J.E. v Cotto
2017 NY Slip Op 31615(U)
June 22, 2017
Supreme Court, Bronx County
Docket Number: 20469/2015e
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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J.E., an infant over the age of 14 years, by his father and natural guardian. DOMINGO ESPINAL, and DOMINGO ESPINAL, individually,

Plaintiff(s),

-against-

ADELE COTTO, METROPOLITAN TRANSIT AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, and JOHN DOE,

Defendant(s).

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Index No.: 20469/2015e

DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment	Papers Numbered
Notice of Motion and Affirmation in Support with Exhibits	1
Affirmation in Opposition by Plaintiff.	2
Affirmation in Opposition by Transit	3
Reply Affirmations in Support with Exhibit	4,5

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant, ADELE COTTO ("Cotto"), moves for summary judgment, dismissing the plaintiffs' complaint against her pursuant to CPLR §3212. Plaintiffs initially filed two separate complaints arising out of the same incident. The first complaint (index number 20469/2015e) named Cotto only as a defendant. The second complaint (index number 20470/2015e) named METROPOLITAN TRANSIT AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, and JOHN DOE (hereinafter collectively referred to as "Transit") as defendants. On September 21, 2015 the two cases were consolidated under index number 20469/2015e, and the caption was amended to the one reflected hereinabove. Since the consolidation, both Cotto and Transit failed to submit amended answers and failed to assert any

cross-claims against one another.

Infant plaintiff seeks damages for injuries allegedly sustained as a result of an incident that occurred on October 30, 2013. Plaintiff DOMINGO ESPINAL asserts derivative claims as infant plaintiff's father. On that date, infant plaintiff was a passenger on a bus owned and operated by Transit. The bus took an alternative route than its normal route due to road work. Instead of going up Ogden Avenue, the bus made a right onto Jerome Avenue. The bus stopped on Jerome Avenue between 165th and 166th Streets in order to discharge passengers. The bus stopped in the right lane, next to a parking lane where cars were parked. There was a travel lane to the left of the bus, then two lanes of traffic going in the opposite direction. Infant plaintiff exited the bus, turned to his left, and crossed in front of the bus in order to traverse three lanes of traffic on Jerome Avenue, mid-block. Infant plaintiff testified that he took a step out into the road at the same time he looked to see if there was oncoming traffic. Prior to him completing this step, he was hit by Cotto's vehicle, who was traveling in the left lane on Jerome, past the bus. Cotto moves for summary judgment on the basis that the record establishes that she is not liable for infant plaintiff's injuries.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for

summary judgment, the non-moving party must establish the existence of triable issues of fact that are, "real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dep't., 1983]).

Here, the Court finds that Cotto has made an initial showing of entitlement to summary judgment, dismissing the complaint as a matter of law. VTL §1152(a) directs that pedestrians crossing in a roadway and any point other that within a cross walk, must yield the right of way to all vehicles upon the roadway. Infant plaintiff's own testimony is clear that he was not crossing in a crosswalk and that when he attempted to cross the street the bus blocked his view of oncoming traffic. He also admits that he took a step into the roadway from in front of the bus at the same time that he looked to determine if there was oncoming traffic. In other words, he did not look before stepping into the roadway. He also testified that he saw Cotto's car when it was about two feet in front of him and that the accident took place immediately thereafter but before he could even complete his first step. Cotto testified she first saw the bus when she made a right turn onto Jerome Avenue and that the bus was stopped in the right lane. Cotto never testified that she was traveling behind the bus. Instead, her testimony establishes that as soon as she saw the bus upon turning right onto Jeremon Avenue, she maneuvered her car into the left lane to go around the bus. After describing her familiarity with Jermone Avenue, Cotto testified that there was no bus stop located where the bus was stopped and that she was driving in the left lane in order to pass the bus. Cotto also testified that she was going 15-20 miles per hour as she was passing the bus, but not over 25 miles per hour. Cotto testified that when the front of her vehicle was slightly past the front of the bus, infant plaintiff ran out from in front of the bus and hit her vehicle.

Non-party witness, Williams Stephens ("Stephens"), was deposed. He was also a passenger on the bus and got off at the same location as infant plaintiff. Stephens was about 10 feet from infant plaintiff when the accident happened and had an unobstructed view of infant plaintiff as he crossed in front of the bus. Stephens testified that infant plaintiff was walking quickly and that he did not stop to look to the left before stepping out into the road. Stephens speculated that Cotto was traveling at about 35 miles per hour but admits that the only time he actually saw Cotto's vehicle was at the moment of impact. Stephens testimony that he thought Cotto was going 35 miles per hour at the time of the accident is of no value. In light of Stephens' testimony that he did not see Cotto's vehicle until

the moment of impact, his assessment of Cotto's speed is speculative and is therefore, insufficient to defeat a motion for summary judgment (*Yelder v. Walters*, 64 A.D.3d 762,765 [2d Dep't., 2009]; see also *Kelly v. Rubin*, 224 A.D. 2d 262 [1st Dep't., 1996]). Stephens also testified that even if Cotto was traveling at 5 miles per hour, he believed she would have still hit the infant plaintiff because she could not have seen him or any other passengers disembarking from the bus.

Based upon the foregoing, Cotto has established that she was traveling in the left lane and was traveling below 25 miles per hour and that she saw infant plaintiff when the front of her car was almost parallel with the front of the bus. This, coupled with the fact that plaintiff admitted that he was not able to take one full step into the street prior to being hit, constitutes a sufficient prima facie showing by Cotto of entitlement to judgment dismissing the complaint (*Caro-Fortyz v. Peterson*, 110 A.D.3d 565 [1st Dep't., 2013]). In *Caro-Fortyz*, the Appellate Division reversed the trial court's denial of defendant's motion for summary judgment based upon facts similar to the fact here. There, the Appellate Division held that defendant driver's testimony that he was traveling in the left lane at about five to seven miles per hour, and did not see plaintiff before the accident, coupled with plaintiff's testimony that she got hit shortly after stepping out into the street from between two parked cars on the street, constituted a sufficient showing to warrant summary judgment dismissing the complaint. Further it has been held that where a defendant driver submits testimony that his view was obstructed, and plaintiff testified that he ran into traffic, midblock, the defendant driver is entitled to summary judgment dismissing the complaint (*Galo v. Cunningham*, 106 A.D.3d 865 [2d Dep't., 2013]). In *Galo*, summary judgment was granted even though the plaintiff testified he looked left, right, then straight ahead before running into the street. Here, on the contrary, the record is clear that infant plaintiff looked *as he was stepping* into a traffic lane. Further, while in *Galo*, the plaintiff ran across two lanes of traffic before being hit, here, infant plaintiff was hit, immediately upon taking a step into the roadway. *Caro-Fortyz* and *Galo,* stand for the proposition that where a pedestrian plaintiff crossed outside of a crosswalk and fails to yield the right of way to vehicles, summary judgment dismissing the complaint is warranted where the defendant driver established that he or she could have done nothing to avoid the collision, which the court finds Cotto has established here.

The oppositions submitted by plaintiff and Transit fail to raise an issue of fact to warrant denial of the motion. Initially, the fact that Cotto failed to submit a copy of plaintiff's verified Bill

of Particulars with her moving papers is not fatal to the motion as both complaints and all initial answers were submitted. Further, Cotto submitted a copy of the Bill of Particulars with her reply papers and as such, the requirement of CPLR §3212(b) has been met (*Pandian v. New York Health & Hosps. Corp.*, 54 A.D. 3d 590,591 [1st Dep't., 2008]).

Plaintiffs attempt to raise an issue of fact as to whether Cotto was traveling at 35 miles per hour at the time of the accident, and as to whether Cotto saw infant plaintiff for longer than five second before hitting him, is not persuasive. As to the speed, Cotto definitively stated that she was not going more than 25 miles per hour at the time of the accident. In fact, Cotto indicated which gears she was in from the time she turned onto Jerome to the time of the accident and indicated that she never made it above second gear. As stated above, Stephens' speculation that Cotto was traveling at 35 miles per hour is of no consequence because he did not observe Cotto's car until the impact. Further, plaintiffs' argument that Cotto's inconsistent testimony relating to the first time she saw the infant plaintiff creates an issue of fact as to whether she had time to react before impact is not persuasive. The deposition testimony of all parties establishes that as soon as infant plaintiff stepped out into the road from in front of the bus, he was hit. Cotto attempted to turn to the left as soon and she saw plaintiff, which she confirms, was when the front of her car was almost parallel to the front of the bus. Cotto's one time statement that it could have been 5-10 seconds between the time she first saw plaintiff until the time she turned her wheel to the left is a red herring. First, Cotto's statement that it could have been 5 seconds was in response to a leading question. However, Cotto corrected her statement and stated that she it was maybe one or two seconds from the time she saw plaintiff until the moment of impact. She confirmed that she had no time to react after seeing the infant plaintiff in that she testified that she immediately turned her wheel to the left when she first saw infant plaintiff, which was when the front of her vehicle was close to parallel with the front of the bus. This couple with the fact that plaintiff did not even take one step into the roadway, confirms that Cotto could do no more to avoid impact.

Plaintiffs' attempt to distinguish the instant matter from the facts in *Caro-Fortyz* on the basis that Cotto testified she was traveling at 20-25 miles per hour, while defendant in *Caro-Fortyz* was traveling at 5-7 miles per hour is not persuasive. The *Caro-Fortyz* court never indicated that defendant's speed was a determinative factor in its analysis. Further, in *Galo*, the fact that summary

judgment was granted even though the plaintiff there had already crossed two lanes of traffic before being hit, strengthens the argument in favor for summary judgment here. While the *Galo* plaintiff was in the process of traversing the roadway when he was hit, infant plaintiff here had not even completed one step, before being hit.

Moreover, plaintiff's contention that the record leaves open the issue fact as to whether Cotto should have exercised some higher level of caution because there was a bus stopped on the side of the road is unavailing. Cotto testified that the bus was not stopped at a bus stop and that she could not see whether passengers were exiting. Stephens confirms this by indicating that there was no way for plaintiff to see anything to the right of the bus as she was traveling past the bus on the left side. Plaintiff's contention that an issue of fact exists as to whether infant plaintiff was attempting to determine whether Cotto had the right of way before stepping into the street is without merit. Infant plaintiff did not look before stepping in the street. He looked at the same time he stepped into the street. Notably, no one disputes that Cotto had the right of way. Moreover, while drivers have a general duty to exercise due care under the circumstances, based on the records, the court finds that Cotto could not have avoided impact based upon the position of Cotto's vehicle (almost parallel to the front of the bus) and infant plaintiff not even completing one step before being hit.

Based on the foregoing, Cotto's motion for summary judgment dismissing the complaint is granted. The Court does not address Transit's request for leave to commence a third-party action against Cotto for indemnification. As far as the court is concerned, no cross-claims have been asserted herein and Cotto has established that she was not negligent. Therefore, a third-party action, seems moot at this point.

The above constitutes the decision and judgment of the court.

Dated: 6/22/17
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.