

Decided on May 27, 2008

**Supreme Court, Queens County**

**Luis Tapia and Theodore Alatsas as Co-Guardians of  
Manuel Matailo, Plaintiff**

**against**

**Royal Bus Tours, Inc. and Elijah Boone, Defendant.**

1470/06

Allan B. Weiss, J.

It is ordered that the plaintiffs' cross-motion is denied and the defendants' motion is granted and the complaint is dismissed.

This is an action to recover for personal injuries that Manuel Matailo a/k/a Pedro Moya sustained on February 5, 2003 at about 6:45 p.m. at the intersection of East 57th St. & the entrance ramp leading to the Queensboro Bridge when the bus, owned by the defendant, Royal Bus Tours, Inc. and operated by Elijah Boone, while making a left turn, struck Manuel Matailo as he rode his bicycle across the entrance ramp. The defendants now move for summary judgment on the issue of liability asserting that the sole proximate cause of the accident was the negligence of Matailo. Plaintiffs oppose, and separately move for summary judgment and to strike the defendants' answer, on the grounds of spoliation of evidence.

The plaintiffs' motion to strike the defendants' answer on the grounds of spoliation of evidence is denied. Sanctions for the spoliation of evidence may be imposed where a litigant, intentionally or negligently, disposes of crucial items of evidence before the adversary has an opportunity to inspect it (*DiDomenico v. C & S Aeromatik Supplies*, 252 AD2d 41, 53 [1998] *Kirkland v. New York City Housing Authority*, 236 AD2d 170 [1997]) and even where the

destruction takes place before the commencement of litigation, if the person who destroyed the evidence was on notice that the evidence might be needed for future litigation (see, *DiDomenico v. C & S Aeromatik Supplies*, supra at 53 [1998]). Although the court has wide discretion in determining the appropriate sanctions for spoliation of evidence (*Molinari v. Smith*, 39 AD3d 607, 608 [2007]), the drastic remedy of striking a pleading will not be imposed unless there is evidence that the spoliation was the result of willful and contumacious conduct resulting in the destruction of "...key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence" (*De Los Santos v. Polanco*, 21 [\*2]AD3d 397, 398 [2005]; see *Dean v. Campagna*, 44 AD3d 603 [2007]). The plaintiffs have failed to submit any evidence to demonstrate that the documents that were allegedly destroyed may contain material and relevant evidence necessary to establish their claim or that the loss of the documents was willful and contumacious.

It is well settled, that the movants on a motion for summary judgment has the burden to affirmatively demonstrate, by the submitting evidence in admissible form their prima facie entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) which burden is not met by pointing out the gaps in the opponent's proof (see *Calderone v. Town of Cortland*, 15 AD3d 602 [2005]; *Doe v. Orange-Ulster Bd. of Co-op. Educational Services*, 4 AD3d 387 [2004]; *Fromme v. Lamour* 292 AD2d 417 [2002]). Where, as here, the movants have sustained their burden, the party opposing the motion must then assemble, lay bare and reveal his proof and show that his claims are capable of being established at trial (see *Scott v. Long Island Power Auth.*, 294 AD2d 348 [2001]; *Spearman v. Times Square Stores Corp.*, 96 AD2d 552 [1983]).

The defendants demonstrated, prima facie, their entitlement to summary judgment dismissing the complaint, through the affidavit of the bus driver, Boone, and the deposition testimony of two independent witnesses, Turso and Murphy, which established that the bus driver, Boone, was not negligent and that the sole proximate cause of the accident was the negligence of Matailo in entering the intersection against a red light and failing to yield the right of way to the bus. In opposition, the plaintiff has failed to establish its entitlement to summary judgment as to liability or to raise a triable issue of fact.

The bus driver, Boone, was required to obey Vehicle and Traffic Law (VTL) § 1111(a)(2) and the New York City Traffic Rules and Regulations (34 RCNY) 34 RCNY §§ 4-03 which provide in pertinent part that a vehicle faced with a steady green arrow may cautiously make the movement indicated however, shall yield the right of way to other traffic lawfully within the intersection or an adjacent cross walk at the time such signal is exhibited. Boone was also required to comply with VTL § 1146 which provides in relevant part that notwithstanding the provisions of any other law, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist. The plaintiff, Matailo, as the operator of a bicycle, is not a pedestrian (VTL § 130), and pursuant to the provisions of the VTL and the New York City Traffic Rules and Regulations is subject to the same rights and duties as the driver of a vehicle (34 RCNY § 4-02[a]; VTL § 1231) rather than those special privileges afforded pedestrians. The operation of a bicycle upon a sidewalk is prohibited (34 RCNY § 4-07[3][i]) except under circumstances not existing here.

At his deposition Turso, the operator of the vehicle immediately behind the bus, testified that he was behind the bus proceeding east in the left lane of 57th Street, the bus stopped when it reached the intersection with the entrance ramp to the Queensboro Bridge for a red traffic light, displayed a left turn signal, waited until the light changed to a green left turn arrow, whereupon it began making a left turn at 5mph, or less, and after 1 or 1 1/2 seconds, it suddenly stopped. [\*3]Murphy, a pedestrian at the intersection, testified at his deposition that he observed Matailo driving his bicycle west on the sidewalk of 57th Street and, when he reached the entrance ramp to the bridge, Matailo drove off the sidewalk without stopping for the red light facing him and entered the intersection directly into the path of the bus which was making a left turn on a green signal. The bus driver, Boone, testified that before starting to turn, he looked and no one was in the intersection, that he did not see Matailo until he was directly in front of the bus. He also stated that his foot was on the break while making the left turn and he was able to stop the 45 foot long bus immediately upon seeing Matailo without running over him after he fell to the ground. All three testified that Matailo was wearing dark clothing which also covered his head and riding a dark colored bicycle. Such evidence is sufficient to demonstrate that the sole proximate cause of the accident was Matailo's violation of VTL §111(d), as well as the provisions of 34 RCNY §§ 4-03 and 4-07[3][i] and failing to yield the right of way to the bus (see *Aiello v. City of New York*, 32 AD3d 361 [2006]; *Wolf v. We Transport, Inc.*, 274 AD2d 514 [2000]).

In opposition, the plaintiff challenges Boone's credibility and asserts that Boone was negligent in failing to avoid the accident or, that at least issues of fact exist in this regard because Boone testified that he saw Matailo 10 seconds before hitting him. Although credibility is generally an issue of fact for the jury, in this case the uncontradicted testimony of two eyewitnesses is sufficient to establish the defendants' entitlement to summary judgment. In addition, the alleged inconsistencies in Boone's testimony refer to matters not at issue herein. Moreover, plaintiffs' description of Boone's testimony is inaccurate and does not reflect any inconsistencies with respect to his description of the relevant events. Boone testified that he first saw Matailo when the bus was "...ready to cross over the cross-walk." which "[c]ould have been no more than 10 seconds, maybe." In addition, plaintiffs' own investigator reported that when he spoke to Boone on March 12, 2003, a month after the accident, Boone stated that "the first time I saw the man when he was in front of me" and that he had no time to stop beforehand. Thus, the plaintiffs' assertion that the bus driver could have taken some unspecified action to avoid the accident is unsupported by the evidence in this case (see *Carpio v. Leahy Mechanical Corp.*, 30 AD3d 554 [2006]; *Lupowitz v. Fogarty*, 295 AD2d 576 [2002]).

Nor is the notation in the police report that an apparent contributing factor was driver inattention (i.e. the bus driver) sufficient to raise a triable issue of fact. The police officer did not observe the accident and his conclusion is unsupported by the evidence in this case, and there is no evidence to establish that the officer is qualified to render an opinion as to the cause of the accident (see *Almestica v. Colon*, 304 AD2d 508 [2003]; *Murray v. Donlan*, 77 AD2d 337, 347 [1980] appeal dismissed 52 NY2d 1071, [1981]). The fact that Boone didn't see Matailo until he was in front of the bus does not necessarily support the conclusion that Boone was inattentive, and there is no other factual assertion in the police report or in the testimony of the witnesses to support such a conclusion (see *Almestica v. Colon*, supra; see also *Montes v. New York City*

Transit Auth., 46 AD3d 121 [2007]; Wolf v. We Transport, Inc., 274 AD2d 514 [2000]).

There is no evidence in this case to indicate that Boone operated the bus in other than a reasonable manner, or that he was able to see Matailo and anticipate that he would violate the [\*4]traffic laws sufficiently in advance of the accident so as to be able to avoid it. On the contrary, Boone, who had the right of way was entitled to assume that Matailo would obey traffic laws which required him to stop and yield the right of way (see Seery v. Mulholland, 41 AD3d 829 [2007]; Shapiro v. Munoz, 28 AD3d 638 [2006]; Almonte v. Tobias, 36 AD3d 636 [2006]).

Dated: May 27, 2008

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J.S.C.