

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PUBLISH

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 61464/14

MOTION DATE: 3/30/17

MOTION NO.: 001 MD

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ARIANA DONOVAN,

Plaintiff,

PLAINTIFF'S ATTORNEY:
LAW OFFICES OF FREDERICK
K. BREWINGTON
556 Peninsula Blvd.
Hempstead, New York 11550

-against-

DOUGLAS QUICK,

Defendant.

DEFENDANT'S ATTORNEY:
ROE & ASSOCIATES
1055 Franklin Ave., Suite 204
New York, New York 10038

Upon the following papers read on this motion for summary judgment; Notice of Motion and supporting papers dated January 31, 2017; Answering Affidavits and supporting papers dated March 16, 2017; Replying Affidavits and supporting papers dated March 29, 2017; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 001) of defendant for summary judgment dismissing the complaint against him is denied.

This action was commenced by plaintiff Ariana Donovan to recover damages for injuries she allegedly sustained on October 8, 2013, while jogging near the intersection of Montauk Highway and Snedecor Avenue in West Islip, New York. Plaintiff alleges that she was struck by a motor vehicle owned and operated by defendant Douglas Quick.

Defendant Douglas Quick now moves for summary judgment in his favor, arguing that he was not negligent. Specifically, defendant asserts that plaintiff suddenly ran across the path of his vehicle, rendering him unable to prevent his vehicle from colliding with her. In support of his motion, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, and an affidavit of nonparty witness Thomas C. Fauvell.

At her deposition, plaintiff testified that at approximately 6:00 a.m. on the date in question, she was jogging eastbound on the north side of Montauk Highway. She stated that she intended to cross Montauk Highway from its north side to its south side at its intersection with Snedecor Avenue, then continue jogging southbound on Snedecor Avenue toward its terminus. Plaintiff indicated that the intersection of Montauk Highway and Snedecor Avenue was regulated by a lighted traffic signal. She stated that she looked upward at the traffic light and noticed that it was illuminated red for traffic traveling on Montauk Highway, but does not know for how long the light had been red before she began crossing. Plaintiff testified she cannot remember if vehicles were stopped at the red light, or if the crosswalk in question had pedestrian control signals. She explained that she began jogging across Montauk Highway, heading in a southerly direction. Plaintiff testified that when she was at a point between the midpoint of Montauk Highway and its southern curb, the right side of her body was struck by a motor vehicle. Plaintiff

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stated that her vision was directed toward the southern curb of Montauk Highway, that she did not see the vehicle that struck her, and that she cannot remember if any stopped vehicle obstructed her vision of traffic.

Defendant Douglas Quick testified that at approximately 7:00 a.m. on the date in question, he was driving his motor vehicle eastbound on Montauk Highway and that the lighting conditions were "bright." He indicated that he was traveling in the right lane of Montauk Highway and that there was a pickup truck with a "box frame" in its rear, traveling in the left lane, alongside his vehicle. Defendant stated that when he first observed the traffic light regulating the intersection, it was illuminated red. He testified that as he approached the intersection he "took his foot off the gas pedal to slow down and then ultimately, if need be, to put the brake on." Defendant stated that the aforementioned pickup truck, whose rear "box frame" obscured his vision of objects to his left, was stopped in the left lane. Defendant indicated that at a point approximately 10 feet west of the intersection, while his vehicle was "almost to a stop" and "[h]ardly moving," the traffic light turned green. He testified that in response to the traffic light turning green, he put his foot on the accelerator to "surge ahead." He stated that, at that moment, a woman ran across his path of travel from the left and his vehicle's driver's side bumper struck her. Defendant indicated that he immediately stopped his vehicle and exited. Defendant recalled seeing a man named Tom at the incident location, whom he assumed was the person who alerted police.

By affidavit, nonparty Thomas Fauvell states that on October 8, 2013, at approximately 6:30 a.m., he was a witness to a motor vehicle accident involving a pedestrian who ran across Montauk Highway at its intersection with Snedecor Avenue in West Islip. He indicates that he was within his motor vehicle, stopped at a red light on Pat Drive facing southbound, at its intersection with Montauk Highway. Mr. Fauvell describes eastbound Montauk Highway at the incident location as comprised of two travel lanes and one left turning lane. He states that immediately prior to the accident, he observed one automobile in the left turning lane, a large truck in the eastbound middle lane, and a "silver grey vehicle" in the right lane.

Mr. Fauvell further states that he observed a jogger cross in front of his vehicle, running westbound on Montauk Highway. He indicates that after the jogger passed in front of his vehicle, she "stepped out into the area of the crosswalk at Sendecor [sic], as the light changed green for east and westbound traffic on Montauk Highway." Mr. Fauvell states he observed the jogger cross in front of the aforementioned stopped vehicle in the left turning lane, then almost be struck by the vehicle in the eastbound "middle" lane. He indicates that the jogger did not stop after the vehicle in the middle lane was forced to "stop short" to avoid hitting her but, instead, continued running through the crosswalk across the eastbound right lane of Montauk Highway, where she was suddenly struck by defendant's silver vehicle. Mr. Fauvell opines that "[a]s a result of the position of the vehicles there was no way the driver of the silver vehicle could have seen the jogger coming across the road after the light had turned green." Mr. Fauvell states the silver vehicle was traveling at less than five miles per hour and that the jogger "jumped out in front of it."

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any

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material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

A defendant moving for summary judgment in a negligence action “has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident” (*White v Adom Rental Transp., Inc.*, ___AD3d___, 2017 NY Slip Op 03801 [2d Dept 2017]). There can be more than one proximate cause of an accident and, generally, it is for the trier of fact to determine the issue of proximate cause (*Id.*). Vehicle and Traffic Law § 1111 (a) (1) states “[t]raffic, except pedestrians, facing a steady circular green signal may proceed straight through . . . [but] shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.” Likewise, a pedestrian who has the right of way “is entitled to anticipate that motorists will obey the traffic laws that require them to yield” (*Huang v Franco*, 149 AD3d 703, 51 NYS3d 188 [2d Dept 2017]). Yet, “[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” (Vehicle and Traffic Law § 1151 [b]). Further, specialized rules apply when a crosswalk is regulated by a pedestrian control signal; Vehicle and Traffic Law § 1112 provides:

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.
- (b) Flashing DON’T WALK or upraised hand. No pedestrian shall start to cross the roadway in the direction of such signal, but any pedestrians who have partially completed their crossing on the WALK or walking person signal shall proceed to a sidewalk or safety island while the flashing DON’T WALK or upraised hand signal is showing.

(c) Steady DON'T WALK or upraised hand. No pedestrians shall start to cross the roadway in the direction of such signal, but any pedestrians who have partially completed their crossing on the WALK or flashing DON'T WALK signal shall proceed to a sidewalk or safety island while the steady DON'T WALK signal is showing.

Here, defendant has failed to eliminate all triable issues of material fact (*see generally Alvarez v Prospect Hosp., supra*). Viewing the evidence in the light most favorable to plaintiff, triable issues of fact exist as to the parties' actions (*see Sylvester v Velez*, 146 AD3d 599, 44 NYS3d 742 [1st Dept 2017]). Specifically, a trier of fact must determine in whose favor the traffic signal was illuminated at the time plaintiff began crossing Montauk Highway; if, or when, such traffic signal changed from being in favor of plaintiff to being in favor of defendant; whether defendant properly used his senses while operating his vehicle; if defendant's view of plaintiff was obstructed by an adjacent vehicle, whether defendant's actions constituted negligence; and whether plaintiff was comparatively negligent.

Accordingly, defendant's motion for summary judgment in his favor dismissing the complaint against him is denied.

Dated: July 11, 2017


J.S.C.

HON. PAUL J. BAISLEY JR.