

Khramtseva v Canepa

2018 NY Slip Op 34522(U)

December 26, 2018

Supreme Court, Bronx County

Docket Number: Index No. 25966/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 14

-----X
KHRAMTSEVA, OLENA

Index No. 25966/2018E

- against -

Hon. JOHN R. HIGGITT,

CANEPA, SIMONE
-----X

A.J.S.C.

The following papers numbered 6 to 17 in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on October 16, 2018 and duly submitted as No. 67 on the Motion Calendar of November 13, 2018

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	6-15
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	17
Replying Affidavit and Exhibits	
Filed Papers	
Memoranda of Law	
Stipulations	16

Upon the foregoing papers, plaintiff’s motion for partial summary judgment on the issue of defendant’s liability is granted, in accordance with the annexed decision and order.

Dated: 12/26/2018

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
OLENA KHRAMTSEVA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 25966/2018E

SIMONE CANEPA,

Defendant.

-----X

John R. Higgitt, J.

This negligence action arises out of a motor vehicle accident that occurred on May 12, 2008, when plaintiff, a pedestrian, was struck by a vehicle owned and operated by defendant Canepa at the intersection of Lydig Avenue and Cruger Avenue in the Bronx. Plaintiff seeks summary judgment on liability and an order setting the matter down for an immediate trial on the issue of damages.

The motion is determined as follows:

Plaintiff submits a copy of the pleadings, her affidavit and a certified copy of the police accident report. Plaintiff averred in her affidavit that she was struck by a vehicle operated by the defendant while waiting at the intersection of Lydig Avenue and Cruger Avenue. Plaintiff further states that she was in “in the crosswalk only a few inches from the curb” when she was struck by defendant’s vehicle. Plaintiff also averred that at the location where she was struck there was a marked crosswalk and that pedestrian traffic at the intersection was controlled by a pedestrian control signal. Regarding the pedestrian control signals at the time of the accident, plaintiff stated, “I had waited for the green light with the walk signal and looked both ways for any vehicular traffic and there were no moving vehicles near me.” The police report contained a statement attributed to the defendant that he pressed the gas pedal instead of the brake, causing 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 sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49

NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Summary judgment should be granted only if the court determines that the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit" (*id.*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Once the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The plaintiff established a *prima facie* case with her affidavit and the statements attributed to the defendant in the police accident report.¹ This proof established that the plaintiff was within a marked crosswalk when the defendant lost control of his vehicle by mistakenly depressing the gas pedal instead of the brake and struck the plaintiff. This evidence is sufficient to establish that the defendant was negligent as a matter of law by failing to exercise due care in avoiding colliding with the plaintiff (*see Vehicle and Traffic Law §1163; Kemenyash v McGoey*, 306 AD2d 516 [2d Dept 2003]; *see also Niyazov v. Bradford*, 13 AD3d 501, 502 [2d Dept 2004]).

Defendant's assertion that plaintiff must also establish her freedom from liability to be entitled to summary judgment is misplaced in light of the Court of Appeals decision in *Rodriguez v City of New*

¹ Because the police officer who prepared the accident report was acting within the scope of his duty in recording the defendant driver's statement and the defendant did not deny making the statement, the statement is admissible as an admission of a party (*see Estate of Mirjani v DeVito*, 135 AD3d 616 [1st Dept 2016]; *Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]; *Jackson v Trust*, 103 AD3d 851 [2d Dept 2013]).

York, 31 NY3d 312 (2018). Moreover, the defendant's argument that the plaintiff's affidavit fails to demonstrate that she entered Lydig Avenue with the pedestrian control signal in her favor "is not a defense to plaintiff's prima facie case" since it raises an issue only as to plaintiff's comparative negligence (see *Bokum v Sera Sec. Servs., LLC*, 165 AD3d 535 [1st Dept 2018]; see also *Rodriguez v City of New York, supra*).

Defendant's argument that the motion is premature inasmuch as no discovery has yet taken place is unavailing as defendant submits no affidavit based on his own knowledge of the events (see *Rodriguez v Garcia*, 154 AD3d 581 [1st Dept 2017]; see *Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (see *Castaneda v DO & CO New York Catering, Inc, supra*; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]).

For the foregoing reasons, it is hereby

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendant's liability is granted; and it is further

OERDERED, that plaintiff's motion is otherwise denied.

The parties are reminded of the February 15, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: December 26, 2018



John R. Higgitt, A.J.S.C.