

Tammany v Demetrius
2014 NY Slip Op 33513(U)
June 3, 2014
031675/2013
Docket Number: 031675/2013
Judge: Margaret Garvey
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
DELILAH TAMMANY, an Infant by her Parents and
Natural Guardian, YESENIA TAMMANY and DAVID TAMMANY,
YESENIA TAMMANY, Individually and DAVID TAMMANY,
Individually,

Plaintiff,

-against-

DECISION AND ORDER
(Motion #1)

CHRISTINA DEMETRIUS,

Index No. 031675/2013

Defendant.

-----X
Margaret Garvey, J.S.C.

The following papers, numbered 1 to 3, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting Summary Judgment on the issue of liability, striking Defendant's First Affirmative Defense, ordering an immediate jury trial on the issue of damages, and for such other and further relief as this Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF SARA DIRECTOR, ESQ. DATED MARCH 10, 2014/EXHIBITS (1-5)	1
AFFIRMATION OF DONNA M. BRAUTIGAM, ESQ. DATED APRIL 4, 2014 IN OPPOSITION/EXHIBITS (A-B)	2
REPLY AFFIRMATION OF SARA DIRECTOR, ESQ. DATED APRIL 10, 2014	3

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of a Summons and Verified Complaint filed through the NYSCEF system on March 26, 2013. Issue was joined with the filing and service of an Answer on behalf of Defendant on September 20, 2013. The action stems from an accident that occurred on November 23, 2012 at the intersection of Main Street and

First Street in Nanuet, New York, within the County of Rockland. It is not disputed that Plaintiff YESENIA TAMMANY was walking in the crosswalk on Main Street with her infant daughter, Plaintiff DELILAH TAMMANY, when Plaintiff YESENIA TAMMANY was struck by a motor vehicle owned and operated by Defendant CHRISTINA DEMETRIUS. It is also not disputed that Defendant CHRISTINA DEMETRIUS was making a left turn onto Main Street from First Street when the accident happened.

Plaintiffs filed the instant motion seeking an award of partial summary judgment on the issue of liability. In support of their motion, Plaintiffs provide the transcript of the Examinations Before Trial of Plaintiff YESENIA TAMMANY and Defendant CHRISTINA DEMETRIUS, as well as an affidavit of eyewitness Walter Ostermeir, and a copy of the Police Accident Report. Plaintiff YESENIA TAMMANY states that she waited for the pedestrian signal and looked both ways multiple times before safely entering the crosswalk, when she was struck by Defendant prior to making her way across the Defendant's lane of travel. Mr. Ostermeir states that he observed the incident, that Plaintiff YESENIA TAMMANY and her daughter had the pedestrian signal in their favor, and were walking across the crosswalk when they were struck by Defendant's vehicle. Mr. Ostermeir also states that Plaintiff YESENIA TAMMANY and her daughter were walking in the crosswalk - they had not run into it, and were not running in the crosswalk.

Defendant opposes the instant application, and argues that triable issues of fact exist as to whether Plaintiff was comparatively negligent or failed to exercise care when crossing the road, and whether Plaintiff crossed the road without exercising her faculty of sight. Specifically, Defendant's counsel argues that it is impossible for Plaintiff to have exercised sufficient care and looked left when Plaintiff concedes that she did not see Defendant's vehicle until a split second before it struck her. Defendant relies upon the testimony of Plaintiff YESENIA TAMMANY and Defendant CHRISTINA DEMETRIUS, arguing that such testimony presents triable issues of fact as to possible comparative negligence on the part of Plaintiff

YESENIA TAMMANY. Additionally, regarding the affidavit of Mr. Ostermeir, Defendant notes that Mr. Ostermeir did not state that he observed whether or not Plaintiff YESENIA TAMMANY looked to the left prior to or when she was crossing the road.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)].

It is likewise well-settled that a plaintiff establishes his or her prima facie entitlement to judgment as a matter of law by demonstrating that he or she exercised due care while crossing a street within a crosswalk with the traffic light in his or her favor when said plaintiff is struck by a defendant's vehicle. [*Arazashvili v. Executive Fleet Mgt., Corp.*, 90 A.D.3d 682 (2d Dept. 2011); *Martinez v. Kreychmar*, 84 A.D.3d 1937 (2d Dept. 2011) (plaintiff demonstrated that she was within the crosswalk with the pedestrian signal in her favor and exercising due care, had looked in all directions to check for approaching vehicles before entering the intersection; defendant failed to offer any evidence in opposition - summary judgment properly granted on the issue of liability); *Lariviere v. New York City Tr. Auth.*, 82 A.D.3d 1165 (2d Dept. 2011); *Benedikt v. Certified Lumber Corp.*, 60 A.D.3d 798 (2d Dept.

2009)].

It is also clear that it is possible for a defendant to raise a triable issue of fact as to possible comparative negligence on the part of a plaintiff walking in a crosswalk with a traffic light in his or her favor. [*Thoma v. Ronaj*, 82 N.Y.2d 736 (1993) (plaintiff's affidavit and the police accident report demonstrate that she may have been negligent in failing to look to her left while crossing the intersection as she conceded that she did not observe the vehicle that struck her - that concession raises a factual question of her reasonable care); *Kusz v. New York City Transit Authority*, 88 A.D.3d 768 (2d Dept. 2011) (plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability against the defendants by demonstrating that the defendant driver failed to yield the right-of-way to the injured plaintiff who was crossing the street within a crosswalk with the pedestrian crossing signal in her favor after looking both ways - defendants raised a triable issue of fact regarding the injured plaintiff's comparative negligence in opposition); *Cator v. Filipe*, 47 A.D.3d 664 (2d Dept. 2008) (plaintiff testified at her deposition that she had not looked to her left or right while crossing the street so a triable issue of fact existed as to her comparative negligence); *Lopez v. Garcia*, 67 A.D.3d 558 (1st Dept. 2009) (issues of fact as to plaintiff's comparative negligence were raised by (1) plaintiff's statement in her affidavit that she did not see the defendant's vehicle before it hit her, (2) the police accident report that stated the defendant driver told police that plaintiff was in his blind spot while driver was executing a legal left turn and a witness said plaintiff never looked when walking into the roadway, and (3) defendant driver's affidavit stated he had seen plaintiff running and she ran into his vehicle in a place where he could not see her)].

In this matter, the Court is faced with the usual dueling affidavits from each party as well as an additional affidavit of an eyewitness on Plaintiff's behalf. The positions advanced by the parties are diametrically opposed; therefore, they cannot be resolved by motion. Specifically, Plaintiff states that she exercised due care before entering the crosswalk by looking

left and right for traffic and saw none. Plaintiff further states that she did not see Defendant's car until it was upon her. However, Defendant states that there was heavy traffic that day (Black Friday), that it was bumper to bumper, that the car in front of her entered the intersection and made the same left turn directly in front of her, that she did not see Plaintiff YESENIA TAMMANY and her daughter (or anyone else) in the crosswalk, and finally that she saw someone fall in front of her car immediately before the accident. On this summary judgment motion, the Court is required to credit Defendant's version and make all reasonable inferences in Defendant's favor. With that in mind, if it was heavy traffic and another car made the turn directly in front of Defendant, it is possible that a jury could find that Plaintiff YESENIA TAMMANY did not exercise due caution in looking around before entering the intersection in light of the fact that she stated she did not see any cars coming, and did not see Defendant's car until it was upon her.

Essentially, what has been presented to the Court is each party's recitation as to what it believes should be found as facts. Unfortunately, acceptance of those supposed facts must be based upon the credibility of the witness propounding the particular point(s), and credibility is not something that this Court can assess based upon papers. Credibility is, instead, an issue for the trier of fact to decide after observing the witness undergo direct examination and the scrutiny of cross-examination.

Consequently, it is this Court's opinion that the papers themselves have raised issues of fact as to possible comparative negligence on the part of Plaintiff YESENIA TAMMANY and those questions must be answered by the jury. Therefore, Plaintiff's summary judgment motion on the issue of liability is denied.

Additionally, counsel should be advised that there will be no settlement conference conducted on June 30, 2014 before the Court Appointed mediator. That date has been adjourned to July 24, 2014 and the settlement conference will be conducted by the undersigned. Counsel should appear at the July 24, 2014 settlement conference with authority

to negotiate a possible settlement, and should have their clients/adjustor available by phone.

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that counsel for the parties shall appear before the undersigned for a settlement conference on **THURSDAY, JULY 24, 2014 at 9:30 a.m.** and shall have authority to settle the matter on that date (parties and/or adjustor shall be reachable by phone); and it is further

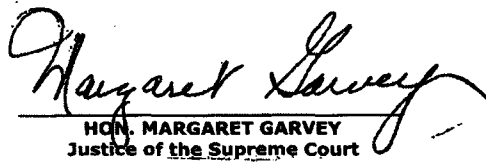
ORDERED that counsel for the parties shall appear at a previously scheduled pre-trial conference on **MONDAY, OCTOBER 6, 2014 at 9:15 a.m.**; and it is further

ORDERED that counsel for the parties are advised to familiarize themselves with this Court's part rules, specifically the requirements for trial notebooks due five business days before the start of trial, and submission of motions in limine due seven business days before the start of trial; and it is further

ORDERED that the trial will commence with jury selection on **TUESDAY, OCTOBER 14, 2014** - counsel shall appear before the undersigned at 9:15 a.m. on that date.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
June 3, 2014


HON. MARGARET GARVEY
Justice of the Supreme Court