

LaFleur v Smith
2025 NY Slip Op 35402(U)
March 6, 2025
Supreme Court, Rockland County
Docket Number: Index No. 035067/2023
Judge: Thomas P. Zugibe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ESMERALDA LAFLEUR,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 035067/2023

Motion Seq. 1

ARNOLD D. SMITH,

Defendant.

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ZUGIBE, J.

ESMERALDA LAFLEUR (“Plaintiff”) has filed a motion for an Order granting summary judgment pursuant to N.Y. CIV. PRAC. L&R (“CPLR”) 3212 on the issue of liability as against ARNOLD D. SMITH (“Defendant”), as well as for an Order striking certain affirmative defenses from Defendants’ Answer. This motion is opposed by Defendants. In connection with Plaintiff’s motion for summary judgment, the Court has reviewed and considered NYSCEF documents numbered 27-33 and 36-38, and hereby renders the following Decision:

By way of brief background, this action stems from an accident that occurred on April 13, 2022 involving the above parties on Tarrytown Road near its intersection at the Crossroads Shopping Plaza in Westchester County. NYSCEF Doc. 1, ¶¶3, 4. The Plaintiff alleges that she was lawfully traversing Tarrytown Road near the intersection, at which time it is alleged the Defendant’s vehicle collided with her. *Id.* The Plaintiff is a resident of Rockland County, New York, and has filed the instant action in Rockland Supreme Court. *Id.* at ¶ 1. As per the Complaint filed with the Rockland County Clerk on October 11, 2023, the accident at issue was caused by the negligence and/or carelessness of the Defendant herein, and that as a result of the collision, the Plaintiff suffered serious personal injuries. *Id.* at ¶5-8.

The Defendant filed an Answer to the Complaint on November 14, 2023. NYSCEF Doc. 4. Said Answer contained various affirmative defenses, including Plaintiff’s own negligent/culpable conduct and contributory negligence. *Id.*

Not all discovery has been completed in this action, and there is no Note of Issue. Notwithstanding, Plaintiff has filed the instant motion contending that the Defendant should be determined liable as a matter of law for her injuries sustained as a result of the accident. In support of the motion, Plaintiff submits her Bill of Particulars and deposition testimony, the Defendant’s deposition testimony, and a photograph of the intersection where the accident occurred. NYSCEF Docs. 29-32.

The Plaintiff testified that on the date of the accident, April 13, 2022, it was sunny, dry and bright outside. NYSCEF Doc. 31, p. 29. The Plaintiff was walking to Dunkin’ Donuts to ask the cashier for change to use to pay for her bus fare to get home to Rockland. *Id.* The

Plaintiff was walking from the Maserati dealership where she worked to get to Dunkin Donuts, which is about a five-minute walk from the dealership. *Id.* at p. 30. The Plaintiff testified she was carrying only her pocketbook at the time, same being worn over her right shoulder. *Id.* at p. 31. After receiving her change from Dunkin Donuts, the Plaintiff testified she went outside to wait on the sidewalk between the Kia dealership and Dunkin Donuts. The Plaintiff was aware of the intersection near where she was waiting, same having a traffic light, but she was not certain the name of the street that intersected with Tarrytown Road. *Id.* at p. 33. The Plaintiff recalled that there is also a crosswalk in that area where the traffic light is located, as well as a pedestrian signal that notifies pedestrians when they can cross the road. *Id.* at p. 33-35. The Plaintiff was waiting to cross Tarrytown Road to get to the bus stop, and she was apparently struck as she finally crossed the street in the crosswalk. Plaintiff indicated that the traffic at the intersection had a red light, and the pedestrian signal indicated that pedestrians could cross. *Id.* at p. 39. At the time when the pedestrian signal so indicated, the Plaintiff began to cross Tarrytown Road. There were not cars coming at that point. *Id.* at p. 31. Plaintiff was in the middle of the intersection at the time she was hit. *Id.*

The Defendant testified that at the time of the accident, he was making a left-hand turn at the subject intersection. NYSCEF Doc. 28, p. 38. The Defendant testified that he did not see the Plaintiff before his vehicle made contact with her. *Id.* The Defendant applied his brakes when he felt contact with her. *Id.* at p. 39. The Defendant further testified that his view was blocked by “[t]he post between [his] windshield and [his] front door.” *Id.* at p. 41.

As per Plaintiff pedestrian, the record evidence establishes that the Defendant failed to exercise due care to avoid colliding with her in violation of N.Y. Vehicle & Traffic Law (“VTL”) § 1146. Plaintiff submits that the admitted failure of the Defendant to observe the Plaintiff, said Plaintiff having had the right of way at the time of the accident, entitles her to summary judgment, since she was entitled to anticipate the Defendant would yield the right of way to her as she utilized the crosswalk to cross Tarrytown Road.

In opposition, Defendant first points out that the motion must be denied for failing to comply with CPLR 3212(b), which requires the pleadings be annexed to the motion papers. In addition, the Defendant argues that his transcript is not admissible, as same is not signed. Finally, Defendant submits that issues of fact preclude the grant of summary judgment at this phase in the litigation, specifically with respect to the Plaintiff’s contention she did not see the Defendant’s vehicle before it struck her. The Defendant argues that Plaintiff did not testify she checked for oncoming traffic to her right and left before crossing Tarrytown Road, but rather, that she only looked ahead, and did not see any vehicles before deciding to cross the street. Thus, as per Defendant, the Plaintiff arguably failed to see all there was to be seen, and contributed potentially the occurrence of the accident. Summary judgment cannot, therefore, be decided at this time.

The Plaintiff has not filed any reply papers.

The Court declines to deny the instant motion based on the purported procedural deficiencies raised in opposition. The Court acknowledges the requirement set forth in CPLR 3212(b) to attach the pleadings to any motion seeking summary judgment. However, the Court

is not precluded from entertaining the motion when the record is sufficient to determine a party's entitlement to relief. *See, Chan v. Garcia*, 24 A.D.3d 197, 806 N.Y.S.2d 23 (1st Dept. 2005). Further, CPLR 2001 permits the Court, at any stage in the proceedings, to disregard a party's mistake, error or omission if a substantial right of a party is not prejudiced. Here, although the Court does not condone the Plaintiff's failure to strictly comply with CPLR 3212(b) and in the future, Plaintiff should be guided by the statute accordingly, the Court notes that the Defendant has suffered no prejudice, and was able to submit complete opposition to the motion on its merits, notwithstanding the deficiency. Further, the pleadings were electronically filed, and specifically incorporated by reference in the Plaintiff's affirmation in support. NYSCEF Docs. 1, 4, 28. *See, e.g., Webster v. Forest Green Apartment Corporation*, 219 A.D.3d 867, 868, 195 N.Y.S.3d 694 (2d Dept. 2023).

Further, with respect to the claim that the Defendant's deposition is not admissible evidence in support of the motion because same was not signed, the Court also rejects same. The moving party can reply on unsigned deposition transcripts when same have been certified as accurate by the court reporter. *See, White Knight Ltd. v. Shea*, 10 A.D.3d 567, 782 N.Y.S.2d 76 (1st Dept. 2004).

The Court will therefore turn to the merits of the instant application.

In deciding a motion for summary judgment, the Court's role is solely to determine whether triable issues of fact exist, not to decide those issues. *F. Garofalo Electric Co. v. New York Univ.*, 300 A.D.2d 186, 754 N.Y.S.2d 227 (1st Dept. 2002). This is because the remedy of summary judgment is a drastic one and it should only be granted when it is clear that no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "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. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion *must* be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

A driver's admission that he did not see a pedestrian while turning at an intersection, and as a result, struck that pedestrian while in the course of making the turn, is sufficient to establish that the defendant is negligent as a matter of law for having failed to yield the right of way. *Shui-Kwan Lui v. Serrone*, 103 A.D.3d 620, 621, 959 N.Y.S.2d 270 (2d Dept. 2013). Therefore, in a failure to yield case, a plaintiff can demonstrate their *prima facie* entitlement to summary

judgment by establishing that a defendant violated the VTL by making a turn directly into their path when they had the legal right of way. *See, Berner v. Koegel*, 31 A.D.3d 591, 592, 819 N.Y.S.2d 89 (2d Dept. 2006). Further, a defendant who admits they did not see the plaintiff's vehicle prior to making their turn, said defendant is negligent, as they have "failed to see that which, though the proper use of sense, should have been seen[.]" *Id.* at 592. Further, when someone has the right of way, they are entitled to anticipate that drivers will obey the traffic laws which require them to yield. *Russo v. Scibetti*, 298 A.D.2d 514, 748 N.Y.S.2d 871 (2d Dept. 2002).

In the case at bar, the Plaintiff testified she was walking in the crosswalk, she had the pedestrian signal indicating she was able to cross, and she was about half-way through the intersection when the Defendant's car struck her. *See, Rose v. Paulino*, 123 A.D.3d 899, 999 N.Y.S.2d 141 (2d Dept. 2014). Further, the Defendant admitted that he did not see the Plaintiff or even realize he hit her until the actual moment of impact, due to an obstruction on his windshield. Based on the foregoing, upon review of Plaintiff's Affidavit and accompanying exhibits, this Court determines that Plaintiff has met its *prima facie* burden on summary judgment.

In opposition to the motion, the Defendant attaches a certified police report which he submits raises an issue of fact as to the Plaintiff's comparative negligence. As per the police report, the Defendant told police that the crosswalk signal was illuminated red with a "don't walk" hand symbol. NYSCEF Doc. 38. This, as per Defendant, requires denial of the instant motion. However, the police report is hearsay, as the officer who prepared same was not present at the time of the accident. Although hearsay may be submitted in opposition to a motion for summary judgment, hearsay evidence in and of itself is "insufficient to warrant denial of a motion for summary judgment[.]" *Johnson v. Kernizant*, 2003 WL 21246172, at *1 (App. Term., 2nd & 11th Dists. 2003).

Further, the Defendant does not submit an affidavit in opposition to the motion and instead only relies on his attorney's affirmation. Counsel's affirmation generally does not have any probative value to defeat a motion for summary judgment. *See, Weingarten v. Marcus*, 118 A.D.2d 640, 641, 499 N.Y.S.2d 794 (2d Dept. 1986).

Finally, the Defendant's deposition testimony is contrary to the hearsay police report, as the Defendant testified that he could *not* see from his angle the pedestrian signal for those crossing Tarrytown Road at the time of the accident. NYSCEF Doc. 32, p. 46. Therefore, the hearsay police report is insufficient to defeat the Plaintiff's *prima facie* entitlement to summary judgment. Defendant has failed to raise a triable issue of fact with respect to the Plaintiff's purported comparative negligence, as there is no admissible evidence in the record before the Court that would support this claim.

Therefore, based on the foregoing, the Court determines that Plaintiff is entitled to summary judgment on the issue of liability. It is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability is granted and any attendant affirmative defenses are deemed dismissed; and it is further

ORDERED, that within ten (10) days of this Decision and Order, Plaintiff is directed to serve a copy of same with notice of its entry upon all counsel; and it is further

ORDERED, that the parties in this action are directed to appear in person before the Court for purposes of a compliance conference on ***Tuesday, April 15, 2025, at 9:30 a.m.***

The foregoing shall constitute the Decision and Order of this Court.

Dated: New City, New York
March 6, 2025



Hon. Thomas P. Zugibe, J.S.C.