

Martinez v Eloise-McKoy
2017 NY Slip Op 33494(U)
June 2, 2017
Supreme Court, Westchester County
Docket Number: Index No. 65692/15
Judge: David F. Everett
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To commence the 30-day statutory time period for appeals as of right under 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
ELIGIO MARTINEZ,

Plaintiff,

-against-

Index No. 65692/15
Motion Sequence No. 001
Decision and Order

R.E. ELOISE-MCKOY

Defendant.

-----X
EVERETT, J.

The following papers were read on the motion:
Notice of Motion/Affirmation in Supp/Exhibits A-H
Affirmation in Opp
Reply Affirmation

In this negligence action, plaintiff Eligio Martinez (Martinez) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendant R.E. Eloise-McKoy (Eloise-McKoy) on the issue of liability. Upon the forgoing papers, the motion, which is opposed by Eloise-McKoy, is granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on September 23, 2015, to recover damages for physical injuries he allegedly sustained on July 12, 2015, when he was struck by Eloise-McKoy's vehicle while crossing a public street within the confines of a crosswalk, with the walk signal in his favor. Issue was joined by service of Eloise-McKoy's answer with affirmative defenses on or

about November 4, 2015, after which the parties conducted discovery pursuant to the preliminary conference and follow-up compliance conference orders. On December 12, 2016, Martinez filed a note of issue and certificate of readiness, and on or about February 16, 2017, he served the instant motion for summary judgment on the issue of liability. It is Eloise-McKoy's position that there are questions of fact as to whether Martinez contributed to the accident by failing to observe what was there to be seen through the proper use of his senses.

As the proponent of the motion for summary judgment, Martinez must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in his favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). Should he make the requisite showing, the burden would shift to Eloise-McKoy to produce evidentiary proof in admissible form sufficient to require a trial on one or more issues of fact (*id.*).

To make his showing, Martinez supports his motion with, among other things, copies of: the pleadings; party deposition transcripts; and a certified copy of the police report relative to the accident.

At his deposition, Martinez testified that, on the morning of July 12, 2015, he was walking along Main Street in New Rochelle, New York. When, at approximately 11:00 a.m, he reached the intersection of Main Street and Division Street, where there was a designated crosswalk, he waited for the pedestrian control signal's walking figure to light up, signaling that it was safe for him to cross (Martinez tr at 19, 20). Martinez testified that, when he saw the pedestrian control signal turn white, he started to walk within the confines of the crosswalk (*id.*). He explained that, he had just taken several steps into the crosswalk when the defendant's

vehicle struck him on his right side. When asked, Martinez denied hearing either vehicle or the sound of a horn before being struck (*id.* at 21, 22).

At the defense deposition, Eloise-McKoy explained that she had been traveling on Main Street at approximately 30 miles per hour, and that, when she saw a green light at the subject intersection, she slowed her car down, but did not stop before making a turn onto Division Street (Eloise-McKoy tr at 15, 16). When asked, Eloise-McKoy denied seeing any pedestrians on any of the corners as she approached the intersection (*id.* at 16), and that the first time she saw Martinez was when he was on the ground. Eloise-McKoy also acknowledged that, although there was nothing obstructing her view of the intersection, she did not see Martinez at any point prior to impact (*id.* at 18, 19).

The narratives contained in the certified police report are consistent with Martinez's and Eloise-McKoy's respective accounts of how the accident occurred.

Here, Martinez has satisfied his prima facie burden of establishing negligence on the part of Eloise-McKoy as a matter of law on the issue of liability (*Zuckerman v City of New York*, 49 NY2d at 562). Pursuant to Vehicle and Traffic Law §§ 1111 (a) and 1112 (a), Eloise-McKoy was required to yield to Martinez, because as a pedestrian walking within a designated crosswalk in the direction indicated by the pedestrian control signal, he had the right of way. Given that Eloise-McKoy's own testimony confirms that nothing prevented her from seeing Martinez before she struck him with her vehicle, she fails to raise a question of fact with respect to her negligence. Moreover, Eloise-McKoy's unsupported speculation that Martinez contributed to his accident by failing to observe her vehicle, is insufficient to rebut plaintiff's prima facie showing

of liability and forestall summary judgment (*see Alvarez v Prospect Hosp.*, 69 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d at 563).

Accordingly, as the evidence in the record demonstrates that there are no triable issues of fact as to defendant's fault in causing the accident, and that the triable issues of fact relate to the amount of damages to which plaintiff may be entitled, it is

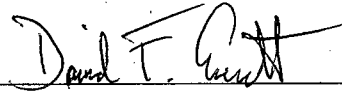
ORDERED that the motion for summary judgment is granted with regard to liability; and it is further

ORDERED that counsel are directed to appear for in the Settlement Conference Part, in courtroom 1600, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, on Tuesday, July 11, 2017 at 9:15 a.m., to schedule a date for a trial on damages.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 2, 2017

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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