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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

LAWRENCE CAMPBELL, as Executor of the Estate of MARGARITA CAMPBELL, deceased,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, and JEAN-JACQUES DORLY,

Defendants.

INDEX NO. 109866/10

MOTION DATE 9/24/12

MOTION SEQ. NO. 003

The following papers, numbered 1 to 7 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits J–Affidavit of Service	No(s).	1-3
Affirmation in Opposition — Exhibits A-D —Affidavit of Service	No(s).	4-5
Reply Affirmation — Exhibit A —Affidavit of Service	No(s).	6-7

Upon the foregoing papers, it is ordered that plaintiff's motion for partial summary judgment on the issue of liability against defendants MTA Bus Company and Jean-Jacques Dorly is denied.

In this action, plaintiff alleges that, on April 6, 2010, decedent was struck while crossing in the cross walk at the intersection of First Avenue and East 57th Street in Manhattan, and that she died due to her injuries on April 9, 2010.

Previously, plaintiff unsuccessfully moved for partial summary judgment as to liability against defendants MTA Bus Company and Jean-Jacques Dorly. In the prior decision and order dated July 6, 2011, this Court did not consider video footage of the incident, "because the DVD was submitted for the first time in reply . . ." (See Delaney Affirm., Ex D.)

Plaintiff again moves for partial summary judgment on the issue of liability against defendants MTA Bus Company and Jean-Jacques Dorly. This

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

time, the video footage is included in plaintiff's moving papers, along with the deposition testimony of Dorly, taken after the prior motion. Plaintiff contends that the testimony and evidence establish that Dorly failed to yield the right of way to decedent as she crossed the street in violation of Vehicle and Traffic Law § 1111, and that Dorly made an improper left turn in violation of Vehicle and Traffic Law § 1160 (c). As plaintiff indicates, "a violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se " (*Barbieri v Vokoun*, 72 AD3d 853, 856 [2d Dept 2010].)

Defendants oppose the motion, on the ground that successive motions for summary judgment are not permitted. Plaintiff argues that the second motion is permissible to correct defects in the first motion, citing *Landmark Capital Investments, Inc. v Li-Shan Wang* (94 AD3d 418, 419 [1st Dept 2012].) Plaintiff also claims that the deposition testimony of Dorly, which was not available at the time of the original motion, constitutes newly discovered evidence.

"Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010].) Here, the deposition testimony of Dorly should be considered newly-discovered evidence. It did not exist at the time of plaintiff's prior motion, and unlike the testimony that Dorly gave at hearings before the Department of Motor Vehicles, defendants had an opportunity to examine Dorly at his EBT. Therefore, the Court exercises its discretion to permit this motion.

> "A party seeking summary judgment has the burden of tendering evidence in admissible form demonstrating the absence of any triable issues of fact. 'To succeed on a cause of action to recover damages for wrongful death, the decedent's personal representative must establish, inter alia, that the defendant's wrongful act, neglect or default caused the decedent's death.' Although a plaintiff's burden of proof in a wrongful death case is reduced because the decedent is unable to describe the events in question (*see Noseworthy v City of New York*, 298 NY 76, 80

(Continued . . .)

> [1948]), the plaintiff is still obligated to provide some proof from which negligence can reasonably be inferred."

(*Roth v Zelig*, 64 AD3d 558, 559 [2d Dept 2009].)

As a threshold matter, the Court disagrees with defendants' contention that the *Noseworthy* doctrine does not apply on this motion. As defendants indicate, the *Noseworthy* doctrine is inapplicable where the parties "were on equal footing with respect to knowledge of the occurrence." (*Morris v Solow Management Corp. Townhouse Co., L.L.C.*, 46 AD3d 330, 331 [1st Dept 2007] [citations omitted].) However, the existence of video footage of the accident does not place plaintiff on equal footing with respect to the parties' knowledge of the occurrence.

"[T]he standard set forth in Noseworthy applies only to 'such factual testimony as the decedent might have testified to, had [s]he lived.'" (*Stewart v Olean Medical Group, P.C.*, 17 AD3d 1094, 1096 [4th Dept 2005]; *Feltus v Staten Is. Univ. Hosp.*, 285 Ad2d 445 [2d Dept 2001]; *cf. Bin Xin Tan v St. Vincent's Hosp.*, 294 AD2d 122, 123 [1st Dept 2002] [plaintiff was not entitled to a *Noseworthy* charge because decedent could not have testified concerning the cytologist's alleged misdiagnosis or whether Dr. Yee and Mt. Sinai should have conducted a tissue biopsy].) Here, the decedent's testimony of how the accident occurred might have been consistent with plaintiff's counsel's assertion of what is depicted in the video footage. However, the video footage does not place plaintiff on the equal footing with defendants because the video footage is not from the vantage point of the decedent, or that of defendant Dorly. It therefore does not substitute for the factual testimony of decedent as to what she had seen when she crossed the street.

Turning to the merits, Vehicle and Traffic Law § 1160 (c) provides,

> "At any intersection where traffic is restricted to one direction on one or more of the roadways, the driver of a vehicle intending to turn left at any such intersection shall approach the intersection in the extreme left-hand lane of the roadway lawfully available to traffic moving in the direction of travel of such vehicle . . . , and after entering the intersection the left turn shall be made so as to leave the intersection, as nearly as practicable, in the left-hand lane

(Continued . . .)

> lawfully available to traffic moving in such direction upon the roadway being entered."

Here, an issue of fact arises as to whether the manner in which Dorly made the left turn for a bus was permissible under Vehicle and Traffic Law § 1160 (c). Defendants cite the New York State Department of Motor Vehicles Commercial Driver's Manual, which states, in pertinent part, "If there are two turning lanes [for a left turn], always take the right turn lane. Don't start in the inside lane because you may have to swing right to make the turn. Drivers on your left can be more readily seen. *See Figure 2.14.*" (Wong Opp. Affirm., Ex C.) Figure 2.14 depicts an arrow, representing a left turn, that begins in the right turn lane, which is completed in the far right lane of traffic. (*See id.*)

Although plaintiff objects to the excerpts of the Commercial Driver's Manual as not being in admissible form (Delaney Reply Affirm. ¶ 32), plaintiff does not dispute its authenticity. Thus, on this motion, "[t]he lack of certification, in the circumstances, is at most a technical irregularity which may be disregarded." (*Borchardt v New York Life Ins. Co.*, 102 AD2d 465, 467 [1st Dept], *affd* 63 NY2d 1000 [1984] [allowing uncertified hospital record to be considered on a motion for summary judgment].)

Contrary to plaintiff's argument, Dorly's conviction for the traffic infraction of making an illegal left turn may not be used as evidence of negligence here.[1] Plaintiff cites no authority for such a proposition. Vehicle and Traffic Law § 155 states, in pertinent part, "A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof."

> "That section has been construed to prevent the disclosure of a conviction for a traffic infraction on the ground that the statute

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[1] In the prior decision and order, plaintiff unsuccessfully argued that defendants MTA Bus Company and Dorly were collaterally estopped from disputing that Dorly violated Vehicle and Traffic Law § 1160. There is no legal basis for relitigating this Court's prior decision and order on this issue.

> expresses a broad public policy *not to employ it as evidence-in-chief to establish negligence in the civil action.* The reason supporting that view is that to make such use of it 'is likely to impair the right of a defendant to a fair trial on the issue of civil negligence.'"

(*Augustine v Village of Interlaken*, 68 AD2d 705, 710 [4th Dept 1979], quoting *Walther v News Syndicate Co.*, 276 AD 169, 175-176 [1st Dept 1949] [emphasis supplied].)

Therefore, plaintiff has not demonstrated, as a matter of law, that Dorly's operation of the bus was a violation of Vehicle and Traffic Law § 1160 (c).

"Under Vehicle and Traffic Law § 1111, the pedestrian has the right of way when crossing with the pedestrian light in a crosswalk." (Rudolf v Khan, 4 AD3d 408, 409 [2nd Dept 2004].) "Although a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk (see Vehicle and Traffic Law § 1111[a][1])." (*Barbieri*, 72 AD3d at 855.)

Here, having reviewed the video footage, this Court cannot rule, as a matter of law, that either party was, or was not, negligent. The Court cannot determine that, as a matter of law, the decedent had the right of way when crossing the street, or that she was in a crosswalk, or and that Dorly failed to yield the right of way to the decedent. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." (*Ugarizza v Schmieder*, 46 NY2d 471, 474 [1979]).

Therefore, plaintiff's second motion for summary judgment is denied.

Dated: 12/27/12
New York, New York

FILED
JAN 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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