

**Zhu Rong Gao v New York City Dept. of Env'tl.
Protection**

2012 NY Slip Op 33074(U)

December 7, 2012

Supreme Court, New York County

Docket Number: 116433/2009

Judge: Geoffrey D. Wright

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SCANNED ON 1/2/2013
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice

PART 62

Index Number : 116433/2009
GAO, ZHU RONG
vs.
NEW YORK CITY DEPARTMENT
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for DISMISS

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). _____

Cross motion


Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the annexed memo to decision. 2

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

DEC 27 2012

NEW YORK
COUNTY CLERK'S OFFICE


GEOFFREY D. WRIGHT
AJSC

Dated: 12/7/12

J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ZHU RONG GAO,

Plaintiff,

Index # 22303/2010

-against-

DECISION

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITY OF NEW YORK and "JOHN DOE" said name being fictitious and intended to represent the operator of defendant(s) vehicle at time of the incident herein,

Defendants.

Present:
Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____
Other.....cross-motion.....	_____

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant, The City of New York moves for an order pursuant to CPLR 3211 dismissing the complaint against the City, on the grounds that the City is not a proper party to this action, or in the alternative, pursuant to CPLR 3212 granting summary judgment in favor of the City, dismissing the complaint and Plaintiff's cross-motion for summary judgment and for such other and further relief as this Court may deem just and proper.

Plaintiff cross-moves for summary judgment on the issue of The City's liability.

The City's motion and the Plaintiff's cross-motion are denied.

This is an action for personal injuries allegedly sustained by Plaintiff Zhu Rong Gao ("Plaintiff") on October 3, 2008 at approximately 9:15 a.m. Plaintiff alleges she was struck by a motor vehicle at the intersection of Forsyth Street and East Broadway, in the County, City and State of New York and that following the accident the vehicle left the scene without reporting it to the authorities. Specifically, the Plaintiff claims "negligence, recklessness and carelessness of the City of New York and New York City Department of Environmental Protection, their agents, servants, employees and/or licensees in the ownership, operation, management, maintenance and control of a certain bus...."

During her 50-h hearing on October 27, 2009, Plaintiff testified (with the assistance of a Mandarin interpreter) that she was walking from her home located at 113 Eldridge Street to the restaurant where she worked as a dishwasher at 137 East Broadway when the accident occurred. Plaintiff testified that as she was crossing Broadway "*the light changed*" when she was in the middle of the street (she claims the light was initially red, but changed to white when she was in the middle of the street). "*I crossed the red light in the middle of the street, the car drove by.*" "*I went across the street and then the red light turned to [a] white light.*" Plaintiff testified she saw the car for the first time stopped at the red light. The car was to Plaintiff's right and was "*going to drive down East Broadway.*" Plaintiff described the car as "*white and in between there was green color.*" She further explained that "*there's a line of green...in between.*" Plaintiff was unable to recall whether she obtained the license plate number of the vehicle, how many doors there were on the vehicle whether it was a car or a truck or if there were any words on the vehicle. Plaintiff described the car as "*just a normal car.*" When pressed as to whether the vehicle was a car or a truck, she testified that "*I think somebody saw it, it belong [sic] to some kind of company car.*"

Plaintiff alleges that as she was crossing the street, the front passenger side of the vehicle struck her right arm and she fell backwards to the ground hitting her head. She further testified that she "*was on the floor for a long time and then he came to pick me up.*" She was told by someone that the person who helped her up was the same one that hit her with his vehicle. Plaintiff testified she did not know his name or who the person was, but stated he picked her up and "*let her sit on the side*" said okay and then left. Plaintiff did not say anything to the person because she contends she did not know that was his car or that he drove away. Additionally she stated she did not know whether the person who assisted her was the driver of the vehicle that struck her and she never ascertained the identity of the driver that struck her. "*I just feel very dizzy and my head hurts, so he put me to the side to sit down then he said okay and then he left, he drove*

away.” Plaintiff stated she got up and walked home thinking she was uninjured. Later that evening she stated she was taken to the emergency room at Bellevue Hospital where she remained for five or six days after learning there was blood inside her brain. Her son-in-law helped her call the police the day after the accident and he provided the police with the information to create the report.

When asked if she were made aware by someone of the owner of the vehicle, Plaintiff testified that someone told her it looked like a company car although they had not saw the plate. A man named Hwalli Chen (“Chen”)¹ who is from Plaintiff’s hometown was on the street when the accident occurred and allegedly saw the man set the Plaintiff down.

The Plaintiff’s EBT was held on September 1, 2010 with the assistance of a Fukanese interpreter. Plaintiff gave testimony which contradicted her earlier testimony at her 50-h hearing. Plaintiff initially testified she did not observe the vehicle until after it hit her. Conversely, during her EBT she testified she observed the vehicle before it struck her, stopped at a red light and that the light was “white” for her as she was crossing the street, but when she was halfway across, “the light flashed” and changed to red, and then the car hit her. She stated she was walking “in between the white lines” when the vehicle struck her and she fell backwards. After she fell to the floor, which she states was for a long time, she testified that a person from the vehicle that stuck her picked her up, then said “you okay now” then he left. According to Plaintiff, when she was hit, she lost consciousness, something which she did not state in her 50-h hearing. Plaintiff described the person who picked her up as a foreigner, a Spanish man with black hair, who weighed approximately 160 pounds and was around 1.7 meters tall and described him as wearing “yellowish” shorts, which were similar to the color of a manila folder, and went “up to the knee.” He assisted her to the sidewalk, where she remained standing but very dizzy. Further Plaintiff testified that a multitude of people saw the accident, one of whom was Chen whom she claimed to have witnessed the accident. When questioned about the numbers on the vehicle that hit her, she testified she did not remember them nor did she see the license plate. When asked if the City owned the vehicle Plaintiff stated that Chen “saw the plate and it is a car that belonged to the City government.” Apparently Chen saw the plate but was unable to recall the plate number.

Plaintiff’s son-in law contacted an attorney on behalf of Plaintiff several days later who spoke to Plaintiff while she was in the hospital. At some point, Plaintiff went to her attorney’s office to identify pictures of vehicles and pictures of drivers, which she was

¹The Affidavit included in the City’s Reply papers has his name as Chen Hua although he testified at his EBT that his name is Hua Di Chen. In addition, Plaintiff referred to the witness as being named Hwalli.

unable to identify. Chen who Plaintiff testified had witnessed the accident did not speak with the police the day of the accident but went to Plaintiff attorney's office to identify pictures of vehicles.

During her deposition, when Plaintiff was shown two exhibits she testified that the vehicle depicted in exhibit 2 looked similar to the car that hit her and was painted the same color. She stated "the vehicle had a green line and there was writing." When asked whether the car that hit her had a picture or symbol on the door, Plaintiff testified "yes, it was a number, but I don't read, so I don't know." After being asked again, Plaintiff testified "I don't read. I don't know what that is." However, when she was shown Plaintiff's exhibit 3, she testified "yes, that is the number." When reexamined by the City attorney, she conceded that it was Chen who told her the vehicle was owned by the City. In addition, she conceded that while she did not see the side of the car when it was stopped, she was only able to see "that is was white and it had something green on it."

During the deposition of Chen, he testified he never saw the DEP vehicle strike the Plaintiff, but saw Plaintiff lying on the ground and a DEP vehicle behind her. He testified he gave that information to the police a couple of days later when he went with Plaintiff's son to the Precinct. Chen stated he didn't see the driver of the DEP vehicle but saw an American man help Plaintiff to the other side of the street. He was unable to provide a description of the man. Approximately two or three days after the accident in 2008, Chen stated lawyers came to speak with him and later gave him a paper to sign. He stated he signed the paper, but did not read it.

"The proponent of a motion for summary judgment must demonstrate that there is no material issue of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In support of their motion The City attaches deposition transcripts of Marilyn King, Risk Manager, Anthony Stio, a supervisor for the DEP, Steven Cear, a supervisor for DEP. and Robert Estevez who, at the time of the accident was Acting District supervisor at DEP. The crux of the testimony was focused on the agency's policies and procedures for vehicles involved in accidents. If a vehicle in involved in an accident employees are instructed to remain at the location of the accident and contact their supervisor and the emergency communication center. There was testimony about the

daily "layout" sheet used by DEP to monitor the vehicles that are assigned to DEP's employees, their assignments and their destination. Every DEP employee assigned a vehicle on October 3, 2008 would be identified on the layout sheet. On the day of Plaintiff's accident there was a three man crew that had a supervisor assigned to them and another two-man crew with a supervisor assigned. On the day of Plaintiff's accident there were no reports of any DEP vehicles involved in an accident. Further, DEP workers wear street clothes while in the field and must wear a bright neon vest and a helmet with the letters "DEP".

In support of their cross-motion Plaintiff argues that she accurately described the truck that hit her, further identified two photos of D.E.P. trucks that looked identical to the truck that hit her, as well as the logo on the side of the truck as being that of DEP. In further support, Plaintiff argues that the accident was witnessed by Chen who gave his name, contact information and a statement about the accident to the police around the time of the accident. Plaintiff has attached a copy of the police report to her papers. In further support, Plaintiff cites statements from Chen's affidavit where he allegedly states "*Ms. Goa was crossing the street with the walk light in her favor in the crosswalk when I saw a white truck with a green stripe and the words DEP on the side hit her and knock her to the ground. The truck was a New York City Department of Environmental Protection truck. The driver of the DEP truck got out, helped Ms. Gao to the sidewalk but never called the authorities or exchanged any information.*" This Court notes that Plaintiff did **not** include a copy of Chen's affidavit with their papers.²

It is clear to this Court that Plaintiff has provided highly questionable and contradictory testimony of the specifics of the accident. This Court questions the credibility of her testimony, and that of her witness Chen. However, "credibility is generally not relevant in determining a motion for summary judgment." Ebasco Constructors, Inc. V. Atena Ins. Co., 260 AD2d 287, 291 (1st Dept 1999). There exists a triable issue of fact as to whether the vehicle that allegedly struck the Plaintiff was that of a vehicle operated by the DEP. As such, the City's motion is denied. Further, for the same reason, Plaintiff's cross-motion for summary judgment is denied.

Accordingly, the City's motion to dismiss pursuant to CPLR 3211 and pursuant to CPLR 3212 is denied. Additionally, Plaintiff's cross-motion for summary judgment on

²A copy was included in the City's Reply papers.

the issue of The City's liability is denied.

This constitutes the decision and order of the Court.

Dated: December 7, 2012


GEOFFREY D. WRIGHT

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

FILED

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