

Williams v Pastorello
2021 NY Slip Op 33775(U)
January 11, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 2020-51241
Judge: Hal B. Greenwald
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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

SHALINA O. WILLIAMS,

Plaintiff,

DECISION AND ORDER

Index No. 2020-51241

Motion Seq #1

-against-

JOSEPH A. PASTORELLO,

Defendant.

X

The following documents were reviewed and considered by the Court in reaching the within Decision and Order.

NYSCEF Doc. Nos. Nos 1,3, 8-13, 15-19

This motor vehicle negligence action is based upon an alleged accident between an automobile and a pedestrian that occurred on June 26, 2019 at the intersection of Main Street and Academy Street, Poughkeepsie, NY. It is alleged that Plaintiff SHALINA O. WILLIAMS (WILLIAMS) was walking in the crosswalk east on Academy and Defendant JOSEPH A. PASTORELLO (PASTORELLO) was driving south on Main Street making a left into Academy when PASTORELLO made contact with WILLIAMS.

The procedural history has been set forth in the papers before the Court.

Currently Plaintiff WILLIAMS has filed a Motion for Summary Judgment pursuant to CPLR 3212 seeking an award of liability against Defendant PASTORELLO. PASTORELLO opposes said motion.

SUMMARY JUDGMENT STANDARD

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957], summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (see *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [1978] *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210[1968]; *Barrett v. Jacobs*, 255 N.Y. 520[1931]; Specifically, automobile accident cases do not generally lend themselves to disposition under summary judgment rules as the question of negligence is essentially one of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 [(1974)] see *Schneider v. Miecznikowski*, 16 A.D.2d 177[4th Dep't, 1962];

Barker v. Savage, 45 N.Y.191[1871]; Salomone v. Yellow Taxi Corp., 242 N.Y. 251[1926].

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." Esteve v. Abad, 271 A.D. 725 (1st Dep't, 1947).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." Pullman v. Silverman, 28 N.Y.3d 1060, 1062(2016), quoting Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Further as stated in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851,853 (1985) "Bare conclusory assertions..." are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. See e.g. Piedmont Hotel Co. v. A.E. Nettleton Co., 263 N.Y. 25, 188 N.E. 145 (1933); If the opposition can show there are questionable issue of fact that require a trial of the action, then summary judgment must be denied. In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is "...even arguably any doubt as to the existence of a triable issue". Baker v. Briarcliff School Dist., 205 A.D.2d 652,661 -62 (2d Dept. 1994).

PLAINTIFF'S ARGUMENT

Plaintiff's argument is very simple, Defendant says he did not see WILLIAMS until he had made contact with her. Accordingly, PASTORELLO is negligent, has no defense and liability must be sustained in this Summary Judgment motion. WILLIAMS cites several cases and statutes.

Vehicle & Traffic Law (V&T) 1163 is mentioned as it governs turning movements, such as the subject left turn and that it should be made, "...with reasonable safety".

In Gomez v Novak, 140 A.D.3d 831 (2nd Dep't, 2016) the Second Department affirmed summary judgment on the issue of liability. Plaintiff had demonstrated that she was in the crosswalk with the signal in her favor, that she while, "...exercising due care, she looked in all directions to check for approaching vehicles before she entered the intersection."

In Moreira v M.K. Travel & Transp., Inc., 106 A.D.3d 965 (2nd Dep't, 2013) again liability was found. Here, Plaintiff offered proof that, "...she waited for the pedestrian crossing signal to display the walk icon, looked both ways before she entered the intersection...".

In Cuevas v Chavez, 94 A.D.3d 803 (2nd Dep't, 2012) liability was established by reason that the defendant failed to yield the right of way as he was crossing the street with the "WALK" signal in his favor.

In *Martinez v Kreychmar*, 84 A.D.3d 1037 (2nd Dep't, 2011) Plaintiff proved to the court she was exercising due care, walking in the crosswalk, looked all around when she was hit by defendant's automobile. Liability denied in the lower court, granted in the Second Department.

In *Qamar v Kanarek*, 82 A.D.3d 860 (2nd Dep't, 2011) liability against the driver was sustained. Plaintiff pedestrian was walking in the crosswalk, was struck "...suddenly and without warning when he was more than halfway across the street...", and he showed he exercised due care.

In *Klee v America's Best Bottling Co.Inc.*, 60 A.D. 3d 911 (2nd Dep't, 2009) Plaintiff was granted liability establishing defendant had violated V&T 1112(a) when plaintiff was crossing the street in the crosswalk with the traffic signal in his favor. V&T 1112(a) states in relevant part:

1112. Pedestrian-control signal indications

Whenever pedestrians are controlled by pedestrian-control signals exhibiting the words "WALK" or "DON'T WALK", or exhibiting symbols of a walking person or upraised hand, such signals shall indicate and apply to pedestrians as follows:

- (a) Steady WALK or walking person. Pedestrians facing such signal may proceed across the roadway in the direction of the signal and shall be given the right of way by other traffic*

DEFENDANT OPPOSES THE MOTION

Defendant first claims the instant Motion for Summary Judgment as to liability is premature, as there has been no discovery. Defendant made certain discovery demands at the same time as it served its Answer, yet no responses have been forthcoming from Plaintiff, only the motion. However, mere speculation that discovery may uncover some pertinent fact, is insufficient to deny summary judgment.

Next, PASTORELLO argues that Summary Judgment is issue finding, and if there is a triable issue of fact "found", Summary Judgment must be denied. Defendant claims Plaintiff's argument is unsubstantiated and reviews the documents offered by plaintiff in support of its motion. The complaint is unverified and has no probative value in terms of the instant motion. The police report is merely a collection of statements by a police officer who was not a witness to the occurrence. However, the police report may be considered evidence and avoid the hearsay rule as a business record, but it's value to support the instant motion is questionable.

The last document reviewed by movant is the Plaintiff's Affidavit wherein she states:

"On June 26, 2019, I was a pedestrian crossing east on Academy Street while in the crosswalk, in the City of Poughkeepsie, County of Dutchess, State of New York. I was struck on my left side by defendant, Joseph A. Pastorella while he was operating his 2005 Nissan Pickup truck.

That's it!

Unlike the cases cited wherein the plaintiff asserted and the court accepted that the plaintiff looked before crossing, or observed traffic signals or pedestrian signals, WILLIAMS was merely in the crosswalk. There are many unanswered questions and certainly triable issues of fact sufficient herein to preclude the granting of summary judgment as to liability.

By reason of the foregoing it is

ORDERED that the Motion by Plaintiff WILLIAMS for Summary Judgment against Defendant PASTORELLO on the issue of liability is denied; and it is further

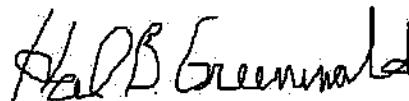
ORDERED that counsel is directed to review, complete and return the annexed Preliminary Conference Order to the Court on or before February 28, 2021.

Any relief not specifically granted herein is denied

The foregoing constitutes the decision and Order of this Court.

Dated: January 11, 2021
Poughkeepsie NY 12601

ENTER



Hon. Hal B. Greenwald, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Justice Greenwald's Chambers, please do not submit any copies. Submit only the original papers.