

Rodriguez v Shuttle Assoc., LLC
2018 NY Slip Op 31595(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 154535/2015
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 154535/2015

NORMA RODRIGUEZ, MICHELLE TORRES

MOTION DATE 06/06/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHUTTLE ASSOCIATES,LLC,ERNST VILSAINT,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion and cross motion are decided as indicated below.

Plaintiffs, Norma I. Rodriguez and Michelle Torres, as Co-Administratrixes of the Goods, Chattels, Credits, and Estate of Rosa E. Alamo (“Ms. Alamo”), move, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendants Shuttle Associates, LLC (“Shuttle”) and Ernst Vilsaint (“Mr. Vilsaint”).

In addition to opposing the motion, defendants cross-move, pursuant to CPLR 3126(3) to strike the Complaint or preclude the testimony of a non-party witness.

BACKGROUND

Plaintiffs commenced this action seeking to recover damages from defendants for serious personal injury to, and the subsequent death of, Ms. Alamo. The Complaint alleges that on September 18, 2014, a 2014 Ford motor vehicle owned by Shuttle and driven by Mr. Vilsaint struck Ms. Alamo as she attempted to cross the intersection at the northwest corner of Second

Avenue and East 116th Street, in Manhattan. Ms. Alamo was transported to the Harlem Hospital, where she died.

The Complaint alleges causes of action for negligence (first cause of action) and wrongful death (second cause of action). Plaintiffs essentially claim that Ms. Alamo had the right of way and was lawfully walking in the crosswalk, and that Mr. Vilsaint failed to yield to Ms. Alamo, causing her to sustain serious personal injury and die. Defendants' answer includes general denials of the allegations in the Complaint and multiple affirmative defenses.

Plaintiffs now move for summary judgment on the issue of liability against defendants. Defendants oppose and cross-move to strike the Complaint or preclude certain testimony.

DISCUSSION

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "The 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 eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

As stated, the Complaint alleges causes of action for negligence and wrongful death. To prevail on a negligence claim, plaintiffs must demonstrate (1) a duty owed by defendants to plaintiff, (2) breach of the duty, and (3) injury resulting from the breach. *See Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825 (2016). Recovery for wrongful death requires proof of (1) the death of a human being; (2) the wrongful act, neglect, or default of defendants by which the decedent's death was caused; (3) the survival of distributees who suffered pecuniary loss by reason of the death of the decedent; and (4) the appointment of a personal representative of the decedent. *Chong v New York City Tr. Auth.*, 83 AD2d 546, 547 (2nd Dept 1981).

In seeking summary judgment as to defendants' liability, plaintiffs argue that Ms. Alamo was in the pedestrian crosswalk, with the light in her favor, when she was struck by the automobile owned by Shuttle and operated by Mr. Vilsaint. Plaintiffs also assert that Mr. Vilsaint failed to yield to Ms. Alamo, who had the right of way, causing her to sustain serious physical injury and die. Plaintiffs further assert that there was no other contributing factor to the incident.

To support their position, plaintiffs rely primarily on the transcript of Mr. Vilsaint's plea allocution in connection with the incident. The transcript reveals that on August 19, 2016, Mr. Vilsaint pleaded guilty to a violation of §19-190(b) of the Administrative Code of the City of New York, failure to give the right of way to pedestrians crossing the street, and violation of Vehicle and Traffic Law §1146(c)(1), failure to exercise due care and causing serious physical injury. *See* Transcript, Not of Mot, Exh F. Thus, it is undisputed that Mr. Vilsaint pled guilty based upon the same car accident and the same facts as the accident and facts at issue herein. It is well settled that a criminal conviction is conclusive proof of its underlying facts. *See S. T. Grand, Inc. v New York*, 32 NY2d 300, 305 (1973). As the facts are established, plaintiffs "made a prima

facie showing of their entitlement to judgment as a matter of law by demonstrating they were crossing the street, within the crosswalk, with the light in their favor, when they were struck by defendant's vehicle". *Beamud v Gray*, 45 AD3d 257, 257 (1st Dep't 2007).

In opposition, defendants argue that a plea of guilty to a traffic violation does not have collateral estoppel or res judicata effect, but does constitute some evidence of negligence. Defendants argument is based specifically and solely on a plea of guilty to a traffic violation. While defendants are correct that "[b]y statute collateral estoppel effect is denied to traffic convictions", *Gilbert v Barbieri*, 53 NY2d 285, 293 (1981), here, Mr. Vilsaint pleaded guilty to §19-190(b) of the Administrative Code of the City of New York which explicitly states that a violation of such shall constitute a misdemeanor. It is evident that Mr. Vilsaint did not pled guilty to a mere traffic violation, and, thus, defendants arguments regarding such is inapposite. As defendants have failed to raise a triable issue of fact, plaintiff's motion for summary judgment on the issue of liability is granted.

In their cross-motion, defendants seek to strike the Complaint or preclude the testimony of nonparty witness Eva Winkler based on plaintiffs' failure to include her name when responding to the disclosure request for names of witnesses. Plaintiffs oppose the cross-motion, asserts that Eva Winkler was not an eyewitness to the accident, and that she serves only to authenticate the photograph of a Google map, which is available as a public record.

Where a trial court determines that a party has failed to comply with its discovery obligations, it has broad discretion to remedy the violation. *See* CPLR 3126. However, the nature and degree of the penalties under CPLR 3126 are extreme and should only be imposed when the failure to disclose has been willful or contumacious. *See Kingsley v Kantor*, 265 AD2d 529, 530 (2nd Dep't 1999).

Here, the Court is satisfied that plaintiffs' failure to disclose was neither willful nor contumacious, and defendants have failed to establish same. Moreover, as noted, plaintiffs seek to use the testimony of a non-eyewitness to the incident solely to authenticate a photograph of a map that is readily available in the public domain. Thus, in an exercise of discretion, the Court denies the cross-motion to strike the Complaint or preclude the testimony of Eva Winkler.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted on the issue of liability as against defendants Shuttle Associates, LLC and Ernst Vilsaint; and it is further

ORDERED that defendants' cross-motion to strike or preclude is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

7/12/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE