Shenouda v Abughazeh

2021 NY Slip Op 33020(U)

December 21, 2021

Supreme Court, Richmond County

Docket Number: Index No. 152750/2018

Judge: Catherine M. DiDomenico

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ASHRAF SHENOUDA,

Plaintiff,

-against-

EMILIA ABUGHAZEH

Defendants.

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Part- IAS 11
Present: Hon. Catherine DiDomenico

DECISION AND ORDER

Index No. 152750/2018
Motion Sequence Nos.: 001

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion Sequence Number 001

	Numbered
Notice of Motion by Plaintiff (001),	1
Affirmation in Opposition by Defendant,	2
Reply Affirmation by Plaintiff	3
Transcript of Proceedings from 9/8/21	4

Upon the foregoing cited papers, the Decision and Order is as follows:

Present Motion / Relevant Facts

Plaintiff, Ashraf Shenouda, moves by Notice of Motion (Seq. No. 001) for an order granting him summary judgment on the issue of liability relating to a motor vehicle accident which occurred on January 17, 2018 at approximately 5:40 P.M. In support of his application, Plaintiff has submitted a transcript of his deposition testimony along with a sworn supplemental affidavit. In addition, Plaintiff relies upon a certified police accident report which he claims contains an admission against Defendant's interest. Defendant has filed written opposition to the motion in its entirety, relying upon her own deposition testimony. In sum and substance Defendant argues that the motion must be denied because there are triable issues regarding Plaintiff's comparative negligence. The present motion was argued on the record of September 8, 2021 and a transcript of those proceedings was considered in relation to this motion.

On January 17, 2018 Defendant Abughazeh was operating a 2016 Nissan Rogue. At the time and place of occurrence she was entering a COSTCO parking lot to purchase gasoline. Defendant claims that as she was turning inside the parking lot she saw Plaintiff, a pedestrian in a motorized wheelchair, coming towards her vehicle. Defendant testified that she applied her

brakes to avoid contact, but that it was too late. According to Defendant the contact points were the vehicle's front right bumper and the right side of the wheelchair. According to Plaintiff the contact points where the vehicle's front bumper and the left side of the wheelchair. It is undisputed that there was no crosswalk where the accident occurred.

In support of his motion Plaintiff argues that he had the "right of way" as a pedestrian, and that Defendant's failure to yield was the sole proximate cause of the accident. In further support of his position Plaintiff offers a certified MV-104 Police Accident Report. While police accident reports are generally inadmissible, they may become admissible if they satisfy a two-pronged test. **See *Yassin v. Blackman*, 188 A.D.3d 62 (2d Dept. 2020)**. First, the report must be properly certified, which this one is. Next, the report must either contain the personal observations that the officer was under a business duty to make, or it must contain statements that satisfy one of the established exceptions to the hearsay rule. **See *Country-Wide Ins. Co. v. Lobello*, 186 A.D.3d 1213 (2d Dept. 2020); see also *Murray v. Donlan*, 77 A.D.2d 337 (2d Dept. 1980)**. The present accident report contains an admission against party interest that Defendant "did not see the pedestrian on [the] wheelchair until it was too late." **See *Sooklall v. Morisseav-Lafague*, 185 A.D.3d 1079 (2d Dept. 2020)**. The report further indicates that Defendant was issued a citation at the scene for violating New York City Administrative Code §19-190(A) which states (in relevant part) that "any driver of a motor vehicle who fails to yield to a pedestrian… when such pedestrian has the right of way, shall be guilty of a traffic infraction." As the report is properly certified and contains both a citation the reporting officer was under a business duty to report, and an admission from Defendant, it is admissible and properly considered by this Court.

Applicable Law

The proponent of a summary judgment motion has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. **See *Otty Cab Corp. v. Nazir*, 72 N.Y.S.3d 517 (2d Dept. 2017)**. A movant's burden can be satisfied by the submission of sworn affidavits or deposition testimony in proper evidentiary form. **See *Charlie Fox, Inc. v. Diallo*, 48 N.Y.S.3d 264 (2d Dept. 2016)**. Once a prima facie showing of entitlement to summary judgment has been established, the burden shifts to the non-moving party to raise a material issue of fact. **See *Ubillus-Tambini v. Ischakov*, 36 N.Y.S.3d 410 (2d Dept. 2016)**.

Decision

Here, Plaintiff has met his initial burden of establishing his entitlement to summary judgment as a matter of law. Plaintiff's testimony that he was traveling through the parking lot in a motorized wheelchair when he was struck by Defendant's vehicle is undisputed. The issue raised by Plaintiff's testimony is "who had the right of way," as the situs of the accident did not have a crosswalk, or a pedestrian control device. Plaintiff's position that he had the right of way is supported by the Police Accident Report which citied Defendant for a violation of NYC Administrative Code §19-190(a). That regulation, which is entitled "Right of Way" imposes a traffic infraction upon the driver of a vehicle who fails to yield the right of way to a pedestrian. The alleged violation of the Administrative Code constitutes "some evidence" of negligence. **See *Elliott v. City of New York*, 95 N.Y.2d 730 (2001)**. A finding that Plaintiff had the right of way is further supported by Section 41 of the New York City Traffic Regulations which provides that "a driver shall yield the right of way to a pedestrian when the pedestrian is upon the half of the roadway upon which the vehicle is traveling...." **See *Rogers v. Parise*, 75 A.D.2d 513 (1st Dept. 1980).** Moreover, a driver is duty bound to see what there is to be seen with the proper use of his or her senses, and a failure to do so will result in a finding of negligence. **See e.g. *Brandt v. Zahner*, 110 A.D.3d 752 (2d Dept. 2013)**. Here Defendant admitted to the police officer at the scene that "she did not see the pedestrian on the wheelchair until it was too late." This failure to keep a proper lookout is further evidence of negligence on the part of Defendant. **See *Carias v. Grove*, 186 A.D.3d 1484 (2d Dept. 2020); *Higashi v. M&R Scarsdale Rest., LLC*, 176 A.D.3d 788 (2d Dept. 2019).**

As the movant has established his entitlement to summary judgment as a matter of law, the burden shifts to the non-moving party, in this case Defendant Abughazeh, to raise a triable question of fact. **See *Paula v. City of New York*, 249 A.D.2d 100 (1st Dept. 1998)**. Defendant does not materially dispute how this accident occurred. The only argument he raises in opposition is that Plaintiff could be found to be comparatively negligent under the fact pattern presented, and that summary judgment cannot be granted as a result. While this Court agrees that there is an issue of possible comparative negligence in this case, the Court of Appeals has recently held that the issue of comparative negligence is no longer a bar to the granting of summary judgment where a Plaintiff meets his or her initial burden. **See *Rodriquez v. City of New York*, 31 N.Y.3d 312 (2018); see also *Pollet v. Charyn*, 2021 NY Slip Op 06715 (2d Dept. 2021); *Mackay v. Paliotta*, 196 A.D.3d 552 (196 A.D.3d 552 (2d Dept. 2021).** As Plaintiff has not moved to strike the affirmative defense of comparative negligence, the Court need not address the likelihood of that claim.

Accordingly, for the reasons set forth above, Plaintiff's motion for summary judgment is hereby granted on the issue of liability to the extent that the Defendant is hereby found to be negligent as a matter of law. However, as the issue of comparative negligence remains as an affirmative defense, that claim must be addressed at trial. As the Note of Issue has already been filed, the matter is hereby scheduled for a settlement conference with the Court's attorney which shall be held on February 18, 2022 at 3:30 PM by conference call. This constitutes the Decision and Order of the Court in relation to motion sequence number 001, any issue raised therein that is not explicitly addressed herein, is hereby denied without prejudice.

Dated: December 21, 2021

Hon. Catherine M. DiDomenico