SJ Denied

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

WILSON DEJESUS,

Plaintiff,

-against-

ALBERT BROWN, THE FIFTH THIRD LEASING COMPANY and RAYMOURS FURNITURE COMPANY, INC.,

Defendants.

Index No. 302593/09

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2, 2a
Replying Affidavit and Exhibits	3
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff's motion for an Order pursuant to CPLR § 3212 granting summary judgment is **DENIED**.

Facts

Bruckner Boulevard is a four-lane road that runs North and South, with islands separating the two outer local lanes and the two inner express lanes. East149th Street is a four-lane street that runs East and West. Plaintiff was walking Westbound on the Northern side of East 149th Street before crossing the Northbound local lane of the Bruckner Boulevard. He waited on the island separating the Northbound express lane from the Southbound express lane for the light to change in his favor. Meanwhile, Defendant ALBERT BROWN, traveling Eastbound on East 149th Street, was waiting to make a left turn onto the Northbound express lane of the Bruckner. Plaintiff was

crossing the Northbound express lane of the Bruckner, when the rear of the truck that Defendant BROWN was driving struck him as it made its left turn onto the express lane.

Arguments

Plaintiff is now seeking summary judgment on the grounds that Defendants are liable as a matter of law for violating VTL §§ 1111(a)(1) and 1112(a). Defendants oppose the motion on the grounds that there is a triable issue of fact as to whether Plaintiff had the right of way.

MSJ Standard

"A motion for summary judgment may only be granted where there exists no material and triable issue of fact. On such a motion the court's role is limited to one of issue-finding, not issue determining. Thus, it is improper to resolve questions of credibility on a summary judgment motion, unless it clearly appears that the issues are not genuine but feigned. On such a motion the opponent is entitled to all favorable inferences." *Con Ed. v. Jet Asphalt Corp.*, 132 AD2d 296.

Defendant BROWN testified that: there were no vehicles in front of him at the intersection; he had on his left turn signal; he looked both right and left; and he checked his mirrors before executing his left turn. He stated that he did not see any pedestrian traffic in the crosswalk or oncoming traffic before making his turn. He added that he checked his left side mirror to make sure his rear left wheel cleared the median. He did not realize that he struck Plaintiff until the front of his vehicle had passed through the crosswalk.

Right of way

> Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left

> unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.

VTL § 1111(a)(1). "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." VTL § 1112(a).

Plaintiff is under the impression that "[b]y virtue of Plaintiff's presence in the crosswalk the Defendant driver was not permitted to turn and move into the crosswalk." (*M.B. Rothenberg Aff* at ¶ 19.) So Defendants are negligent as a matter of law. This stance is unsupported by caselaw that holds that whether a pedestrian "had the right of way hinges upon whether or not the [vehicle] was in motion when she stepped into the crosswalk." *Kaminsky v MTANYCTA*, 79 AD3d 411, 412; *see also Fannon v. MTA*, 133 AD2d 211, 212. "Defendants' negligence is not established as a matter of law if plaintiff began to enter the crosswalk while the bus was already turning into it." *Kaminsky v MTANYCTA*, 2009 NY Slip Op 32576U, *aff'd by* 79 AD3d 411.

Plaintiff testified that when he was waiting to cross he saw Defendants' truck stopped at the intersection. (*W. Dejesus EBT* at 138:2-11; 142:7-9, 14-17.) He did not look at the vehicle again, however, until after the impact. (*Id.* at 142:10-13, 18-21.) The fact that he was in the crosswalk after the accident does not resolve the issue of whether he was in the crosswalk when Defendants began their turn. *See Brito v. MABSTOA*, 188 AD2d 253, 255. Thus, there is a triable issue of fact as to whether Plaintiff had the right of way.

Comparative negligence

There are also issues of comparative negligence that must be determined by a jury. *See Adenekan v NYCTA*, 28 Misc. 3d 1232A "The right of way is not a right to self-inflicted mayhem for which the defendant can be held liable, and one cannot, to the exclusion of everyone and everything around him, rely solely upon his right of way." *Schmidt v. S. M. Flickinger Co.*, 88 AD2d 1068, 1069. Indeed, the fact that Plaintiff had the WALK light in his favor prior to crossing "does not absolve [him] from looking, while so crossing, for vehicles approaching which deny [him] that right." *Schmidt*, 88 AD2d at 1068.

The foregoing shall constitute the decision and order of this Court.

Dated: FEB 24 2012

J.S.C.

KENNETH L. THOMPSON, JR.