

Barber v MTA Bus Co.
2016 NY Slip Op 30320(U)
February 26, 2016
Supreme Court, New York County
Docket Number: 157159/13
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

FATIMA BARBER, individually and as m/n/g of
DAMEIN WALKER, infant under the age of 14 yrs,

Plaintiff(s),

-against-

MTA BUS COMPANY and "JOHN DOE", a fictitious
name, actual name unknown,

Motion Seq.# 2

DECISION AND ORDER

Index #: 157159/13

Hon. Leticia M. Ramirez

Defendant(s).

Plaintiffs' motion, pursuant to CPLR §3212, seeking summary judgment on the issue of liability, is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Winegrad v New York Univ. Med. Ctr.*, *supra.*; *Menzel v. Plotnick*, 202 A.D.2d 558, 610 N.Y.S.2d 50 (2nd Dept. 1994). A movant's failure to submit sufficient evidence to eliminate any material issues of fact mandates denial of the motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr.*, *supra.* Furthermore, in deciding summary judgment motions, the Court must

accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *Menzel v. Plotnick*, *supra*.

To prevail on a summary judgment motion on the issue of liability, the movant has the burden of establishing, with admissible evidence, that the movant is free from any comparative negligence, as a matter of law. *Thoma v Ronai*, 82 N.Y.2d 736 (1993); *Maniscalco v New York City Transit Auth.*, 95 A.D.3d 510 (1st Dept. 2012); *Villa v Leandrou*, 94 A.D.3d 980 (2nd Dept. 2012). Evidence demonstrating alternate theories of the cause of the accident raise material issues of fact that must be determined at trial. *Mitchell v The Maguire Co., Inc.*, 151 A.D.2d 355 (1st Dept. 1989). Credibility determinations must be resolved by the trier of fact. *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

Bicyclists are subject to the same duties under the New York State Vehicle and Traffic Law applicable to motorists. *N.Y. Veh. & Traf. Law §1231*. As such, a bicyclist entering an intersection has a duty to yield the right-of-way to traffic approaching or already in the intersection. *N.Y. Veh. & Traf. Law §1140 and §1143*.

In this action, the plaintiffs allege that the infant plaintiff Damein Walker ("infant plaintiff"), was struck by a bus owned by defendant MTA Bus Company, while on his bicycle at the intersection of Main Street and 36th Avenue, Roosevelt Island, New York, at approximately 4:30 p.m., on August 31, 2012.

In support of their motion, the plaintiffs submitted, inter alia, the sworn affidavit of infant plaintiff. In his affidavit, the infant plaintiff stated that he was 12 years old at the time of the accident, had just left his grandmother's house and was riding his bicycle to his uncle's job. When he reached the subject intersection, he paused on the sidewalk and sat on his bicycle, while waiting for the subject bus to complete a right turn from northbound Main Street onto eastbound 36th Avenue. The infant plaintiff then stated that "suddenly and without warning," the bus mounted the sidewalk and struck his bicycle,

causing him to fall to the ground.

Defendant MTA Bus Company (“defendant”), in opposition to the motion, submitted, inter alia, the transcript of the infant plaintiff’s 50H hearing testimony, in which the infant plaintiff testified that he did not look to his left and was unsure if he looked to his right before the accident. He only saw the bus immediately before accident. He further testified as follows:

“Q. Were you still on the sidewalk at the time of the impact or had you gone into the street?

A. I was entering the street.

Q. Was the front of your bicycle in the street?

A. Yes.

Q. How far into the street was the front of your bicycle at the time of the contact?

A. It was up so far that my back tire was on the sidewalk. I was entering the street...

Q. At the time of the contact, how fast was your bicycle going, if you know, in miles per hour or any other way?

A. Slow.

Q. Very slow?

A. Slow.”

(Exhibit “A” - pgs. 53-55 annexed to the defendant’s affirmation in opposition).

In addition, defendant submitted the relevant police accident report, which describes the accident as follows: “bicyclist was riding northbound on sidewalk and hit MTA bus which was traveling eastbound after making a right hand turn onto 36th Avenue bridge entrance. Vehicle #1 continued up ramp leaving scene of accident. Police did not witness.” It appears from a review of the police accident report that the description of the accident was reported to the police by the infant plaintiff, as the driver of the bus left the scene of the accident.

Conversely, a review of the infant plaintiff’s deposition transcript, also submitted by the defendant, reveals that, at the time of his deposition, the infant plaintiff testified that he was stopped on the sidewalk waiting for traffic to stop so that he could cross street at the time of the accident. He testified that he and his bicycle were fully on the sidewalk

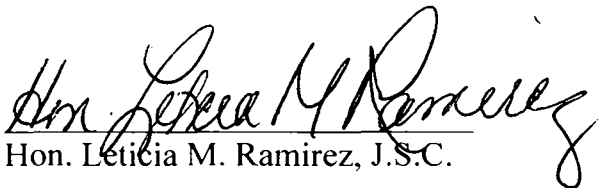
at the time of the accident and that neither he nor his bicycle entered the street before the accident.

As the infant plaintiff was consistent in both his 50H hearing testimony and his deposition testimony that the traffic signal was in the bus' favor at the time of the accident and given the conflicting testimonies of the plaintiff and the police accident report, there are material issues of fact, as to whether any comparative negligence can be attributed to the infant plaintiff, which preclude the grant of summary judgment in favor of the plaintiffs. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Thoma v Ronai*, 82 N.Y.2d 736 (1993); *Maniscalco v New York City Transit Auth.*, 95 A.D.3d 510 (1st Dept. 2012); *Villa v Leandrou*, 94 A.D.3d 980 (2nd Dept. 2012); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

Accordingly, the plaintiffs' motion is denied, in its entirety.

This constitutes the Decision and Order of this Court.

Dated: February 26, 2016
New York, New York


Hon. Leticia M. Ramirez, J.S.C.