

Faulknor v Gina's Trucking Inc.
2016 NY Slip Op 33176(U)
March 7, 2016
Supreme Court, Westchester County
Docket Number: Index No. 62389/2015
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
DIANA FAULKNER,

Plaintiff,

-against-

**DECISION & ORDER
Index No. 62389/2015
Sequence No. 1**

**GINA'S TRUCKING INC. and RORY J. JENKINS,
COUNTY OF WESTCHESTER, VILLAGE OF
CROTON ON HUDSON, AND TOWN OF
CORTLANDT,**

Defendants.

-----X
WOOD, J.

The following papers were read and considered in connection with defendants' motion for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
Plaintiff's Counsel's Affirmation in Opposition, Exhibits.
Defendants' Counsel's Reply Affirmation.

This action arises from a motor vehicle accident on July 7, 2015, wherein plaintiff/pedestrian was hit by defendants' tractor trailer as she attempted to cross the entrance ramp of Route 9 South at its intersection with Croton Point Avenue in the County of Westchester. Plaintiff opposes the motion.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a 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 demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v. City of New York, 721 NYS2d 790 [2d Dept 2000]). A driver of a motor vehicle has a statutory duty to yield the right of way to a pedestrian and to use due care to avoid colliding with a pedestrian on the roadway (see Vehicle and Traffic Law §§

1112(a), 1146 and 1152(a), as well as a common-law duty to see that which she should have seen through the proper use of her senses (Domanova v. State of New York, 41 AD3d 633 [2007]). Rules of City of New York Department of Transportation (34 RCNY) § 4-04(b)(1), entitled “Operators to yield to pedestrians in crosswalk,” provides that “[w]hen traffic control signals or pedestrian control signals are not in place or not in operation, the operator of a vehicle shall yield the right of way to a pedestrian crossing a roadway within a crosswalk when the pedestrian is in the path of the vehicle or is approaching so closely thereto as to be in danger.” Rules of City of New York Department of Transportation (34 RCNY) § 4-04(b)(2), entitled “Right of way in crosswalks,” provides that “[p]edestrians shall not cross in front of oncoming vehicles. Notwithstanding the provisions of (1) of this subdivision (b), no 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 impossible for the operator to yield.” Rules of City of New York Department of Transportation (34 RCNY) § 4-04(c)(2) provides that “[n]o pedestrian shall cross any roadway at an intersection except within a cross-walk.” NYC Traffic Rule Section 4-04 (c) 3 states that “No pedestrian shall cross a roadway except at a crosswalk on any block in which traffic controls are in operation at both intersections bordering the block” . ,

Here, plaintiff maintains that when she stepped off the curb onto the shoulder of the roadway with her right foot, it was between the curb and the white line of the shoulder of the roadway. The tractor trailer hit her when it made a right turn and crossed the white line into the shoulder of the roadway where she had stepped down.

In opposition, defendants argue that at the time of the accident, plaintiff was in violation of New York State Vehicle and Traffic Law Section 1151(b), which states that no pedestrian shall suddenly leave a curb...and walk into the path of a vehicle which is so close

that it is impractical for the driver to yield. In further support of their motion, defendants rely on the deposition testimonies of the parties and other evidence that they say demonstrates that plaintiff pedestrian failed to exercise due care by looking to check for vehicles before entering the intersection. The scenario that the tractor trailer suddenly materialized on the roadway in the instant before plaintiff stepped from the curb is unrealistic according to defendants.

Defendant Rory Jenkins, who was the driver of the tractor trailer testified that he saw a white man and a black woman walking on the pedestrian sidewalk prior to reaching the entrance ramp of Route 9 (I:34-35). He also saw these people when he stopped at the stop sign and that they were approximately half way up the block to his right side. He testified that he slowly drove by them, as they were approximately 8 feet from the corner when he passed them, and that was the last that he saw of them. That when he turned about 85% of the truck before he noticed that the accident had occurred; that he used his mirrors while making his turn, and that he followed the tires all the way through the turn. No part of his truck went upon the sidewalk.

Mr. Washburn, the person who was walking with plaintiff testified that he was getting ready to step off the curb but that plaintiff stepped off first.

- Q. Now, just prior to the accident, within five or ten seconds, did you see the tractor trailer:
A. Briefly, but I didn't - - maybe I should have warned her but I didn't - I mean, everything happened so fast. It's like a nightmare.
- Q. Did you see the tractor trailer within five seconds prior to the accident?
A. I guess I would say so. I mean, maybe I should have...
- Q. Now, earlier you testified that for the full ten seconds prior [to] the accident, you were looking at Ms. Faulknor and she was looking at you. She was to your left:
Q. And the tractor trailer was coming for your right; correct?
A. Yes, sir.
- Q. Are you sure you saw the tractor trailer prior to the accident?
A. I am not sure about anything at this point in time, to be honest with you. (Ex J)

Ultimately, he testified that he could not be sure if he saw the tractor trailer prior to the

accident (*see Exhibit J:89*).

Defendants claim that Jenkins was lawfully proceeding making his right turn, as a reasonable person under the circumstances and that he has demonstrated his freedom from comparative negligence so they are entitled to summary judgment dismissing the complaint.

In contravention, plaintiff claims that at the time of the accident she was walking with a friend on the sidewalk of Croton Point Avenue for seven minutes before the accident occurred. Plaintiff stepped off of the curb into the street with her right foot and the truck hit her. She did not see the truck before the accident. She explains that she is statutorily blind, has a prosthetic eye but that she would have been able to see a tractor trailer if it was directly in front of her. She was wearing prescription glasses at the time of the accident, and did not need to use a cane. Plaintiff stated that as soon as she stepped off the curb, she heard the truck's engine to her left side, and then she was hit by defendant's trailer. She stated that the tractor trailer hit her as it made a right turn and crossed the white line into the shoulder of the roadway. Her affidavit reads: "I have walked the same way to work 3-4 time per week for over 15 years, and have never had a problem with traffic as I crossed the roadway at this intersection. The tractor trailer made a right turn crossing the white line into the shoulder of the roadway and hit me as I had started to cross the intersection" (*see Plaintiff's Affidavit*). Plaintiff cites that defendants' violation of Vehicle & Traffic Law sections 1128(d) and 1131 is evidence of dependants' per se negligence, as the rear wheel of the tractor trailer crossed into the shoulder of the road and struck plaintiff as the driver was making a right turn at the intersection.

Vehicle and Traffic Law Section 1131 provides that no motor vehicle shall be driven over, across, along, or within any shoulder of any state controlled-access highway. VTL

§1151(b) provides that pedestrians shall not leave the curb and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield; and VTL §1152(a) states that pedestrians crossing a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection, shall yield the right of way to all vehicles within the roadway.

Plaintiff points out that defendants mistakenly recount that the driver of the tractor trailer made a left turn in front of plaintiff, when defendant driver made a right turn from Croton Point Avenue onto Route 9 South entrance ramp and struck plaintiff. However, based upon the record, this is clearly nothing more than de minimis error, a scrivener's error, as the deposition testimony, the photographs, the supporting depositions, and all evidence presented on this motion demonstrate that defendants' tractor trailer was completing a right turn.

Taking into consideration the parties arguments and submissions, Defendants as the proponents of this summary judgment motion, failed to meet their burden of establishing freedom from comparative negligence as a matter of law as Defendants failed to establish that plaintiff's actions were the sole proximate cause of the collision (Pollack v Margolin, 84 AD3d 1341 [2d Dept 2011]). Viewing the evidence submitted in support of the defendant's motion in the light most favorable to the nonmoving party, the court finds that Defendants failed to demonstrate as a matter of law, that defendant Jenkins exercised due care to avoid the subject accident or that he was not operating the vehicle in a negligent manner(Rea v Bono, 95 AD3d 856 [2d Dept 2012]). and whether he defendant exercised due care to avoid striking a pedestrian (Sale v Lee, 49 AD3d 854 [2d Dept 2008]). As the question of comparative negligence is generally a question for the jury (Jahangi v Logan Bus Co., Inc., 89 AD3d 1064 [2d Dept 2011]), this Court finds that there is a triable issue of fact precluding summary

judgment as to whether any negligence on defendant's part contributed to the accident, by failing to keep a proper lookout, by traversing in the shoulder while making his turn, or otherwise. Further, the above facts may lead a fact finder to believe that plaintiff suddenly left the curb and walked or ran into the path of defendant's vehicle, making it impossible for defendant to yield or to question whether the pedestrian has exercised reasonable care in stepping off the sidewalk. For these reasons, Defendants' motion must be denied.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

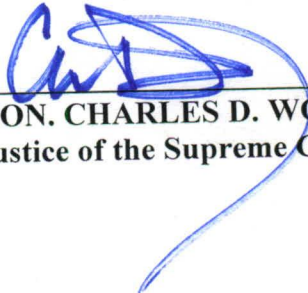
NOW, therefore, it is hereby

ORDERED, that Defendants' motion for summary judgment is denied; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that the parties are directed to appear on **April 4th**, 2017, at 9:15 A.M. in courtroom 1600, the Settlement Conference Part, Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: March 7, 2016
White Plains, New York


HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Mallilo & Grossman, Esqs.
Attorneys for Plaintiff
163-09 Northern Blvd.
Flushing, New York 11358

Leonard M. Cascone, Esq.
Cascone & Kluepfel, LLP
Attorney for Defendants
Rory J. Jenkins
Gina's Trucking Inc
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

Morris Duffy Alonso & Faley
Attorneys for Defendant
Village of Croton
Two Rector Street, 22nd Floor
New York, New York 10006

Syma B. Funt, Esq.
Robert F. Meehan
Westchester County Attorney
Attorneys for Defendant
County of Westchester
148 Martine Avenue
White Plains, New York 10601

John J. Walsh, Esq.
Hodges Walsh & Messemer, LLP
Attorneys for Defendants
Town of Cortlandt
55 Church Street-Suite 211
White Plains, New York 10601