at 45, 47). She testified she did not recall where the accident happened and did not recall seeing the truck stopped before the accident (*id* at 50). She testified that she was

walking straight with the intention of going towards 124th Street (*id* at 52). She stated, “When you asked me if I crossed at 126th Street, it was confusing because certain things I just don't remember (*id* at 54, lines 24,25) “I just remember leaving my daughter s house and getting hit by a truck” (*id* at 55, line 6,7).

Thompson testified he had been employed as a driver by Action Carting for 12 years (Thompson tr at 10). On the date of the accident, he was driving truck No. 1184, which was not his normal truck, but he had driven it at least four or five times prior to the accident (*id* at 31). Prior to the accident, Thompson got onto Eighth Avenue at 135th Street and the accident occurred on 126th Street (*id* at 59). He stated that he was eating his lunch at the time of the accident (*id* at 50). When asked whether there were a lot of hazards on the roadway including, doubled parked cars, bicyclists, and pedestrians walking in the roadway Thompson agreed (*id* at 91). He stated “I remember coming to the stop light and I stopped away from the pedestrian crossing, the light changed, and I checked the mirrors and there was nothing. “Because there were double parked cars, I checked the mirrors, once the intersection was clear and everything, I checked all my mirrors and then proceeded” (*id* at 93, line 24,25; 94 at 1-6). When asked how the accident happened Thompson stated that “when I took my foot off the brake...the truck was not moving, I checked the mirror to see if anything was wrong, and then looked left and saw people stopping and pointing in front of the truck, and that's when I got out, I thought it was one of those delivery guys, bicycle, because those guys, as you know, they are in and out of traffic” (*id* at 94, lines 17-25). Thompson was shown the video taken from his vehicle's cab. When asked whether before advancing at the light he looked into the mirror on the right side he stated no and that if he had he would have been able to see Plaintiff (*id* at 121).

Desch, P.E., who specializes in traffic accident reconstruction, opined that there is no evidence to indicate or support that Thompson was not operating his truck in a reasonable and attentive manner as he traveled through the accident location. He states that the video recordings clearly show that the traffic signal was green, and that Thompson waited an additional four seconds until after a woman pushing a baby stroller had cleared the crosswalk in front of his vehicle before he proceeded to move toward the intersection. He states that Plaintiff can be seen fifty-one seconds before the collision rolling her wheeled walker within the roadway along a row of parked vehicles on Frederick Douglass Boulevard, from West 127th Street southbound to West 126th Street, prior to the collision. Visibility testing revealed that Plaintiff was entirely blocked from Thompson's view by the hood of the truck as she attempted to cross in front of the truck, he would have no expectation that a pedestrian would be hidden below his truck's hood. He stated that as part of our vehicle inspection, he conducted visibility testing with a surrogate pedestrian using a rolling type of walker. The testing was conducted with the roll-off truck parked and the surrogate pedestrian moving along a similar path as that of Plaintiff, as captured and recorded using the truck's front, side and rear cameras. It was determined that a

pedestrian coming around the right side and front of the truck would not be visible to the driver due to the height of the hood with respect to the height of the pedestrian. Desch opined that because Plaintiff stopped next to the passenger side of the truck and then moved left toward the front and around the right front corner, all while in close proximity to the truck, she would not be visible to the driver.

Defendants seek summary judgment on the grounds that Plaintiff, without warning and without looking in the direction of oncoming traffic, “darted out” directly into Defendant’s path in violation of Vehicle and Traffic Law §1151, leaving the Thompson unable to avoid the accident. Further, Defendants aver that Plaintiff is comparatively negligent as a matter of law.

In opposition, Plaintiff avers that Thompson failed to use reasonable care as a matter of law. Further, Plaintiff contends that there may be more than one proximate cause of this accident. While Plaintiff may or may not have been negligent that does not eliminate Thompson’s negligence in failing to check his mirrors and failing to observe Plaintiff before proceeding.

Plaintiff also submits an expert affidavit of David M. Wolfe PhD who opined that the plaintiff would have been visible to the defendant-driver had he kept a proper lookout and executed visual searches in his various mirrors. In particular, as plaintiff traversed the roadway, her appearance would have transitioned over the right convex mirror, right fender mirror, passenger door mirror, and right front cross-over mirrors and for the entire time the plaintiff was walking near the truck, the driver failed to observe her. He stated that the driver failed to exercise a reasonable level of attentiveness by failing to check his mirrors before he proceeded, and by the distractions caused by eating, and otherwise not paying attention.

Applicable Law and Analysis

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003].; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). The failure to make prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*Winegrad*, 64 NY2d at 853). Once a movant meets the initial burden, the burden shifts to the opponent, who must the produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion, a court’s role is solely to determine if triable issues exist, not to determine the merits of any such issues. (*Sillman v Twentieth Century-Fox Corp.*, 3 NY2d 395 [1957]).

Under Vehicle and Traffic Law §1146 (a), a driver must exercise due care to avoid colliding with a pedestrian in any roadway 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 (*Quintavalle v Perz*, 139 AD3d 182 [1st Dept 2016]). Vehicle and Traffic Law § 1152 provides that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway (Vehicle and Traffic Law § 1152[a]).

With respect to an expert, to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. *See Shechter v 3320 Holding LLC*, 64 AD3d 446 [1st Dept 2009]. The party seeking to present the expert bears the burden to establish that the expert possesses sufficient skill knowledge and experience. [*Id.*]. Here, John Desch, P.E, holds a Bachelor of Science Degree in Civil Engineering from University of Dayton; and a Certificate in Traffic Accident Reconstruction from Northwestern University, Traffic Institute. David M. Wolfe PhD holds a Bachelor of Science Degree in Engineering with a minor in Mathematics from James Madison University, and a Doctor of Philosophy degree in Electrical and Computer Engineering with a concentration in electromagnetics and photonics from the University of Delaware. The parties do not raise issues with their expert's qualifications or fitness to render opinions with on the cause of the subject accident.

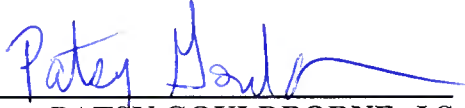
Under the circumstances presented here, Defendants' submissions failed to demonstrate their prima facie entitlement to judgment as a matter of law. Thompson initially testified that he looked in the mirrors prior taking his foot off the brake. But when shown the video footage, he testified, that he did not look at his right-side mirrors prior to advancing and if he did, he would have seen Plaintiff on the passenger side of his vehicle. Further, he testified that Eighth Avenue was an area with many hazards, and he was aware of "delivery guys" in and out of traffic. The video also confirmed, and Thompson agreed that he was eating when the accident occurred. Accordingly, Thompson failed to demonstrate, prima facie, that he kept a proper lookout and that his alleged negligence did not contribute to the happening of the accident (*Hammond v Diaz*, 82 AD3d 839, 840 [2nd Dept 2011]). Because the evidence is insufficient in eliminating an absence of any material issues of fact the motion should be denied without determination of the sufficiency of the opposition (*Winegrad*, 64 NY2d at 853). Additionally, the issue of comparative fault is generally a question for the trier of fact. *Meza-Hernandez v Rain Properties Inc.*, NY Slip Op 32789(U) [Sup Ct Bronx Cty 2017]; *see also Maniscalco v New York City Tr. Auth.*, 95 Ad3d 510 [1st Dept 2012].

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: January 9, 2025

Hon. 
PATSY GOULDBORNE, J.S.C.

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