Mitchell v Sherpa
2021 NY Slip Op 33042(U)
December 22, 2021
Supreme Court, Bronx County
Docket Number: Index No. 23184/2019E
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31

VELMA MITCHELL, Plaintiff, -against- NIMA SHERPA and UBER TECHNOLOGIES INC., Defendants.	**Index No. 23184/2019E** **HON. VERONICA G. HUMMEL, A.J.S.C.** **Mot. Seq. No. 4**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to plaintiff VELMA MITCHELL's ("Plaintiff") motion (Seq. No. 4) seeking an order, pursuant to CPLR 3212, granting her summary judgment against defendant NIMA SHERPA ("Defendant") on the First Cause of Action asserted in the First Amended Verified Complaint solely as to the issue of liability and dismissing Defendant's First, Third, and Sixth Affirmative Defenses asserted in Defendant's Verified Answer to the First Amended Verified Complaint alleging the contributory negligence of Plaintiff.

This is a personal-injury action arising out of an accident that occurred on January 18, 2019, when Defendant's vehicle struck Plaintiff while she was crossing Henry Hudson Parkway East (the "Henry Hudson East") at or near its intersection with West 246th Street in the Bronx, New York (the "Accident").

In support of the motion, Plaintiff submits an attorney affirmation, an affidavit from Plaintiff, a Statement of Material Facts, copies of the pleadings, an uncertified copy of the police accident report, and copies of the transcripts of the depositions of Plaintiff and Defendant. Because the police accident report is not certified, the Court cannot consider it in deciding the motion. *Coleman v. Maclas*, 61 A.D.3d 569, 569 (1st Dep't 2009).

In opposition to the motion, Defendant submits only an attorney affirmation. Defendant did not include in her opposition papers a Statement of Material Facts corresponding to Plaintiff's Statement of Material Facts, as required by Uniform Trial Court Rule 202.8-g(b). 22 NYCRR 202.8-g (eff. Feb. 1, 2021). Consequently, under Rule 202.8-g(c), each fact stated in Plaintiff's Statement of Material Facts is deemed admitted.

The relevant, admitted—and thus undisputed—facts are as follows: On January 18, 2019, Plaintiff, a pedestrian, was crossing the Henry Hudson East from east to west beginning at the northeast corner of its intersection with 246th Street. Prior to entering the street, Plaintiff observed the pedestrian "walk" sign flashing white, indicating that she was permitted to cross the Henry Hudson East and had the right of way. At approximately 7:05 a.m., while she was in the middle of the Henry Hudson East and walking within the crosswalk, Plaintiff was struck on her left side by Defendant's vehicle. At the time, Defendant was making a left turn from 246th Street onto Henry Hudson East. Defendant first observed Plaintiff approximately 2 to 3 seconds prior to the impact, when Plaintiff was approximately 2 to 3 feet away from Defendant's vehicle. Defendant did not have a clear view of the pedestrian signal and never observed whether it was white, yellow, or red prior to the Accident. Notably, it is also deemed admitted that Plaintiff did nothing to contribute to or cause the Accident.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). A plaintiff in a negligence action moving for summary judgment on the issue of liability must, therefore, establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. *Fernandez v. Ortiz*, 183 A.D.3d 443 (1st Dept 2020). A plaintiff is not required to demonstrate his or her freedom from comparative fault in order to establish a *prima facie* entitlement to summary judgment on the issue of liability. *Rodriguez v. City of N.Y.*, 31 N.Y.3d 312, 324-25 (2018).

Plaintiff argues that Defendant's conduct violated Vehicle and Traffic Law ("VTL") §§ 1130(1) and 1146(a). Pursuant to VTL § 1130(1),

> [w]henever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police offers. No vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or

> dividing section or space or at a crossover or intersection, as established, unless specifically authorized by public authority.

Further, while VTL § 1146(a) does not specify a crosswalk, it states that due care shall be taken by drivers to avoid colliding with pedestrians, regardless of whether the pedestrian is in a crosswalk. Moreover, New York City Traffic Rule 4-03(c)(1) requires traffic to yield to pedestrians crossing with the light in their favor. A violation of the VTL constitutes negligence *per* se. *Drummond v. Perez*, 146 A.D.3d 645 (1st Dep't 2017); *see also Davis v. Turner*, 132 A.D.3d 603 (1st Dep't 2015); *Flores v. City of N.Y.*, 66 A.D.3d 599 (1st Dep't 2009).

Here, Plaintiff has established *prima facie* entitlement to summary judgment on the issue of liability by submitting evidence showing that she was crossing an intersection within the crosswalk, with the light in her favor, when Defendant's vehicle struck her while making a left turn. *See Curl v. Schiffman*, 183 A.D.3d 415, 415 (1st Dep't 2020); *Rozon v. Rosario*, 144 A.D.3d 597, 597 (1st Dep't 2016); *Beamud v. Gray*, 45 A.D.3d 257, 257 (1st Dep't 2007).

In opposition, Defendant has failed to raise a triable issue of material fact as to whether there was a nonnegligent explanation for the Accident. Initially, by failing to submit a counter–Statement of Material Facts, Defendant has admitted that Plaintiff was walking with the pedestrian signal in her favor (*i.e.*, had the right of way) and in the crosswalk when Defendant struck her. But even if that were not so, Defendant's attempt to raise an issue of fact as to whether Plaintiff was in the crosswalk when she was struck is unavailing. Defendant mischaracterizes his own deposition testimony on which he relies: rather than addressing Plaintiff's location in or outside of the crosswalk, the testimony he cites relates only to where Plaintiff was between one side of the street and the other when Defendant hit her. Indeed, Defendant testified a few moments later that he did not remember whether Plaintiff was in the crosswalk at the time of the Accident but that he "felt like it's near [the] crosswalk." This testimony would be insufficient to raise an issue of fact as to Plaintiff's location vis-à-vis the crosswalk even if Defendant were not deemed to have already admitted that Plaintiff was in the crosswalk. Moreover, even if Plaintiff were not in the crosswalk, that fact does not obviate Defendant of his duty of due care in the operation of his vehicle and to avoid colliding into Plaintiff, pursuant to VTL § 1146(a). Accordingly, the motion is appropriately granted insofar as it seeks an order granting partial summary judgment as to Defendant's liability for the Accident.

Additionally, Plaintiff has made a *prima facie* showing that she did not negligently contribute to the cause of the Accident, and Defendant, in turn, has failed to generate a triable issue

of material fact. First, as noted above, it has been deemed admitted that Plaintiff did nothing to contribute to or cause the Accident. Second, Defendant has failed to raise any question of fact as to whether Plaintiff was in the crosswalk. Third, although Defendant contends that there is a question of fact as to whether Plaintiff failed to take evasive action to avoid the Accident, that contention is purely speculative and, therefore, insufficient to raise an issue of fact. *See Cabrera v. Rodriguez*, 72 A.D.3d 553, 554 (1st Dep't 2010) (citing *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 (1978)); *Garcia v. Verizon N.Y., Inc.*, 10 A.D.3d 339, 340 (1st Dep't 2004). In any event, Plaintiff was not required to anticipate that a vehicle would enter the intersection while she had the right of way and was lawfully walking in the crosswalk as a pedestrian. Accordingly, the motion is also appropriately granted insofar as it seeks an order granting summary judgment dismissing Defendant's affirmative defenses alleging Plaintiff's contributory negligence.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

ORDERED that that part of plaintiff VELMA MITCHELL's motion (Seq. No. 4) seeking an order, pursuant to CPLR 3212, granting her summary judgment against defendant NIMA SHERPA on the First Cause of Action asserted in the First Amended Verified Complaint solely as to the issue of liability is **GRANTED**; and it is further

ORDERED that that part of plaintiff MITCHELL's motion (Seq. No. 4) seeking an order dismissing defendant SHERPA's First, Third, and Sixth Affirmative Defenses asserted in her Verified Answer to the First Amended Verified Complaint alleging plaintiff MITCHELL's contributory negligence is **GRANTED**; and it is further

ORDERED that the trial of this action shall be limited to the issues of serious injury and damages, if any; and it is further

ORDERED that the Clerk shall mark the motion (Seq. No. 4) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: December 22, 2021 **Hon.** *s/Hon. Veronica G. Hummel/signed 12/22/2021*
VERONICA G. HUMMEL, A.J.S.C.

1.	CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY		☒ CASE STILL ACTIVE
2.	MOTION IS.....	☒ GRANTED	☐ DENIED	☐ GRANTED IN PART ☐ OTHER
3.	CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
		☐ FIDUCIARY APPOINTMENT		☐ REFEREE APPOINTMENT