

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

480

CA 15-01770

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

DAWN M. BUSH, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RICKI KOVACEVIC, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered July 14, 2015. The order denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion that sought summary judgment with respect to the issues of defendant's negligence and proximate cause and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, as a pedestrian, she was struck by a vehicle owned and operated by defendant. Following discovery, plaintiff purported to move for partial summary judgment "on the issue of liability," but she did so without raising the issue of serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 51). Although not explicitly mentioned in her motion, plaintiff implicitly sought summary judgment dismissing defendant's first affirmative defense, which alleged plaintiff's comparative negligence, i.e., whether plaintiff's own conduct contributed to the accident. Supreme Court denied the motion.

As a preliminary matter, we note that because plaintiff did not raise the issue of serious injury on her motion, we cannot presume that such issue "was necessarily decided" by the court (*Ruzycki*, 301 AD2d at 51). We therefore address plaintiff's motion only with respect to the issues of defendant's negligence and proximate cause (*see Leahey v Fitzgerald*, 1 AD3d 924, 925; *cf. Stevens v Zukowski*, 55 AD3d 1400, 1401). We conclude that the court erred in denying the motion with respect to the issues of defendant's negligence and proximate cause, but properly denied the motion insofar as it

implicitly sought dismissal of the first affirmative defense (see *Brubaker v Houseknecht*, 83 AD3d 1539, 1540). Plaintiff established her prima facie entitlement to judgment as a matter of law on the issues of defendant's negligence and proximate cause by establishing that she was crossing the street within the crosswalk when she was "struck by defendant's vehicle, which was making a left turn" (*Beamud v Gray*, 45 AD3d 257, 257; see *Gyabaah v Rivlab Transp. Corp.*, 129 AD3d 447, 447; see generally Vehicle and Traffic Law § 1111 [a] [1]).

In support of her motion, plaintiff submitted defendant's deposition testimony. In that testimony, defendant stated that, because she struck plaintiff on the passenger side of her car, plaintiff "had to have been maybe two feet off of the crosswalk." Although defendant contends that plaintiff may have violated Vehicle and Traffic Law § 1151 (b), which provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield," that section "by its plain terms, applies only where there are no traffic signals" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442; see *Wallace v Barody*, 124 AD3d 1172, 1174; *Kochloffel v Giordano*, 99 AD2d 798, 799). Here, there was a traffic signal and, therefore, section 1151 does not apply. Moreover, the fact that the crosswalk was not marked because of the recent repaving of the road is also of no moment where, as here, the undisputed evidence establishes that plaintiff was walking in a crosswalk as defined by section 110 (see *Kochloffel*, 99 AD2d at 798).

In any event, defendant admitted that she did not see plaintiff until the impact had already occurred, and we thus conclude that defendant's claim concerning plaintiff's location in the street is mere speculation and an insufficient basis to deny plaintiff's motion insofar as it relates to defendant's negligence (see *France Herly Bien-Aime v Clare*, 124 AD3d 814, 815; *Sulaiman v Thomas*, 54 AD3d 751, 752). Although defendant contended that she looked for pedestrians before turning left, defendant had both "a statutory duty to use due care to avoid colliding with pedestrians" (*Barbieri v Vokoun*, 72 AD3d 853, 856; see Vehicle and Traffic Law § 1146), as well as "a common-law duty to see that which [she] should have seen through the proper use of [her] senses . . . [T]he fact that [defendant] never saw [plaintiff, who was walking slowly with a cane,] does not excuse [defendant's] conduct" (*Domanova v State of New York*, 41 AD3d 633, 634; see *Barbieri*, 72 AD3d at 856).

Contrary to plaintiff's contention, however, we conclude that there are issues of fact concerning plaintiff's comparative negligence (see *Brubaker*, 83 AD3d at 1540). We agree with defendant that the evidence submitted by plaintiff establishes that there are triable issues of fact whether the light for pedestrian traffic had changed before plaintiff commenced walking across the street (see generally Vehicle and Traffic Law § 1112 [b]). We thus conclude that "the evidence submitted by plaintiff does not establish a total absence of comparative negligence as a matter of law" (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019; see *Tiwari v Tyo*, 106 AD3d 1462, 1463;

Brubaker, 83 AD3d at 1540; *cf.* *Stevens*, 55 AD3d at 1401).

In opposition to the motion, defendant submitted an uncertified police accident report, wherein the police officer indicated that there was damage to the front passenger side of defendant's vehicle. Although "reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence" (*Yeargans v Yeargans*, 24 AD2d 280, 282; *see Szymanski v Robinson*, 234 AD2d 992, 992), the report submitted by defendant was "not authenticated" and, "[b]ecause the report was not submitted in evidentiary form, it should not have been considered on the summary judgment motion" (*Szymanski*, 234 AD2d at 992; *see Golombek v Marine Midland Bank*, 193 AD2d 1113, 1114). Here, as in *Szymanski*, defendant did not "provide[] an acceptable excuse" for failing to tender the proof in admissible form (234 AD2d at 992; *see generally Grasso v Angerami*, 79 NY2d 813, 814).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court