

Crimi v Goldman

2012 NY Slip Op 32853(U)

November 26, 2012

Sup Ct, Queens County

Docket Number: 17912/2011

Judge: Robert J. McDonald

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

JOSEPHINE CRIMI, Index No.: 17912/2011
Plaintiff, Motion Date: 11/02/12
- against - Motion No.: 85
Motion Seq.: 2
DONALD GOLDMAN, Defendant.

- - - - - x

The following papers numbered 1 to 20 were read on this motion by the plaintiff, JOSEPHINE CRIMI, for an order pursuant to CPLR 3212 granting partial summary on the issue of liability and setting the matter down for a trial on damages:

Table with 2 columns: Document Name and Page Number. Includes: Notice of Motion-Affidavits-Exhibits- Memo of Law...1 - 8, Affirmation in Opposition-Affidavits-Exhibits...9 - 16, Reply Affirmation...17 - 20.

This is a personal injury action in which plaintiff, JOSEPHINE CRIMI ("plaintiff"), seeks to recover damages for injuries she sustained as a result of a motor vehicle/pedestrian accident that occurred on May 25, 2011, in a parking lot located at 1500 Sunrise Highway, Suffolk County, New York. At the time of the accident, plaintiff was a pedestrian who was walking toward a store from the parking space where she had left her vehicle when she was struck by the motor vehicle owned and operated by DONALD GOLDMAN("defendant"). Goldman was backing up out of a parking space when he struck the defendant. As a result of the accident, the plaintiff allegedly sustained serious physical injuries including a hip fracture necessitating an open reduction. Plaintiff commenced this action by serving and filing a summons and verified complaint on June 8, 2010. Issue was joined by service of defendant's verified answer dated September 20, 2011.

The plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages only. In support of the motion, the defendant submits an affidavit from counsel, Matthew R. Kreinces, Esq., a copy of the pleadings, a copy of plaintiff's verified bill of particulars, a copy of the transcript of the examination before trial of defendant, an affidavit of facts from the plaintiff, and a copy of the police accident report (MV-104).

In her affidavit, dated September 27, 2012, plaintiff Josephine Crimi, age 87, states that on May 25, 2011, she drove her car to Sal's Fruit Tree and parked in their parking lot. She states, "I then started walking to the front door. I was looking straight ahead to go to the door of the store. As I was walking to the store, I was then hit by the vehicle driven by Mr. Goldman while he was backing out of a parking space. I did watch out for myself and my own safety because I walk slowly. After I fell, Mr. Goldman came out of the car and told me he was sorry because he did not see me."

Defendant testified at his examination before trial on July 2, 2012, that on May 25, 2011, he was shopping at Sal's Fruit Tree in Copaigue, New York. At 9:20 a.m. he and his wife were leaving the store. He got in his vehicle intending to drive to the entrance of the store where his wife was waiting with the shopping cart. As he was backing his vehicle out of the parking space he struck the plaintiff with the rear of his vehicle. He testified that he did not see the plaintiff before the accident. He first realized he had an accident when he heard tapping on the car and then he saw the plaintiff. He states that, "backing up I was looking through my rearview mirror and heard the tap and looked to my driver's side rearview mirror and saw the plaintiff diagonally stagger away from my car." He stated that he saw her fall to the ground. Defendant testified that he first saw the plaintiff after the impact. He testified that his wife did not witness the accident. After the accident he spoke to the police officers at the scene. "I told them I was backing up slowly, looking through my rearview mirror, felt a tap on the car and I looked to my left driver's side rearview mirror, and I saw the plaintiff staggering away from the car, three or four steps perhaps and then falling. I stopped the car immediately and I went to assist her." He testified that he said to her, "I'm very sorry. I didn't see you."

With respect to liability, plaintiff argues, based upon the affidavit of the plaintiff and the defendant's examination before trial, that the defendant is solely responsible for striking the plaintiff with his vehicle. Counsel asserts the defendant driver was negligent in that he violated section 1146(a) of the Vehicle and Traffic Law which requires drivers to exercise due care to avoid colliding with a pedestrian upon any roadway. Counsel asserts that the evidence demonstrates that the defendant violated Vehicle and Traffic Law § 1146(a) by failing to exercise due care to avoid striking the plaintiff/pedestrian. In addition, counsel asserts that the defendant violated Vehicle and Traffic Law § 1211(a) which states that, "the driver of a vehicle shall not back the same unless such movement can be made with safety." Further, counsel asserts that the defendant driver was negligent in failing to see that which he should have seen as a driver through the proper use of his senses. Here, based upon the testimony of the defendant, who stated that he did not see the plaintiff before he backed his vehicle out of a parking space, counsel states that the defendant was negligent in not keeping a proper lookout when backing his car out of the space when it was not safe to do so (citing Ortiz v Calvera, 26 AD3d 319 [2d Dept. 2006]; Garcia v Verizon N.Y., Inc., 10 AD3d 339 [1st Dept. 2004]). Further, counsel asserts that the plaintiff stated that she was walking slowly and looking forward towards the store when she was hit and therefore, plaintiff is entitled to partial summary judgment on the issue of negligence as the plaintiff established her own freedom from comparative negligence.

In opposition, defendant's counsel, Timothy Tenke, Esq. submits the deposition testimony the plaintiff, Josephine Crimi, taken on July 2, 2012. She testified that on the day of the accident at approximately 9:00 a.m she had driven to Sal's Fruit Tree in Copaigue and parked in their parking lot. When she got out of her car she walked approximately 15 feet and was struck on her left side by the defendant's vehicle. She testified that she did not see his vehicle or hear its engine running prior to the accident because she was looking straight towards the store. She stated that as she was lying on the ground the defendant came over to her and stated that he was sorry, he did not see her. She was then transported from the scene by ambulance and taken to the emergency room at Good Samaritan Hospital. Counsel states that based upon the testimony of the plaintiff there is a question of comparative negligence because he asserts that her testimony indicates that the fact that she wasn't looking at the cars in the parking lot raises a question of fact as to whether she was being as careful as she should have been.

Defendant's counsel contends that the deposition testimony of the plaintiff and the defendant raise material questions of fact concerning the plaintiff's own negligence and therefore plaintiff has failed to demonstrate her own freedom from negligence as a matter of law.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

VTL § 1146(a) states in pertinent part that "every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary."

In addition, VTL § 1211(a) states that "the driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic."

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence showing that the defendant-driver violated Vehicle and Traffic Law §§ 1146(a) and 1211 by failing to exercise due care and failing to take adequate precautions to avoid colliding with the plaintiff while he was backing his vehicle out of a space in a parking lot. Defendant conceded that he did not see the plaintiff in the vicinity of his vehicle prior to backing into her (see Bukharetsky v Court St. Off. Supplies, Inc., 82 AD3d 812 [2d Dept. 2011]; Pragay v Lavado, 45 AD3d 828 [2d Dept. 2007]; Ortiz v Calavera, 26 AD3d 319 [2d Dept. 2006]).

In opposition, the defendant failed to raise a triable issue of fact. The defendant's contention that triable issues of fact were raised as to the comparative negligence of the plaintiff was speculative. Plaintiff testified that when she was struck she was walking slowly through the parking lot and looking straight towards her destination. There is no suggestion in the record that she was not looking where she was going (see Ortiz v. Calavera, 26 AD3d 319 [2d Dept. 2006]).

Accordingly, this court finds that plaintiff has met her burden and has established her entitlement to judgment as a matter of law by submitting evidence that defendant Goldman's negligent operation of his vehicle was the sole proximate cause of the accident, and therefore, it is hereby,

ORDERED, that the plaintiff's motion is granted, and the plaintiff, JOSEPHINE CRIMI, shall have partial summary judgment on the issue of liability against the defendant, DONALD GOLDMAN, and it is further,

ORDERED, that the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages.

Dated: November 26, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.