| **Donnellan v Kitovsky** |
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| 2018 NY Slip Op 33310(U) |
| December 11, 2018 |
| Supreme Court, Kings County |
| Docket Number: 508193/2015 |
| Judge: Lara J. Genovesi |
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 11th day of December 2018.

P R E S E N T:

HON. LARA J. GENOVESI, J.S.C.

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ADAM DONNELLAN,

Plaintiff,

Index No.: 508193/2015

DECISION & ORDER

-against-

LEONID KITOVSKY and CREATIVE FURNITURE, INC.,

Defendants

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | NYSCEF Doc. No.: |
|---|---|
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed | 58-72 |
| Opposing Affidavits (Affirmations) | 79-83 |
| Reply Affidavits (Affirmations) | 88-89,96-99 |

***Introduction***

Defendants, Leonid Kitovsky and Creative Furniture, Inc., move by notice of motion, sequence number four, pursuant to CPLR § 3212 for an order granting summary judgment in favor of defendants and dismissing plaintiff's complaint. Plaintiff, Adam Donnellan, opposes this application.

***Background***

This is a cause of action for personal injuries allegedly sustained by plaintiff Adam Donnellan (Donnellan) on July 5, 2014, at approximately 10:00 p.m., when he was struck by defendants' vehicle. The vehicle was owned by defendant Creative Furniture, Inc. and driven by defendant Leonid Kitovsky (Kitovsky). The accident took place at the intersection of Christopher Street and West Street, also known as the Westside Highway. West Street is a two-way street that is divided by a median. The pedestrian knockdown occurred on the northbound side. There are five northbound lanes of traffic on West Street; four traveling lanes and one parking lane. Christopher Street intersects with the West Street from the east. The crosswalk for the West Street is just north of Christopher Street.

Plaintiff testified at his examination before trial (EBT) on October 20, 2016, that he and two friends, Connor Doyle and Craig Joyce, went to the pier located at Christopher Street and West Street to go on a boat cruise (*see* Adam Donnellan's EBT, NYSCEF Doc. #65 at 42). Plaintiff testified that his memory "is extremely fuzzy, hazy" about events that occurred from the time he got on the boat until the time the accident occurred (*id.* at 53). Much of plaintiff's testimony related to liability is in the form of "My friends told me . . . ", hearsay, and therefore, not considered by this Court (*see Allstate Ins. Co. v. Keil*, 268 A.D.2d 545, 702 N.Y.S.2d 619 2 Dept., 2000]; *see also Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708, 870 N.Y.S.2d 395 [2 Dept., 2008]). Plaintiff recalled purchasing a beer when he initially got on the boat but could not recall the number of beers purchased while on the boat (*see id.* at 47-48).

Plaintiff also recalled purchasing water while on the boat but could not recall how many waters he purchased or how much water he consumed while on the boat (*see id.* at 45-46). Plaintiff further asserted that he had no memory of what he did at the intersection of Christopher Street and West Street (*see id.* at 56). Plaintiff testified that he never saw the car before the accident (*see id.* at 70-71).

The defendant, Kitovsky, was deposed on August 14, 2017. He drove his 2013 Lexus LS460, which was leased by his company, Creative Furniture, Inc. for which he is sole shareholder. Prior to the accident, Kitovsky and his wife were traveling from their home in Brooklyn towards the George Washington Bridge to meet friends for dinner. Kitovsky states, and it is undisputed, that it was a dark, clear night with no visibility concerns. He did not believe that the streets were heavily congested and there was average traffic. At the time of the accident, he was not on the phone nor was he having a "heated discussion" with his wife.

Kitovsky drove northbound in the left most lane on West Street; this is the lane next to the median. Defendant indicated that he constantly holds his foot at the brake when driving close to a crosswalk in case there is a pedestrian, so he can immediately stop (*see* Kitovsky EBT, NYSCEF Doc. #66, at 40-41). Defendant specifically recalled that he held his right foot over the brake as he was approaching the southern-most crosswalk at the intersection of Christopher Street and West Street (*see id.* at 42, 44). Defendant further testified that his car was traveling within the speed limit of 25 miles per hour when he entered the intersection of Christopher Street and West Street, and the

controlling traffic light for him at the intersection was green (*see id.* at 46). He further stated that he was moving with the flow of traffic (*see id.* at 47).

Defendant asserted that he was looking straight as he approached the intersection, entered the intersection, and as he approached the northbound crosswalk of the intersection (*see id.* at 51-52). Defendant testified that he saw plaintiff "a split second before [the] accident." (*id.* at 52). Plaintiff ran east and was less than "less than 10 feet" from defendant's vehicle when the defendant first saw the plaintiff (*id.* at 52; *see also id.* at 53). Defendant asserts that plaintiff turned around and attempted to run back toward the median (*see id.* at 74-75). When asked if the plaintiff was running in the crosswalk when he was struck, defendant testified that he thought plaintiff was (*see id.* at 87). Defendant later testified "Adam wasn't exactly in the crosswalk. He [was] slightly further than the crosswalk." (*id.* at 93). Defendant testified that he would have passed plaintiff, but plaintiff "decided to turn around and run back" (*id.* at 75).

**Q.** At any time did he change directions when you saw him running?
**A.** Yes.
**Q.** What did he do?
**A.** He turn around and start walking back.
**Q.** Was he walking back or running back?
**A.** Running back.
**Q.** How far across the street did he get before he turned around?
**A.** He got to the lane between left and middle lane and as soon as he got to this lane, if he would have stayed there, nothing would have happened. I got as close as possible to the left, so I would have pass him but he decided to turn around and run back (indicating).
**Q.** But the question is, when you first saw Adam, he was running eastbound from your left to your right, correct?
**A.** When I first saw him, I'll try to describe to you to the best of my knowledge. This way may probably may not be a direct answer but it will give you an understanding of how it happened, if I may.
**Q.** Sure.

**A.** He ran through my lane. He stopped at the middle between my lane and the middle lane. I saw him running, I did not see him right from the moment that he start running, probably from the middle of the lane because it's a shorter lane. When the person is physically running, it's a matter of split seconds. When he stopped, he stopped without pause. He immediately turned around and started running back.

* * *

**Q.** Was it your understanding that you were going to be able to pass him because he was heading eastbound across the street?

**A.** It wasn't my understanding of any kind. I was trying to avoid an accident.

**Q.** Did you apply your brakes before or after he stopped and turned around?

**A.** I started applying the brakes as soon as I saw him running, not knowing what's going to happen next. The only thing that did not prevent this accident is for him to turn around and coming back straight at my car. It felt like he was running into my car.

(*id.* at 74-77).

Defendant testified that he heavily applied the brakes right before the accident, and the car stopped right after the crosswalk (*see id.* at 44-46). Plaintiff was struck with the front passenger side of the vehicle (*see id.* at 54). Defendant further stated "[t]hat Adam came in front of the car within a split second, I've done everything that I could to get to the left of my lane. Unfortunately, there was a concrete wall and because I moved as close as possible to the left, my car hit Adam only with the right side of the car, otherwise I would have hit him with the center of the car and the impact would have been a lot more severe" (*id.* at 67). Plaintiff landed behind the vehicle after he was struck.

The police accident report lists four witnesses: Craig, Joyce; Connor Doyle; Liubov Shevchenko (Shevchenko); and Jones, Jonathan. Pursuant to plaintiff's deposition testimony, Joyce and Doyle are plaintiff's friends. Shevchenko is defendant's wife and the record is silent as to Jones. Shevchenko was deposed on December 12,

2017. It appears that the other witnesses were not deposed. Shevchenko was in the front passenger seat of the vehicle that struck plaintiff. She does not recall if her vehicle had a green traffic signal (*see* Shevchenko EBT, NYSCEF Doc. #67, at 50). She testified that the accident happened instantly (*see id.* at 23). Plaintiff was not in the crosswalk (*id.* at 50 and 62). Plaintiff crossed the street, passed the lane the vehicle was in "and then he stopped and abruptly he was coming back" (*id.* at 26, 55 and 56). She testified that the vehicle didn't hit the plaintiff, rather, plaintiff hit the vehicle on the passenger side (*id.* at 22, 23 and 26). It happened in a split second (*id.* at 33). Shevchenko testified that her husband hit the brakes and he was trying to move away but it was so fast (*id.* at 34). The defendant did not use his horn "he had just enough time to hit the brakes and try to avoid the collision" (*id.* at 57).

Defendants served on plaintiff a notice of witness disclosure on August 18, 2017, with two witnesses names: Elena Genovese-Picard (Genovese-Picard) and Jennifer Pereira (Pereira) (*see* Pereira EBT, NYSCEF Doc. #81, at 6). These two witnesses were in a vehicle stopped at the red light on Christopher Street. Defendant-movant annexed handwritten notarized statements by Genovese-Picard and Pereira that were taken and written by their investigator. These statements are in inadmissible form and shall not be considered (*see Lillo-Arouca v. Masoud*, 163 A.D.3d 646, 647, 79 N.Y.S.3d 651, 653 [2 Dept., 2018] ["The court also properly declined to consider the "affidavits" of the defendants' neighbors. The "affidavits" contained no jurat or other indication the neighbors had been sworn, and therefore were not in admissible form"]). However,

plaintiff, in opposition, annexed the deposition transcripts of Genovese-Picard and Pereira.

Genovese-Picard was deposed on March 20, 2018. Genovese-Picard was driving her friends home after having dinner with them. She was the first car waiting on Christopher Street at the red light with the intention of turning right onto West Street (Genovese-Picard EBT, NYSCEF Doc. 80, at 17). She testified to remembering "being at the red light and seeing a person stopped on the, you know, there's a divide between north and south and thinking that that person looked like they may be in a dangerous spot to be standing because they don't have the right to cross and then almost immediately they were hit after I thought that" (*id.* at 20 and 64). She further testified that the plaintiff was off the divide by at least two or three feet, and she does not recall what direction he was looking (*id.* at 34). Genovese-Picard does not recall seeing the defendant's vehicle swerve or hearing a horn sound or screeching tires. She cannot say for sure since the accident happened very quickly – in a split second (*id.* at 47 and 64). She also testified that she saw the plaintiff, looked away for a moment and then he was hit (*id.* at 65). When asked if she could tell the rate of speed of defendant's vehicle, Genovese-Picard testified that "it wasn't very fast because I know that there were other cars. He wasn't the only car or that car wasn't the only car on the road at the time. There was just moderate traffic flow so I can't say for sure" (*id.* at 27-28)

Pereira was deposed on March 27, 2018. She was in the front passenger seat of Genovese-Picard's vehicle. Plaintiff was not in the crosswalk (Pereira EBT, NYSCEF Doc. #81, at 16). Pereira testified that she looked at plaintiff continuously (*id.* at 39).

She stated that "it felt like" plaintiff was in the middle of the left lane for "a couple of minutes" – "long enough for me to see a person standing there" (*id.* at 17). Later, Pereira testified that she observed plaintiff for "more or less" a minute (*id.* at 19). Thereafter, she testified that she could have looked at plaintiff for less than a minute (*see id.* at 39). Plaintiff was swaying, and she could not tell what direction the plaintiff was looking (*see id.* at 19 and 22). She testified that she could not tell the speed of defendant's car but "it was a normal flow of traffic" (*id.* at 21; *see* 33).

***Expert Affidavits***

In support of the motion for summary judgment, defendants provided a report from Brian E. Pape, Ph.D., a toxicologist, to establish that plaintiff's blood alcohol concentration would have caused him to be seriously impaired and increase the risk of causing or contributing to an accident. Plaintiff opposed the consideration of this report. The report is unsworn, and therefore not in admissible form (*see Yuan Gao v. City of N.Y.*, 145 A.D.3d 939, 940, 43 N.Y.S.3d 493, 495 [2 Dept., 2016]). This Court did not consider this report in determining the motion (see *Hoffman v. Mucci*, 124 A.D.3d 723, 2 N.Y.S.3d 531 [2 Dept., 2015] ["Since the plaintiff's expert report was not in admissible form, the Supreme Court properly declined to consider it in determining the motion]). Defendants in reply, provide an expert affidavit from Robert S. Fijan, Ph.D. (Fijan). Accordingly, this Court provided plaintiff an opportunity to submit a surreply.

Fijan is a consultant in accident reconstruction and biomechanics. Fijan asserts that plaintiff's expert, Donald R. Phillips, P.E.'s (Phillips), conclusion that defendant was traveling at 41 miles per hour before the accident is an assumption and is incompatible

with the case materials (*see* Affidavit of Robert S. Fijan, Ph.D., NYSCEF #89 at ¶ 12). Fijan further asserts that Phillips' conclusions, based on his analysis of the Kitovsky 2013 Lexus LS460 Event Data Recorder ("EDR"), are false and unsubstantiated by the evidence (*see id.* at ¶ 14). Fijan concludes that neither of the "two crash event triggers" from the EDR report are consistent with the subject accident (*see id.* at ¶ 10). Fijan further concludes that the data from the EDR report, relied on by Phillips, does not correlate with the subject accident and does not specify that the recorded event corresponds to the date and time of the subject accident (*see id.* at ¶ 11). Fijan's opinions are presented "with a reasonable degree of biomechanical engineering and scientific certainty" (*id.* at ¶ 14).

Plaintiff annexed an affidavit by Donald R. Phillips, P.E. (Phillips), a professional engineer, to establish that defendant was speeding and should have seen plaintiff prior to impact. Phillips based his opinion on deposition testimony of the parties and non-party witnesses and documents produced during discovery, including the Kitovsky 2013 Lexus LS460 EDR (*see* Affidavit of Donald R. Phillips, P.E., NYSCEF #82 at ¶ 5). Phillips' analysis of the EDR report is that defendant was traveling at 41 miles per hour prior to impact (*see id.* at ¶ 6). He opines that at this rate of speed, defendant had plaintiff in his line of sight at least 72 feet prior to impact (*see id.*). Phillips further concluded that the Airbag Control Module in the defendants' vehicle was imaged and revealed "two crash event triggers", one being the impact with plaintiff. Phillips further opined that defendant was traveling between 42.9 miles per hour to 39.8 miles per hour at the time of impact, did not apply brakes in the manner in which one in an emergency would do and he

"failed to take any evasive measures or turn his vehicle [] in any way to avoid striking the [p]laintiff." (*id.*). Phillips' "opinions and observations have been expressed with a reasonable degree of engineering and scientific probability and certainty." (*id.*).

***Contentions***

Defendants contend that they are entitled to summary judgment on the issue of liability because they were not negligent, and plaintiff was the sole proximate cause of the accident. Defendants aver that they are free from liability, as defendants had the green light, was paying attention to the road, tried to avoid the accident, and could not avoid the accident because of plaintiff's actions. Defendants also assert that plaintiff's blood alcohol level and reckless conduct, crossing against a "do not walk sign", constitute as intervening and/or superseding causes of the accident.

Plaintiff contends that defendants have failed to meet their burden entitling them to summary judgment on the issue of liability. Plaintiff asserts that triable issues of fact exists concerning defendant's negligent operation of the vehicle, defendant's failure to yield to a pedestrian, whether plaintiff was in the crosswalk, defendants' vehicle's rate of speed and defendant's inattentiveness. Plaintiff contends that the evidence shows that defendant was speeding, and plaintiff was in the crosswalk for an extended period of time before the accident occurred. Plaintiff further contends that defendants have failed to submit any admissible evidence to show that plaintiff was intoxicated, since the toxicologist's report was unsworn and in admissible form.

***Discussion***

"[T]he 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 absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.,* 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident" (*Ellis v. Vazquez*, 155 A.D.3d 694, 63 N.Y.S.3d 530 [2 Dept., 2017], citing *Topalis v. Zwolski,* 76 A.D.3d 524, 906 N.Y.S.2d 317 [2 Dept., 2010]). "[E]very driver of a vehicle shall exercise due care to avoid colliding with any…pedestrian…upon any roadway and shall give warning by sounding

the horn when necessary" (N.Y. Veh. & Traf. Law § 1146). "Although a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk" (*Barbieri v. Vokoun*, 72 A.D.3d 853, 900 N.Y.S.2d 315 [2 Dept., 2010)]). Defendant driver also has the common law duty "to see that which he should have seen through the proper use of his senses" (*id.*, citing *Domanova v. State of N.Y.*, 41 A.D.3d 633, 838 N.Y.S.2d 644 [2 Dept., 2007]).

Defendants failed to eliminate all triable issue of fact as to whether Kitovsky took reasonable care to avoid the collision and whether defendant was speeding at the time of the collision (*see generally Alatsas v Sacchetti*, -- AD3d --, 2018 NY Slip Op 08270 [2 Dept., 2018]). Defendant and his wife testified that plaintiff changed directions and was running back to the median when the accident occurred. However, Genovese-Picard and Pereira testified that the defendant was standing in the street. Genovese-Picard looked away momentarily, but Pereira looked continuously at the plaintiff. Although neither knew what direction the plaintiff was looking, they each testified that he stood in the street. The conflicting testimony of the defendant and his wife and the witnesses raises a question of fact.

Furthermore, plaintiff's and defendants' competing expert affidavits are in direct conflict over the analysis of the data retrieved from the vehicle during discovery. "It was within the province of the jury to resolve issues of conflicting expert testimony" (*Sozzi v. Gramercy Realty Co. No. 2, L.P.*, 304 A.D.2d 555, 557, 758 N.Y.S.2d 659, 661 [2 Dept., 2003]; *see Rakovsky v. Rob-Lee Corp.*, -- AD3d --, 2018 NY Slip Op 07471 [2 Dept., 2018]). Considering the conflicting deposition testimony and the conflicting expert

affidavits, summary judgment is denied (*see N.Y. Sch. Ins. Reciprocal v. Milburn Sales Co., Inc.*, 83 N.Y.S.3d 906 [2 Dept., 2018]).

***Conclusion***

Defendants' motion for summary judgment on the issue of liability is denied as there are triable issue of fact to be determined by a jury. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

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