

Lopez v Samuels

2022 NY Slip Op 33808(U)

June 13, 2022

Supreme Court, Bronx County

Docket Number: Index No. 300952/2017e

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 31

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FANNY LOPEZ,
Plaintiff,

Index No. 300952/2017e

DECISION and ORDER
Mot. Seq. 2

-against-

TRACE SAMUELS and PATRICIA MALCOLM,
Defendants.
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VERONICA G. HUMMEL, A.J.S.C.:

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed in NYSCEF regarding the motion of plaintiff FANNY LOPEZ (plaintiff) [Mot. Seq. 2], for an Order pursuant to CPLR 3212, granting the plaintiff partial summary judgment on the issue of liability and dismissing defendants TRACE SAMUELS’ and PATRICIA MALCOLM’S (defendants) second affirmative defense of culpable conduct, comparative negligence, and assumption of risk.

Plaintiff’s action seeks to recover monetary damages for alleged serious personal injuries sustained as a result of a pedestrian knockdown which happened on February 24, 2017. The Accident occurred at the intersection of Bainbridge Avenue and East 193rd Street in Bronx County. Plaintiff was a pedestrian crossing East 193rd Street. Defendant Samuels collided with plaintiff.

In support of the motion, plaintiff submits a statement of material facts, an attorney affirmation, the pleadings, and a personal affidavit. Plaintiff does not submit a reply.

In opposition, defendants submit an attorney affirmation, a statement of material facts, plaintiff’s deposition testimony, plaintiff’s affidavit, and an uncertified copy of the police report.

Defendant has not been deposed and elects to not submit a personal affidavit.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must 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. *Tsyganash v Auto Mall Fleet Management, Inc.*, 163 A.D.3d 1033 (2d Dep't 2018); *see Rodriguez v City of New York*, 31 N.Y.3d 312 (2018). A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case. *see Rodriguez v City of New York, supra*. Importantly, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Alvarex v Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606 (1st Dep't 2012).

Plaintiff established *prima facie* entitlement to summary judgment on the issue of liability by submitting evidence showing that plaintiff looked both directions and began crossing an intersection within the crosswalk, with the light in plaintiff's favor, when defendants' vehicle struck plaintiff while making a turn. *see Curl v Schiffman*, 183 A.D.3d 415 (1st Dep't 2020); *Rozon v Rosario*, 144 A.D.3d 597 (1st Dep't 2016); *Beamud v Gray*, 45 A.D.3d 257 (1st Dep't 2007). This conclusion is supported by both the plaintiff's affidavit and deposition testimony and any inconsistency as to how far along in the cross-walk the plaintiff had reached before impact is insufficient to warrant denial of the motion. Having presented evidence of defendants' negligence, plaintiff need not demonstrate freedom from comparative fault in order to obtain partial summary judgment of liability against the negligent defendant. *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].

In opposition, defendants fail to raise a triable issue of material fact. The attorney affirmation submitted in opposition to the motion has no evidentiary value. *see Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (1st Dep't 2011) ("It is well established . . . that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value."), and is thus insufficient to defeat the motion. In addition, the contention by

defendants that plaintiff's motion is premature also lacks merit as the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion. *Downey v. Mazzioli*, 137 A.D.3d 498, 499 (1st Dep't 2016). "Depositions are unnecessary [before the court determines the liability motion], since defendants have personal knowledge of the facts, yet failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact." *Thompson v. Pizzaro*, 155 A.D.3d 423 (1st Dep't 2017); *Downey v. Mazzioli*, 137 A.D.3d 498, 499 (1st Dep't 2016).

Similarly, defendants do not present any material issue of fact in opposition to plaintiff's *prima facie* showing that there is no basis for maintaining the second affirmative defense of culpable conduct, comparative negligence, and assumption of risk. Accordingly, the affirmative defense is appropriately dismissed.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff FANNY LOPEZ (plaintiff) [Mot. Seq. 2], that for an Order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability and dismissing the defendants TRACE SAMUELS' and PATRICIA MALCOLM'S (defendants) second affirmative defense of culpable conduct, comparative negligence, and assumption of risk is granted; and it is further

ORDERED that the Clerk shall mark motion sequence 2 decided in all court records.

This constitutes the decision and order of the court.

Dated: June 13, 2022

ENTER:

s/Hon. Veronica G. Hummel/signed 06/13/2022

HON. VERONICA G. HUMMEL, A.J.S.C.

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