Shea v Caner
2014 NY Slip Op 32721(U)
October 14, 2014
Supreme Court, Suffolk County
Docket Number: 12-11109
Judge: Jerry Garguilo

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COPY

SHORT FORM ORDER

INDEX No. 12-11109

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3-12-14 (#002)
MOTION DATE 4-23-14 (#003)
ADJ. DATE 7-9-14
Mot. Seq. # 002 - MG
003 - MD

JANICE SHEA as Parent and Natural Guardian of THOMAS SHEA,

Plaintiff,

- against -

ANNABEL CANER and ANTHONY GAMBINO,

Defendants.

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Upon the following papers numbered 1 to 25 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-15; (003) 16-17; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 18-21; Replying Affidavits and supporting papers 22-23; 24-25; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant Anthony Gambino pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross claim asserted against him by co-defendant Annabel Caner, on the basis he bears no liability for the occurrence of the accident is granted, and the complaint and cross claim as asserted against him are dismissed; and it is further

ORDERED that motion (003) by defendant Annabel Caner pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis she bears no liability for the occurrence of the accident is denied.

In this negligence action, the plaintiff Janice Shea, as parent of Thomas Shea, seeks damages for personal injuries he sustained on August 10, 2010 while he was a pedestrian crossing SR 25A, from the

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parking lot at the Cold Spring Harbor State Park, west of its intersection with Flora Street, to the north side of the road to Trustee Park. It is alleged that Thomas Shea stepped into the roadway when defendant Anthony Gambino waved to him to cross, and that Annabel Caner's oncoming vehicle then struck the plaintiff.

In their motions filed prior to the serving of the note of issue and certificate of readiness, defendants seek dismissal of the complaint on the basis they bear no liability for the occurrence of the accident.

The proponent of a summary judgment motion 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 (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (002), defendant Gambino submitted, inter alia, an attorney's affirmation; copies of the supplemental summons and amended verified complaint, defendants' answers and amended answers, and plaintiff's verified bill of particulars; transcripts of the examinations before trial of plaintiffs and defendants; uncertified copy of a MV 104 Police Accident Report which is not admissible as the report constitutes hearsay (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In support of motion (003) defendant Caner submitted, inter alia, an attorney's affirmation which incorporates motion (002).

Thomas Shea testified to the extent that he is twelve years of age. On August 10, 2010, when he was ten, he was involved in an accident. He was with his mother, sister, and two brothers near Cold Spring Harbor Bay. He had just finished a hiking trip on a trail near Cold Spring Harbor Bay. He was in the parking lot and decided to cross the street to get a drink at the water fountain. He did not know the name of the road, but stated that it was just next to the parking lot. It was daylight. He described the road, which he was told was 25A, as having one lane in each direction, separated by a double yellow line. There was a solid white line on the side of the road, about one foot from the curb, on either side of the road. His brother James, then fourteen, told his mother that they wanted to get a drink from the water fountain on the other side of the street. His mother said they would all go. There was no crosswalk in the area. There was a traffic light down the street to his right, however, the road curved to the right so the light could not be seen. To his left, 25A was straight. He was the first of his family to step onto the roadway. While he was still on the sidewalk, he saw a gray car was coming to a stop, slowing down to his left. There was a "girl" passenger in that car. A car to his right passed by him. The male driver in the car which stopped to his left, waved him on. He noticed two cars stopped in back of the car which waved him on to his left. He looked to his

right and saw no cars. He looked to his left, saw the stopped car, and started to cross the street. He took about six steps. He crossed to the front of the stopped car, walking "fastly" to just before the double yellow line. His left foot was behind the yellow line, and his right foot was on the yellow line closest to the parking lot. He became aware of the accident as he fell down. A split second before he went down, he did not see a car. He did not feel a contact with a vehicle before he fell. He remembered waking up on the curb and did not know what was going on. He was bleeding from his right leg. Someone had strapped a belt around it.

Janice Shea testified to the extent that she did not see the accident happen as her head was turned as she went to grab her eight year old son's hand. She stated that she had taken the kids hiking in the trails behind the Cold Spring Harbor Library around 3:00 p.m. They were there about an hour and were getting ready to go home at about 4:30 p.m. They had finished the water she brought with them. She knew there was a water fountain across the street on the north side of 25A near the dock. They were in the parking lot on the south side. She described 25A as having two lanes, one in each direction, running east and west, with a curve to the south about 50 to 100 feet away. She told her children that they would cross the street to the fountain on the other side. They reached the sidewalk between the road and the parking lot, closer to the eastern entrance to the lot. They approached the edge of the curb and waited. Cars had been passing steadily in each direction. She saw a car heading eastbound come to a stop to her left. The eastbound lane of traffic was closest to them. There was a double yellow line separating traffic from the westbound lane. There was a crosswalk just to her right, a couple hundred feet away. They were standing five abreast, parallel to the road, just west of the curb cut for the easterly entrance to the parking lot. Cars that had passed in an eastbound direction before the car which stopped, were traveling between 20, 30, or 35 miles per hour. The car which stopped, remained stopped for about five to ten seconds, which was when she turned her head to grab Joseph, her eight year old. Her son Thomas was to her right. James and Emily were immediately to her left. Joseph was one person away, so she looked to her left to grab his hand, while the car in the eastbound lane remained stopped. She assumed it was stopped to allow them to cross. About five seconds later, she saw Thomas on the ground. She heard no horns, and no brakes, and no tires screeching. She heard a thud and her daughter scream. Thomas and the front panel just in back of the driver's side headlight of the Caner vehicle, which was traveling westbound, came into contact. She thought it was traveling 20, 25, or 30 miles per hour when she first saw it just west of Thomas, and it continued passed him and pulled over. She saw Thomas lying on the roadway just south of the yellow line, mostly in the eastbound lane.

Annabel Caner testified to the extent that she was born in 1932. She was involved in the accident with the plaintiff Thomas Shea when her vehicle and the plaintiff made contact. She was traveling in a westbound direction, and testified that it might have been south. The accident occurred on 25A (Northern Boulevard) adjacent to the parking lot. She stated that the road curves somewhat to the left in the vicinity of the accident. She traveled that road about four times a week and was en route to home from Huntington Village. She described 25A as a two lane road with one travel lane in each direction. She stated that there is parking along the westbound travel lane. She described traffic at the time as continuous, but not stop and go. She did not recall seeing a car traveling in front of her prior to the accident, and testified she did not know the distance between the front of her vehicle and the rear of the car in front of her. She believed that ten seconds prior to the accident, she was traveling at about 30 to 35 miles per hour. She did not recall eastbound traffic conditions at the time of the accident. She did not recall if there were any cars stopped in traffic in the eastbound lane as she proceeded west at the time of the accident.

Ms. Caner testified that one or two seconds prior to the accident, she saw the infant plaintiff who was at "the edge" into the eastbound lane. She testified that he came from her left from the parking lot. She did not recall if he was on the roadway or the sidewalk when she first saw him. She then testified that she did not see him standing, but saw him darting, going from the parking lot side of the road to the harbor side of the road. He was not in her driving lane when she first saw him. She later testified that he was half into the other lane when she first saw him. She was looking straight ahead just prior to the time she saw him. She continued that when the contact occurred, the child had already crossed the yellow line into her travel lane. She later testified that she did not remember seeing the yellow line. She could not recall if there were any vehicles traveling east which may have obstructed her view, but that traffic was continuous. Her left front fender made contact with the child, but she did not run over him. She did not know if her foot was on the brake or the gas pedal when she first saw him, however, she tried to stop when she saw him. There was no option to change her steering. She stated that there were cars parked along the westbound travel lane. A woman then darted out and grabbed the child and pulled him back to the side that he came from. She had stopped after the accident, but because of the traffic, continued going until she could turn around and return to the site. She then testified that she did not stop her vehicle because traffic was going and it did not seem like a good option. Traffic was not bumper to bumper. When she returned, there were people clustered around the child. She spoke only to the police. She learned that Dr. Gambino was a witness to the accident. She also testified that she gave a statement.

Anthony Gambino testified to the extent that he is a board certified cardiologist. He witnessed the accident. His daughter Christina was in his vehicle with him at the time. He stated that it was a clear day. The roads were dry. He drives on 25A about two to three times a day. At the time of the accident, he had been driving about one-quarter mile in an easterly direction on 25A. He described 25A, also known as Northern Boulevard, as having one travel lane in each direction, separated by a double yellow line. At that time of the day, eastbound traffic backs up because of the traffic light ahead. His vehicle was stopped. behind vehicles stopped in front of him up to the traffic light about 500 feet ahead. The road curves to the right in the vicinity of the accident. There were cars stopped behind him as well. He testified that traffic was moving well with no back up in the westbound direction. He was about five to ten feet from the accident when it occurred, involving one child and one car. He first saw the Caner vehicle about one car length away coming from the west. There was no obstruction from the curve at that point, and he was able to see one hundred yards down the curve. His car was stopped about one-half car length behind the car in front of him. His hands were on the steering wheel. He was talking to his daughter, when he saw a little boy running, darting, across the front of his car in the eastbound lane, in front of him. He raised his hand and yelled "stop" because he saw the other car coming towards him. He saw the boy look at him. He stated the boy had been on the sidewalk standing with his family. He never made eye contact with the child while he was on the sidewalk. The impact occurred when the child was in the westbound lane, just across the double yellow line. He stated the boy saw the other car and "kind of jumped," straight up, and landed "pretty much where he was hit." He then saw the boy trying to drag himself, when his mother came, picked him up and dragged him to the side. He said the mother was distraught. He asked someone for a belt and helped the child by tying the belt around one of his legs, and using pressure and gentle tourniqueting until the ambulance arrived.

Vehicle & Traffic Law § 1152 (a) provides that [e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within and unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. In the instant action, it has been established that the infant

plaintiff was crossing Route 25A at a point which did not have a crosswalk to cross to the other side. Therefore, the infant plaintiff had a duty to yield to all vehicles on the roadway.

While the infant plaintiff testified that he believed defendant Gambino waved him to cross in front of his stopped car, it has been established that the Gambino vehicle was stopped in traffic which extended to the traffic light about five hundred feet ahead. Although defendant Gambino denied waving the child across the front of his vehicle, and testified that he raised his hand and yelled for the infant to stop because he saw the Caner vehicle approaching, there is no factual issue to preclude summary judgment from being granted to Gambino.

Plaintiff's counsel argues, and the infant plaintiff avers, that because Gambino waved to him to cross, he stepped into the street and tried to cross, relying upon Gambino that it was safe to cross. Counsel cites to ***Heard v City of New York***, 82 NY2d 66, 603 NYS2d 414, quoting that "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully." However, citing to ***Heard v City of New York***, *supra*, in ***Mahautiere v New York City Transit Authority***, 118 AD3d 854, 988 NYS2d 241 [2d Dept 2014], the court reasoned that defendant satisfied its prima facie burden by establishing, inter alia, that its gratuitous provision of air conditioning "created no justifiable reliance" on the part of the plaintiff. It continued that the failure to cool the train car on which the plaintiff was riding at the time of the incident did not place her "in a more vulnerable position than [she] would have been in had the defendant done nothing." In the instant action, whether or not Gambino waved the infant plaintiff to cross in front of his stopped vehicle, he did not place the infant plaintiff in a more vulnerable position as the infant plaintiff had ascertained the safety of crossing the westbound lane when he looked to his right before crossing.

In ***Malpeli v Yenna***, 81 AD3d 607, 915 NYS2d 628 [2d Dept 2011], the court held that "[A]n 'assumed duty,' or a 'duty to go forward'" may arise once a person undertakes a certain course of conduct upon which another relies" citing ***Heard v City of New York***, *supra*, quoting ***Allan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 414 [1993], which set forth, "In determining whether a cause of action lies in such instances, '[t]he query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm,'" or, rather, whether he or she has merely "'stopped where inaction is at most a refusal to become an instrument of good.'" "Put differently, the question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing." In the instant action, had defendant Gambino done nothing, the infant plaintiff would still have had the duty to ascertain there was no vehicle coming from his right before attempting to cross the westbound travel lane, and testified that he did so. Therefore, defendant Gambino did not place the infant in a more vulnerable position than he would have been in had Gambino waved him to cross.

Plaintiff also cites to ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011], wherein the driver of a bus, double parked on a one way street, waved to plaintiff mother to cross in front of the bus. However, as the mother looked around the bus, she saw an approaching vehicle, and stepped back, but, the infant plaintiff continued forward and was struck by a vehicle approaching around the bus. Defendant operator of the vehicle which struck the infant was granted summary judgment, the record was searched, and the complaint was dismissed against the bus company who employed the driver. The dismissal was reversed on appeal, citing to ***Valdez v Bernard***, 123 AD2d 351, 506 NYS2d 363 [2d Dept 1986], wherein it was held that "[A] driver of a motor vehicle may, under certain circumstances, be liable to a pedestrian where the

driver 'undertakes to direct a pedestrian safely across the road in front of his vehicle and negligently carries out that duty.'" In ***Kievman v Philip***, *supra*, the defendant demonstrated prima facie that the mother did not rely upon the bus driver's alleged wave, thereby severing the causal nexus between the alleged negligence of the bus driver and the accident. However, plaintiffs in that case raised a factual issue as to whether they relied to any degree upon the bus driver's wave, and if so, whether the bus driver exercised reasonable care under the circumstances.

In ***Valdez v Bernard***, *supra*, the infant was waved across the road by a bus driver and sued the transit authority for her injuries. After a bifurcated jury trial on the issue of liability, the trial court entered an interlocutory judgment against the transit authority, finding it 2 percent at fault. When the transit authority appealed, the court held that the wave of the hand by the transit authority's bus driver was not the proximate cause of the accident because the infant stated that she interpreted the bus driver's wave to mean only that the driver would not move the bus while she passed in front of it, and because the infant made an independent decision to cross the adjacent lane of traffic because she looked both ways before proceeding to cross the road. In the instant action, there is a factual issue concerning whether or not defendant Gambino waved the infant to cross in front of his vehicle. If Gambino did wave, it was not the proximate cause of the accident as the infant plaintiff made an independent decision to cross the adjacent lane of traffic and looked both ways before proceeding to cross the road. Accordingly, defendant Gambino has demonstrated prima facie entitlement to summary dismissal of the complaint and the counterclaim asserted against him.

Plaintiff has failed to raise a factual issue. The infant plaintiff averred in his opposing affidavit that he looked to his right just before he crossed, and he saw no car coming from his right. Therefore, he failed to see the Caner vehicle approaching. His opposing affidavit is self-serving wherein he stated that he believed defendant Gambino knew there were no other cars coming from his right and that he relied on him, and thought it was safe to cross. This is unsupported by the infant plaintiff's prior testimony wherein he stated he looked to his right and saw no cars; he looked to his left, saw the stopped car, and started to cross the street. Based upon the foregoing, even if defendant Gambino did wave to the plaintiff to cross in front of his vehicle, this was not the proximate cause of the accident as it was plaintiff's independent decision to cross the roadway after looking to the right and ascertaining he could cross.

Accordingly, motion (002) by defendant Anthony Gambino for summary dismissal of the complaint and the cross claim asserted by co-defendant Annabel Caner is granted.

Vehicle & Traffic Law § 1146 (a) provides in relevant part that "[n]otwithstanding the provisions of any other law to the contrary, 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." Vehicle & Traffic Law § 1151 (b) provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield." Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago***, 277 AD2d 419, 716 NYS2d 710 [2000]). A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson***, 7 Misc3d 1022A, 801 NYS2d 238 [City Court, Ithaca 2005]).

In the instant action, there are factual issues concerning whether or not defendant Caner exercised due care while operating her motor vehicle to avoid colliding with the infant plaintiff, and whether or not she breached her duty to see what was on the roadway, namely the infant plaintiff, to avoid striking him. Ms. Caner testified that one or two seconds prior to the accident, she saw the infant plaintiff who was "at the edge," into the eastbound lane. She testified that he came from her left from the parking lot. She did not recall if he was on the roadway or the sidewalk when she first saw him. She then testified that she did not see him standing, but saw him darting, going from the parking lot side of the road toward the harbor side of the road. He was not in her driving lane when she first saw him. She later testified that he was half into the other lane when she first saw him. She was looking straight ahead just prior to the time she saw him. She continued that when the contact occurred, the child had already crossed the yellow line into her travel lane. She later testified that she did not remember seeing the yellow line. Thus there are factual issues concerning where the infant plaintiff was located when she first observed him, the amount of time which lapsed from the time she first observed the infant plaintiff, and whether she exercised reasonable care, and observed what was there to be seen. Here, the infant plaintiff had not just stepped off the curb providing defendant Caner with no opportunity to stop, swerve, or sound her horn as he was in the adjacent travel lane (*see* ***Deegan v Getter***, 42 Misc3d 1225 (A) [Sup Ct, Kings County 2014]).

"The following test determines whether an issue of fact exists for resolution by a jury: is there a valid line of reasoning and are there permissible inferences which could possibly lead rational men to the conclusion of negligence on the basis of the evidence presented? Moreover, such a determination is almost invariably a question of fact and is for the jury to determine in all but the clearest of cases" (***Cincotta v Johnson***, 130 AD2d 539, 515 NYS2d 115 [2d Dept 1987]).

Defendant Caner further testified that she braked to stop when she saw the infant plaintiff, but because there were cars parked on the shoulder of the westbound lane, she had no options. Thus, there are factual issues concerning whether or not defendant Caner exercised due care by not steering to the right toward the parked vehicles in an attempt to avoid contact between her vehicle and the infant plaintiff. The defendant testified that her left front fender made contact with the child, but she did not run over him. There are factual issues concerning whether or not she had time to sound her horn to warn the infant plaintiff that her vehicle was approaching when she first saw him. The defendant did not sound her horn. Here, it cannot be determined as a matter of law that defendant Caner was not negligent or that she exercised reasonable care and observed what was there to be seen.

Accordingly, motion (003) by defendant Caner for summary dismissal of the complaint as asserted against her is denied.

Dated: 10/14/14

J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION