Shimonova v Santaella
2020 NY Slip Op 30598(U)
January 21, 2020
Supreme Court, Queens County
Docket Number: 710609/2016
Judge: Joseph J. Esposito

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO IA Part 6
Justice

X

ALLA SHIMONOVA, Individually and as Guardian of the Personal Needs and Property Management of DANIEL PINKHASOV,

Index Number: 710609/2016

Plaintiffs,

Motion Date: August 12, 2019

-against-

RICHARD J. SANTAELLA, CITY OF NEW YORK, SHANNON EPSTEIN, DANIEL EPSTEIN and REGO II BORROWER LLC,

Motions Seq. Nos. 6, 7, 8 and 9

Defendants.

X

The following papers numbered EF138 to EF395 read on this (1) motion by Shannon Epstein and Daniel Epstein (the Epstein defendants), for summary judgment in their favor pursuant to CPLR 3212; (2) motion by Rego II Borrower LLC (Rego II), for summary judgment in its favor dismissing all claims and cross claims pursuant to CPLR 3212; (3) motion by the City of New York ("the City"), for summary judgment in its favor pursuant to CPLR 3212; and (4) motion by Richard J. Santaella for summary judgment in his favor pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF138-242
Answering Affidavits - Exhibits	EF248-386
Reply Affidavits	EF387-395

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Plaintiffs in this negligence action seek damages for personal injuries sustained by Daniel Pinkhasov, a pedestrian who was struck by a vehicle operated by Richard J. Santaella. Pinkhasov was crossing the street in violation of section 1152 (a) of the Vehicle and Traffic

Law, when he was struck by a vehicle operated by defendant Santaella. The record indicates that Santaella was traveling in the northbound lane of 97th Street, between 62nd Drive and Horace Harding Expressway when Pinkhasov "darted" into the roadway and was struck by Santaella's vehicle. It is undisputed that Pinkhasov was crossing mid-block outside the cross walks located at either end of the street, when he was struck by the vehicle operated by Santaella. The incident occurred on the public roadway across from the Rego Center Mall in Queens, New York.

Plaintiffs commenced this action against the City of New York for allegedly failing to create a controlled mid-block cross-walk despite the existence of a shopping mall entrance across the street from the area of impact; against Rego II (the owner of the shopping mall), for failing to regulate the street given its proximity to the mall and regular use by mall patrons. Plaintiffs sued the Epstein defendants for double parking which, they contend, obstructed Santaella's view of Pinkhasov in the roadway. Plaintiffs sued Santaella, the owner and driver of the vehicle which struck Pinkhasov. The action of Alla Shimonova is derivative.

Each of the defendants respectively move for summary judgment in their favor dismissing the complaint, insofar as asserted against them. The motions are opposed by the respective parties.

Facts

The undisputed record indicates that on September 15, 2013, at approximately 6:00 p.m., plaintiff Pinkhasov was traversing back and forth from one side of 97th Street to the other in order to retrieve purchased items and load them into the trunk of his friend's vehicle which was parked on a public street as opposed to in one of the two multi-level parking garages made available to mall shoppers. After doing this several times, plaintiff attempted to walk across the street mid-block, outside of the two cross walks on either end of the street, without looking in either direction for oncoming traffic, when he was struck by a vehicle operated by Santaella. At the time of the accident, the Epstein defendants' vehicle was double-parked approximately half a car length away from where the accident occurred, waiting for a parking spot of a vehicle expected to exit. The Epstein vehicle never came into contact with plaintiff and was not moving at the time of the accident.

Alla Shimonova testified, upon examination before trial, that the accident occurred in the middle of 97th Street, between Horace Harding Avenue and 62nd Drive. She and her husband, Pinkhasov, were driven to Costco at this location by a friend "Peter". She described the traffic conditions as "very busy" and that there were "a lot of cars." When she and Pinkhasov left the Costco, Shimonova stopped with the cart filled with items, across the street from where Peter's vehicle was parked on the public street. Her husband, Pinkhasov,

took items from the cart and brought them to the car, which was across 97th Street. He was loading items into the trunk of the car and made several trips. He crossed in the middle of the street, although there was a crosswalk, with pedestrian signals at the intersection of 62nd Drive and 97th Street. Shimonova did not witness the accident as she was looking down at the time putting an item into a bag. She did not see the vehicle that came in contact with her husband. After she heard the impact, she looked up and saw her husband. Shimonova testified to asking Santaella why he was speeding, however, she came to the conclusion that Santaella was speeding because of the sound of the impact. She did not observe the vehicle before the impact occurred.

Richard J. Santaella testified, at a deposition, as follows: the accident occurred while it was still daylight outside. He was operating a 2003 Toyota Camry. The accident happened in the middle of 97th Street. He described 97th Street as a two way road, divided by a double yellow line with a parking lane on each side of the road. The traffic conditions were "moderate" because "there's a mall right there", and that "that area is always . . . congested". On the date of the accident, Santaella observed double parked cars in the area where people load their vehicles. His highest rate of speed on 97th Street was 20 miles per hour. He had no issues seeing or hearing at the time of the accident. At the time of impact, he was traveling fifteen (15) miles per hour because he saw a double parked car and slowed down. Santaella did not see Pinkhasov prior to the impact. He became aware of the accident when he heard the impact. Santaella testified that the double parked hatchback car obstructed his view of Pinkhasov.

Detective Walter Bowden testified on behalf of the City, as follows: he was assigned to the collision investigation Squad for the New York City Police Department, which covers all five boroughs. He testified to a double-parked car being a hazard to other vehicles on the road in that it impairs the sight of an oncoming vehicle. Generally, double parked cars would call for the issuance of a summons by any NYPD officer who "observe[s] the violation."

Detective Rino Mitacchione testified at a deposition, as follows: on the date of the accident, he was assigned to Highway 3, Collision Investigation Squad in Queens. His duties were to "investigate and reconstruct collisions involving bicycles, pedestrians, motor vehicles, in regards to serious physical injuries." With regards to the instant case, he believes that the "contributing factor was the pedestrian walking into traffic." He continued to testify that he believes that when Pinkhasov "actually turned and crossed mid-block into the path of the vehicle. . . like, walked into the path of the vehicle, that was [the] problem." He testified that crossing the street mid-block or "jaywalking" is a summonsable offense and that the only reason that he did not issue one to Pinkhasov was because of Pinkhasov's injuries. Finally, Defective Mitacchione indicated in his report regarding the incident, that "crossing mid-block was the contributing factor."

Police Officer Richard Zapata testified that he visited the scene within seventy-two (72) hours after the accident and observed the traffic signals, made sure that the pavement markings were bright enough for people to see and any type of work that was being done. While at the scene, he noted that "there wasn't anything out of the norm."

Shannon Epstein testified that he was operating a black Nissan Versa on the date of the accident; that the weather was clear and it was still natural light out. Prior to the accident, he saw pedestrians crossing the street "on the corners. . . by the traffic lights." He observed Pinkhasov loading and unloading his packages, so he stopped in front of that vehicle because he figured that would be the next vehicle to leave a parking spot. He observed Pinkhasov go across the street and come back with more packages approximately six to seven times. Each time he crossed, he observed Pinkhasov look both ways before crossing except the time that he was struck. On that occasion, he "did not look both ways" when crossing. Pinkhasov stopped before crossing "each and every time. . . except for the last time." He testified that the vehicle which struck Pinkhasov was going ten to twenty miles an hour.

The police report taken following the accident, indicates that "[Santaella] was traveling northbound on 97th Street when he observed a double-parked car on the side of the road. He then continued, passing the double -parked car when he suddenly observed Pinkhasov come from in front of the double-parked car and into the passenger side of his vehicle. Specifically, it notes that Pinkhasov "without even looking, jogged back into the roadway" to get additional groceries and was then struck. Under the summary of investigation, Detective Mitacchione writes, "after reviewing all available information, the cause of this collision is pedestrian error."

The City's witnesses also testified and confirmed that a study of the 97th street area where plaintiff was injured, was done and it was concluded that a mid-block crossing did not meet the requirements set forth in the federal MUTCD Warrant 4 for a controlled mid-block crossing, and therefore, one was not installed at that location.

Motion by the Epstein defendants

The motion by the Epstein defendants for summary judgment in their favor dismissing the complaint, insofar as asserted against them, is granted. The undisputed record indicates that the Epstein vehicle was double parked when Santaella's vehicle struck plaintiff. The Epstein vehicle never made contact with plaintiff and the mere fact that the Epstein vehicle was double parked merely furnished the condition for the accident but was not the proximate cause for such (*see Wechter v Kelner*, 40 AD3d 747 [2d Dept 2007]). Although the issue of proximate cause is generally one for the jury (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315 [1980]), "liability may not be imposed upon a party who 'merely furnished the condition or occasion for the occurrence of the event' but was not one of its causes" (*Shatz*

v Kutshers Country Club, 247 AD2d 375, 375 [2d Dept 1998], quoting *Sheehan v City of New York*, 40 NY2d 496, 503 [1976]; *see Doria v Cassamajor*, 36 AD3d 752, 753 [2d Dept 2007]; *Poggiali v Town of Babylon*, 219 AD2d 626, 627 [2d Dept 1995]; *Williams v Envelope Tr. Corp.*, 186 AD2d 797, 798 [2d Dept 1992]). Here, the Epstein defendants demonstrated their prima facie entitlement to judgment as a matter of law by presenting evidentiary proof that Shannon Epstein's conduct in double parking his car approximately a half car length away from where the accident occurred merely furnished the condition or occasion for the accident, and was not a proximate cause of the plaintiff's injuries (*see Sheehan v City of New York, supra*; *Doria v Cassamajor, supra*; *Siegel v Boedigheimer*, 294 AD2d 560, 562 [2d Dept 2002]; *O'Malley v USA Waste of New York, Inc.*, 283 AD2d 409 [2d Dept 2001]; *Haylett v New York City Tr. Auth.*, 251 AD2d 373, 374 [2d Dept 1998]; *Marsella v Sound Distrib. Corp.*, 248 AD2d 683, 684 [2d Dept 1998]; *Gleason v Reynolds Leasing Corp.*, 227 AD2d 375, 376 [2d Dept 1996]). In opposition, plaintiffs failed to raise a triable issue of fact.

Motion by Rego II

The motion by Rego II for summary judgment in its favor is granted. Rego II is the owner of the shopping mall which abuts the roadway where Pinkhasov was struck by Santaella's vehicle. Plaintiffs assert that since the public makes use of the public street parking on 97th Street, in Rego Park, which abuts both residential buildings and Rego II's shopping mall, that Rego II should be liable for the subject accident. Specifically, plaintiffs assert that Rego II had a duty to ensure that drivers operated their vehicles safely in the public roadway; that it was Rego II's duty to undertake traffic studies; devise traffic plans to prevent drivers from speeding and double parking ; direct pedestrians as to where to walk on the public roadway and supervise patrons as they load their cars with goods purchased at the various stores in the mall.

Absent a duty of care to the person injured, a party cannot be held liable in negligence (*Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 342 [1928], *rearg denied* 249 NY 511 [1928]). Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises (*Gilbert Props. v City of New York*, 33 AD2d 175, 178 [1st Dept 1969], *affd* 27 NY2d 594 [1970]). "The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-97 [1st Dept 1988], *quoting Dick v Sunbright Steam Laundry Corp.*, 307 NY 422, 424.)

An owner or occupier of land generally owes no duty to warn or protect others from a dangerous condition on adjacent property unless the owner created or contributed to such a condition (*see Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). "The reason for

such a rule is obvious—a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard" on neighboring property (*id.*). Thus, in fixing the duty point, the analysis is tempered by considerations such as "the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]; *see also Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001] [duty must "comport with what is socially, culturally and economically acceptable"]).

Here, it is undisputed that the subject accident occurred on the public roadway and that neither the injured plaintiff, the driver of the double-parked vehicle, nor the driver of the vehicle that struck plaintiff were employed by Rego II (or any of its tenants). Under these circumstances, Rego II cannot be held liable for the accident (*see Haymon v Pettit*, 9 NY3d 324, 328 [2007]; *Meyers v Delancey Car Serv., Inc.*, 127 AD3d 1148, 1150 [2d Dept 2015]). Furthermore, Rego II demonstrated it did not control the public street upon which the accident occurred and owed no duty to the injured pedestrian (*see Haymon v Pettit*, supra. In opposition, the plaintiffs failed to raise a triable issue of fact (*see Kallem v Mandracchia*, 111 AD3d 893, 894 [2d Dept 2013]).

The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others (*Nickelsburg v City of New York*, 263 App Div 625, 626 [1st Dept 1942]; *see Santorelli v City of New York*, 77 AD2d 825 [1st Dept 1980]; *Wylie v City of New York*, 286 App Div 720 [1st Dept 1955]). Special use cases usually involve the installation of some object in the sidewalk or street or some variance in the construction thereof. In *Nickelsburg*, for example, the court found a special use where iron rails had been imbedded in the sidewalk leading from the defendant's property to permit the wheeling of refuse to the curb. *Santorelli* involved an oil filler cap, jutting above the sidewalk, which was used in the delivery of heating oil to the abutting owner's building. In *Wylie*, the sidewalk in front of the abutting owner's premises was cut to form a runway, constructed differently from the rest of the sidewalk, to provide trucks with ingress and egress to a warehouse. The common thread in each of these cases was an installation "exclusively for the accommodation of the owner of the premises which he was 'bound to repair *** in consideration of private advantage" (*Nickelsburg v City of New York, supra.*, at 626, citing *Heacock v Sherman*, 14 Wend 58). None of the indicia of special use are remotely present in this case. Plaintiffs do not allege that Rego II benefitted from the 97th Street roadway in a manner different from that of the general populace. They argue that Rego II co-opted the street for its own commercial benefit by causing or encouraging customers to park on the public roadway, but fails to cite any cases in which such a common occurrence

as double parked cars on the public thoroughfare outside a mall, car wash, parking lot or other facility open to the public has been held to constitute a special use. The conduct of the customers in stopping their vehicles in the street (double parking) while waiting for an available parking space is a normal use of the street; and, from Rego II's perspective, varies only in degree from the ordinary commercial enterprise's utilization of the public streets to provide access to its premises for its customers. "To construe the amorphous benefit received by such entrepreneurs as a 'special benefit' would effectively allow the special use exception to swallow up the rule exempting abutting landowners from liability for injury on the public ways. It would place on every homeowner and commercial establishment a duty to maintain the abutting public roads whenever it could be shown that they, too, reap a special benefit from the use of the public streets (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298-99 [1st Dept 1988]).

Plaintiffs' remaining contentions that Rego II had a duty undertake traffic studies, devise traffic plans to prevent drivers from speeding and double parking; to direct pedestrians as to where to walk on the public roadway and supervise patrons as they load their cars, is without merit (*cf., Haymon v Pettit, supra*).

The branch of the motion which is to dismiss the loss of consortium claim is also granted. Any cross claim or derivative claim for loss of consortium must fall once the primary claim of negligence fails (*see Balestrero v Prudential Ins. Co.*, 283 App Div 794, *affd* 307 NY 709; *Maddox v City of New York*, 108 AD2d 42, 49 [2d Dept 1985], *affd*, 66 NY2d 270 [1985]).

The branch of the motion which is for summary judgment dismissing plaintiffs' claim of gross negligence and or for punitive damages is granted. Upon Rego II's prima facie showing of entitlement to summary judgment dismissing the claims for punitive damages, plaintiffs failed to allege facts sufficient to demonstrate that Rego II engaged in conduct which rose to the high level of moral culpability necessary to support a claim for punitive damages (*see Fin. Services Veh. Tr. v Saad*, 72 AD3d 1019, 1021 [2d Dept 2010]; *99 Cents Concepts, Inc. v Queens Broadway, LLC*, 70 AD3d 656 [2d Dept 2010]; *Anderson v Elliott*, 24 AD3d 400, 402 [2005]; *cf. Randi A. J. v Long Is. Surgi-Ctr.*, 46 AD3d 74, 81-82 [2007]).

The branch of the motion which is to dismiss the claims for common-law and contractual indemnity and contribution is also granted. The City and Santaella asserted cross claims against all defendants for contribution, common-law indemnity and contractual indemnity. The Epstein defendant also asserted cross claims against all defendants for contribution and or common-law indemnification. On the instant facts, Rego II owed plaintiffs no duty of care as it pertains to preventing the instant accident, and without a duty, there can be no liability for contribution or indemnification (*see Nassau Roofing & Sheet*

Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 [1988]; *Smith v Hooker Chemical Corp.*, 83 AD2d 199, 201–202 [4th Dept 1981], *lv. dismissed* 56 NY2d 503 [1982]).

Motion by the City

The motion by the City for summary judgment dismissing the complaint, insofar as asserted against it, is granted. Plaintiff alleges that the accident occurred as a result of the absence of a mid-block traffic control device. The City avers that it is entitled to summary judgment because they are immune from liability under the doctrine of qualified immunity. In the alternative, the City claims that plaintiff cannot show that the City had a duty to redesign or improve the roadway where plaintiff was injured, nor that the City was the proximate cause of his injuries.

A municipality has a duty to keep its streets in a reasonably safe condition (*see Friedman v State of New York*, 67 NY2d 271, 283 [1986]; *Weiss v Fote*, 7 NY2d 579, 584 [1960]; *Warren v Evans*, 144 AD3d 901 [2d Dept 2016]). "While this duty is nondelegable, it is measured by the courts with consideration given to the proper limits on intrusion into the municipality's planning and decision-making functions. Thus, in the field of traffic design engineering, the [governmental body] is accorded a qualified immunity from liability arising out of a highway planning decision" (*Friedman v State of New York*, 67 NY2d at 283; *see Warren v Evans*, 144 AD3d at 901–902; *Poveromo v Town of Cortlandt*, 127 AD3d 835, 837 [2d Dept 2015]). Under the doctrine of qualified immunity, a governmental body may not be held liable for a highway safety planning decision unless its study of the traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan (*see Friedman v State of New York*, 67 NY2d at 284; *Alexander v Eldred*, 63 NY2d 460, 466 [1984]; *Weiss v Fote*, 7 NY2d at 589). Immunity will apply only "where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" (*Weiss v Fote*, 7 NY2d at 588; *see Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 673 [1999]; *Warren v Evans*, 144 AD3d at 902; *Kuhland v City of New York*, 81 AD3d 786, 787 [2d Dept 2011]). Thus, liability for injury arising out of the operation of a duly-executed highway safety plan may only be predicated on proof that the plan either was evolved without adequate study or lacked reasonable basis (*Weiss v Fote*, 7 NY2d 579, 589 [1960]; *Tyberg v City of New York*, 173 AD3d 1239, 1240-41 [2d Dept 2019]). When, as here, a municipality studies a dangerous condition and determines as part of a reasonable plan of governmental services that certain steps need not be taken, that decision may not form the basis of liability (*Friedman v State*, 67 NY2d 271, 286 [1986]; *see e.g., Alexander v Eldred*, 63 NY2d 460, *supra; Weiss v Fote*, 7 NY2d 579, *supra).*

Here, the City demonstrated that its traffic control plan was neither plainly inadequate nor lacking in a reasonable basis and that it had no notice, either constructive or actual, of any dangerous condition on the particular stretch of road prior to the instant accident which

would have given rise to a duty to review either that plan or any other aspect of the design of the roadway in light of actual conditions (*see Friedman v State of New York*, 67 NY2d at 285–286; *Weiss v Fote*, 7 NY2d 579, 587–588; *Lucchese v Silverman*, 25 AD3d 589, 590-91 [2d Dept 2006]). The evidence indicates that in response to a March 14, 2012 request for a midblock crossing on 97th street, the City Department of Transportation's Intersection Control Unit (ICU) performed a Traffic Signal Study at 97th Street mid-block on December 4, 2012, to determine if it met the requirements for a controlled crosswalk (a marked crosswalk with a traffic signal or a stop sign). The ICU performed the Traffic Signal Study by following and applying the strict requirements of the federal Manual on Uniform Traffic Control Devices, Chapter 4, Warrant 4. The ICU used the City of New York's City Environmental Quality Review (CEQR) manual, an internal City document with a set of standards, to perform the three counts (of traffic, pedestrian and gaps) in the morning at school admission time, in the midday and in the later afternoon, at school dismissal time, as there was a school in the vicinity. After analyzing the Traffic Signal Study's date and other information, the City DOT determined that the location did not meet the requirements set forth in the federal MUTCD Warrant 4 for a controlled mid-block crossing. Thus, the City responded to the request for a midblock crossing by conducting a Traffic Signal Study, applying the strict requirements of the federal MUTCD, and then denying the request accordingly.

The evidence further indicates that at the time of the subject accident, there were marked crosswalks and properly-operating traffic control devices within a reasonable distance from 97th Street, midblock , at 97th Street's intersections at 62nd Drive and Horace Harding Expressway; that the street lights were operating properly on the accident date; that Detective Bowden did not record any design defects or allegedly hazardous conditions when he investigated the accident; that the New York Police Department provided enforcement concerning the ban on double-parking for years prior to the accident date; that there was no speeding involved; that there was no lack of warnings to pedestrians; that the City reviewed, conducted necessary studies and then provided responses to requests about a mid-block crossing, signs, claims of speeding and double-parking on 97th Street, with explanations. Furthermore, there were no prior similar accidents at the 97th Street accident location or withing its vicinity; and the City did in fact provide two safe places for pedestrians to cross 97th Street within a reasonable distance from the 97th Street mid-block location where plaintiff was struck. There was also no evidence that any feature of 97th Street was a proximate cause of Pinkhasov's accident. The intervening act of the injured plaintiff in crossing mid-block without properly looking for oncoming traffic was the proximate cause of the accident (*Levi v Kratovac*, 35 AD3d 548, 550 [2d Dept 2006]).

In opposition, plaintiffs submitted the affidavit of their expert, Nicholas Bellizzi, P.E., who opines that the absence of an appropriate study and crosswalk at the subject location was

a substantial factor in causing the accident and Pinkhasov's injuries. The opinion expressed in the report of plaintiffs' expert that a midblock traffic signal should have been installed is insufficient to overcome the qualified immunity, as "something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with failure to discharge its duty to plan the roadways for the safety of the traveling public" (*Weiss v Fote*, 7 NY2d 579, 588 [1960]; *Affleck v Buckley*, 276 AD2d 507, 508-09 [2d Dept 2000], *affd*, 96 NY2d 553 [2001]; *see also, Abrahams v Town of Brookhaven*, 220 AD2d 472 [2d Dept 1995]).

Accordingly, the motion by the City for summary judgment dismissing the complaint, insofar as asserted against it, is granted.

In light of the court's determination regarding the absence of liability on the part of the City, it need not entertain the City's remaining contentions.

Motion by Santaella

The plaintiff allegedly was crossing the street in violation of section 1152 (a) of the Vehicle and Traffic Law, when he was struck by a vehicle operated by Santaella. Movant Santaella demonstrated his *prima facie* entitlement to judgment as a matter of law by providing evidence establishing that Pinkhasov entered a roadway from between stopped cars without looking both ways, began crossing the roadway at a fast pace, and came into contact with the moving vehicle, and thus crossed the roadway in such a manner that Santaella was unable to avoid contact with the plaintiff pedestrian (*see Mancia v Metropolitan Tr. Auth. Long Is. Bus*, 14 AD3d 665 [2d Dept 2005]; *Blazer v Tri-County Ambulette Serv.*, 285 AD2d 575, 576 [2d Dept 2001]; *Carrasco v Monteforte*, 266 AD2d 330, 331 [2d Dept 1999]; *Brown v City of New York*, 237 AD2d 398, 398-399 [2d Dept 1997]). Epstein testified that, immediately prior to the subject accident, he observed Pinkhasov "jog" into the roadway, mid-block, without looking both ways. While previously when Pinkhasov would cross the street to load packages, he would look left, northbound, then right, southbound, prior to crossing. However, immediately before the accident occurred, Pinkhasov failed to look both ways before crossing. Epstein testified that Pinkhasov stopped before crossing "each and every time. . . except for the last time." Furthermore, the police report attributes "pedestrian error" as the cause of the subject accident. Under the circumstances presented here, Santaella established his entitlement to judgment as a matter of law by demonstrating that the conduct of the plaintiff in crossing the street at a location other than at an intersection, while emerging from between stopped cars, was the sole proximate cause of the accident, and that Santaella was free from fault despite the plaintiffs' allegation that he failed to avoid striking Pinkhasov (*see Galo v Cunningham*, 106 AD3d 865, 866 [2013]; *Rodriguez v Catalano*, 96 AD3d 821, 822 [2d Dept 2012]; *Rosa v Scheiber*, 89 AD3d 827, 828 [2d Dept 2011]; *Braxton v Jennings*, 63 AD3d 772 [2d Dept 2009]; *Sheppeard v Murci*, 306 AD2d 268, 269

[2d Dept 2003]; *Brown v City of New York*, 237 AD2d 398 [2d Dept 1997]). In opposition, the plaintiffs failed to raise a triable issue of fact as to whether Santaella operated his vehicle in a negligent manner (*see Rodriguez v Catalano*, 96 AD3d 821, 822 [2d Dept 2012]; *Mancia v Metropolitan Tr. Auth. Long Is. Bus*, 14 AD3d at 665).

Conclusion

The motion by the Epstein defendants for summary judgment in their favor is granted.

The motion by Rego II for summary judgment in its favor is granted.

The motion by the City for summary judgment in its favor is granted.

The motion by Santaella for summary judgment in its favor is granted.

In accordance with the foregoing, the complaint is dismissed, with prejudice.

The foregoing constitutes the decision and order of this court.

Dated: January 21st 2020

JOSEPH J. Esposito, J.S.C.

FILED
JAN 29 2020
COUNTY CLERK
QUEENS COUNTY