

Hall v City of New York
2013 NY Slip Op 31870(U)
August 12, 2013
Sup Ct, New York County
Docket Number: 100179/2011
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 100179/2011
HALL, DELOREAN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS *LAB: 1254*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

AUG 13 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

Dated: 8-12-13
AUG 12 2013

[Signature]
HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
DELORIAN HALL,

Plaintiff,

-against-

THE CITY OF NEW YORK AND "JOHN DOE"
(OPERATOR),

Defendants.
-----X

HON. KATHRYN E. FREED:

DECISION/ORDER
Index No. 100179/2011
Seq. No. 002

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant The City of New York ("the City"), moves for an Order dismissing the complaint as against it, or in the alternative, granting it summary judgment pursuant to CPLR§ 3212, dismissing the complaint against it. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on October 26, 2010, at approximately 8:50 a.m., when while riding her bicycle with her three year old son, she

was struck by a Department of Sanitation garbage truck owned by the City and negligently operated by "John Doe." Plaintiff claims that she was en route to her son's day care center when the accident occurred. Immediately prior to the accident, she had made a right turn on East 6th Street and traveled eastbound toward Avenue B along the right side of the street. There was no dedicated bike lane on East 6th Street. She proceeded down the street and came to a stop behind traffic that was stopped on East 6th Street. During that time she observed said truck stopped on the road and also a sanitation worker dressed in a shirt which bore the letters "DSNY." As plaintiff passed said truck, "John Doe" veered the truck to the right, striking her bicycle on the handlebars, and propelling her to the ground. Defendant continued to drive away. Plaintiff called 911 and was transported to the hospital via ambulance.

As a result of the accident, she sustained injuries to her shoulder, back, neck and knees, necessitating surgery to repair a torn ACL. Thereafter, plaintiff commenced the instant action via Service of a Summons and Verified Complaint on or about January 11, 2011. The City served its Answer on January 31, 2011. Plaintiff's §50-h hearing was held on February 25, 2011.

Positions of the parties:

The City argues that plaintiff's complaint necessitates dismissal because it is not a proper party. It argues that defendant's mere allegations do not constitute evidence in admissible form sufficient to support her claim that she was struck by a vehicle owned and operated by the DOS. The City asserts that plaintiff only described the subject truck as "white," and could not recall observing any DOS Logo. Since there are both city and privately owned garbage trucks, the City argues that this description is insufficient to determine with any degree of certainty, that it belonged to the City.

In support of its argument, the City refers to and relies on pertinent aspects of the deposition testimony of DOS Supervisors Joseph Albanese and Ryan Dempsey. On August 19, 2011, Mr. Albanese was deposed. It is undisputed that he testified that he was the supervisor of the Manhattan 3 garage which in 2010, covered the area including East 6th Street between Avenues A and B (Exhibit “D” at 9). Mr. Albanese also testified that he received a radio call on October 26, 2010, instructing him to proceed to New York Downtown Beekman Hospital, wherein he met with plaintiff in the emergency room. Plaintiff informed him that she could not and did not obtain a license plate number or truck number.

After meeting with plaintiff, Mr. Albanese filled out a DOS accident report annexed as Exhibit “E.” He stated therein that there was an “[a]lleged accident involving an unknown collection truck and a bicyclist with an attached seat holding a child. No injuries to child. The bicyclist was taken to NY Downtown Beekman Hospital with injuries to back, neck, arm, and leg.” Mr. Albanese also testified that October 26, 2010 was a Tuesday, and the area of East 6th between Avenue A and Avenue B is not covered by a route on Tuesday. (Exhibit D at 32). Therefore, businesses located on East 6th Street would use a private carting company and residential buildings have their garbage picked up by the City. *Id.* at 30-32.

The deposition of Ryan Dempsey, another Superintendent for DOS was held on March 7, 2012. Mr. Dempsey testified that he is currently assigned to District 3, and his duties include assuring that the garbage collection trucks, recycling trucks, and street sweepers are dispatched daily. He also testified on October 26, 2010, he was at the 9th Precinct, on an unrelated incident, when he was apprised of plaintiff’s accident. He testified that East 6th Street between Avenues A and B was within the confines of DOS Manhattan District on that day and still is to date. (Exhibit F at 16).

After seeing plaintiff at the hospital, Mr. Dempsey testified that he interviewed sanitation workers in Manhattan District 3, subsection 3. All those interviewed claimed of having no knowledge of the incident. *Id.* at 38-39.

Additionally, Mr. Dempsey testified that no recycling is picked up on Tuesday in that area, and on in October 2010, garbage was collected on East 6th Street between Avenues A and B on Mondays, Wednesdays and Fridays. *Id.* at 60, 83. No garbage collection occurred on East 6th between Avenues A and B on the day of plaintiff's accident. *Id.* at 75-76.

In response, plaintiff argues that questions of fact exist as to whether defendants' negligently operated the subject garbage truck, proximately causing her injuries. In contravention of the City's proffering of certain segments of the aforementioned deposition testimony, plaintiff refers to and relies on those aspects which support her position. Most notable, is the suggestion that despite the fact that there was no designated garbage pick up on the day of her accident in that particular area, the presence of a garbage truck did not necessarily mean that it was there to pick up garbage.

Q. Can you tell me what discretion they do have [referring to drivers getting to their route]

A. They have to get to their route, so if the street is blocked off for construction, they go around the corner and take the other street. They're going to try to get there as soon as possible.

(See Aff. in Opp. Albanese test. Exhibit G, p. 29, lines 17-25).

Q. So even though this block was not scheduled for pick up on the date of the accident, a Sanitation truck could have been traveling on that block getting to another route; is that correct?

A. It could be.

(*Id.* at p. 30, lines 2-7).

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.3d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Morgan v. New York Telephone*, 220 A.D.2d 728 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

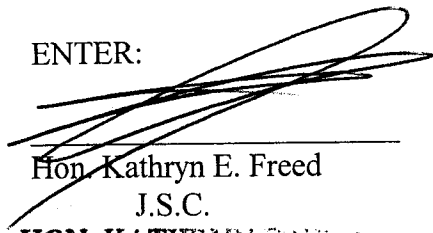
The Court agrees with the City that issues of witness credibility are not appropriately resolved in a motion for summary judgment (see *Alvarez v. New York City Hous. Auth.*, 295 A.D.2d 225 [1st Dept. 2002]; *Gaspar v. LC Main, LLC*, 27 Misc.3d 1212(A), 2010 N.Y. Slip Op. 50691(U) (Sup Ct, NY County 2010), *affd* 79 A.D.3d 428 [1st Dept. 2010]). However, the aforementioned portions of testimony that plaintiff proffers need not be viewed as raising credibility issues nor should they be regarded as merely “rank speculation.” They do indicate that there may be a myriad of reasons why a DOS truck may be in the vicinity of the accident on a day it is not scheduled to be there. This is sufficient to create a material issue of fact that defeats a motion for summary judgment.

Therefore, in accordance with the foregoing, it is hereby
ORDERED that defendants' motion for summary judgment is denied; and it is further
ORDERED that this constitutes the decision and order of the Court.

DATED: August 12, 2012

AUG 12 2013

ENTER:



Hon. Kathryn E. Freed

J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK