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SHORT FORM ORDER

INDEX No. 06-27818
CAL. No. 08-01841-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 002 - MD

RICARDO ESPADA GARCIA, as Administrator of the Estate of HECTOR GARCIA,	:	KUHARSKI, LEVITZ & GIOVINAZZO Attorneys for Plaintiff 7 Dey Street, 14th Floor
Plaintiff,	:	New York, New York 10007
- against -	:	MARTIN, FALLON & MULLE Attorneys for Defendant
STEPHEN W. STRAWGATE,	:	100 East Carver Street
	:	Huntington, New York 11743
Defendant.	:	

Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers(002) 1 - 9 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 10-13 ; Replying Affidavits and supporting papers 14-16 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion (002) by the defendant, Stephen W. Strawgate, for an order pursuant to CPLR 3212 dismissing the complaint as asserted by the plaintiff, Ricardo Espada Garcia, as Administrator of the Estate of Hector Garcia, on the basis he bears no liability in the occurrence of the accident, is denied.

This is an action to recover damages for the personal injury and wrongful death of the plaintiff's decedent, Hector Garcia, when, on October 1, 2004, the bicycle he was riding on Barnes Road, Town of Brookhaven, County of Suffolk, State of New York, was struck by the vehicle operated by the defendant Stephen W. Strawgate.

The defendant now seeks summary judgment dismissing the complaint asserted against him on the basis he bears no liability for 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. To grant summary judgment it must clearly appear that no material and triable issue of

fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

In support of this application, the defendant has submitted an attorney's affirmation; a copy of the pleadings, answer and bill of particulars; copies of the transcripts of the examination before trial of a non-party witness, Robert T. Danowski taken on April 28, 2008 and Stephen Strawgate taken on September 27, 2007; and a copy of an uncertified transcript of the hearing before the New York State Department of Motor Vehicles Administrative Law Judge Maria Sotolongo on April 21, 2006, but copies of the exhibits have not been provided. In his Reply, the defendant has submitted copies of photographs not supplied with the moving papers and not previously provided to the plaintiff although requested previously.

In opposing this motion the plaintiff has submitted an attorney's affirmation; a copy of photographs at/near the site of the accident; and various discovery demands served upon the defendant.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

At the Administrative Hearing Police Officer Carey gave testimony that upon arriving at the scene of the accident he learned the victim had already been discovered in the back of Mr. Strawgate's pick up truck. He described Barnes Road where the accident happened as heavily tree-lined in some areas broken up by residential homes and a pond and some duck farms on the right, but more heavily tree-lined where the accident occurred. He did not witness the accident and could not testify where the bicyclist was when the impact occurred. He stated the bicyclist was wearing dark clothing. He did not see any light on the bicycle when he observed it after the accident.

Robert Danowski testified that he has a bachelors degree in mining technology and is a self-employed plumber. He also testified that Mr. Strawgate was his neighbor but they do not go out socially, although he has gone to his house twice to do plumbing work. Additionally, Mr. Strawgate worked for him as a helper on some occasions before the accident.

Mr. Danowski testified that he witnessed the accident on October 1, 2004 at about 6:40 p.m. while he was driving with his wife in his vehicle. The weather was clear, the roads were dry, and it was dusk. He traveled for about two miles southbound on Barnes Road which had one travel lane in the northbound direction and one travel lane in the southbound direction, separated by two yellow lines. The posted speed limit was thirty miles per hour. The accident occurred about a quarter mile north of Montauk Highway. There was no intersection at the site of the accident. He came to a bend in the road to the right which then straightened. When he witnessed the accident, he was on the straight portion of the roadway. His headlights were on low beam and there were no vehicles traveling in his lane in front of him. He saw low beam headlights come around the bend heading north in the opposite direction, approaching him about one hundred feet away at the beginning of the bend, from the oncoming driver's perspective. The bend went towards the right for the oncoming car. Three or four seconds lapsed from when he first saw the headlights until the accident occurred. He noticed the front wheel of the bicycle when he was about fifty to seventy-five feet away from the headlights of the other vehicle. The bicycle was ahead of that northbound vehicle. As the other vehicle came around the bend halfway through it, it T-boned the person on the bike. Immediately prior to impact, the front wheel of the bicycle was in front of the right (passenger) headlight of the other vehicle, then the impact occurred. He thought the front wheel of the bicycle was facing east to west as it appeared that the bicycle was going from the right headlight over to the driver's headlight. He noticed no lights or reflective devices on the bike. He saw the bike roll and come apart. He only saw a silhouette of a person as the accident unfolded and the bicyclist began flipping, rolled, rolled up, and then he couldn't see him anymore. He heard the noise of the impact and heard tires screeching about the same time. He did not know the speed of the other vehicle at the time of impact, but stated the other vehicle traveled forward about a hundred feet after the impact. The accident occurred in front of a house, and the woman who lived there came out because she heard a noise

Mr. Strawgate testified at his examination before trial that he had gone from work to the dentist. His wife met him there with his three year old son whom he then took to Smith Point Park to fly a kite. He was on his way home traveling northbound for about a quarter of a mile on Barnes Road in his 1998 Chevrolet pickup truck when the accident occurred. His son was in the car seat in the front seat of the pickup truck. The headlights, which come on automatically, were on as the sun was setting and there was only little light. The street lights were not yet on. He was going uphill and around a curve to the right in the road. He testified that his view ahead was blocked by the curve, a tree and a telephone pole to his right, and the time of day with regard to darkness and shadows from the tree next to the road on his left. He had frequently driven this road with similar lighting conditions. He did not see the bicycle or its rider prior to the accident. He could not describe how far ahead of him he could see prior to the accident. His first indication that he had been involved in an accident was when he saw something, a person, fly at the windshield and hit the windshield. He did not know a bicycle was involved until he got out of his vehicle about a minute later. He did not remember what his rate of speed was at the time of the accident. He did not remember if he had cruise control on at the time of the accident. He did not remember what he did with respect to the operation of his vehicle when he saw the body. At some point he applied the brakes but did not know how far he traveled until his vehicle came to a stop, but thought it took about ten seconds. He did not know if he made any skid marks. He testified that before he got out of his vehicle, he was in shock. He looked over at his son; there was some glass; he asked him if he was ok and talked to him, and then he got out of his vehicle. He saw the hood of the vehicle was dented and

the window was cracked, but he did not see the bicycle immediately. He walked down the street to find the body. It wasn't until after that he was advised by someone that the body, which had gone over the top of his vehicle after it hit the windshield, was in the back of his truck. He did not know that Mr. Danowski was at the accident scene until two days later when Mr. Danowski told him he saw the accident.

A cyclist is subject to the general rules of the road (***Clark v Woop,*** 159 AD2d 437 [2nd Dept 1913]). Vehicle and Traffic Law §1231 provides in relevant part that every person riding a bicycle... shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this title (*see,* ***Baker v Nassau County Police Activity League,*** 265 AD2d 515 [2nd Dept 1999]).

The Vehicle and Traffic Law provides that every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist and shall give warning by sounding the horn when necessary, Vehicle and Traffic law §1146 ... whether it is negligent to fail to employ a warning via a horn must be considered in the light of the relevant circumstances (***Doubrovinskaya v Dembitzer,*** 20 Misc3d 440 [Supreme Court of New York, Kings County 2008]). There are factual issues concerning the defendant's testimony about his view being obstructed by the curve in the road, the telephone pole and tree to his right and the shadows from the tree on the left side of the road, and whether he was negligent in failing to sound his horn as he went into the curve to alert any pedestrians/cyclists of his approaching vehicle, even though he did not see the decedent prior to the accident.

Pursuant to Vehicle and Traffic Law §1180(a), "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. At paragraph (e), §1180 provides in relevant part that "The driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when going around a curve, when approaching a hill crest, ... when traveling upon any narrow or winding roadway...." Based upon the foregoing, there are factual issues concerning the rate of speed the defendant was traveling going into the curve and approaching the incline on this winding roadway, and whether he should have operated his vehicle at a reduced speed in light of his testimony that his view was obstructed by the curve in the road, the telephone pole and tree to his right and the shadows from the tree on the left side of the road.

It is only in rare cases that a trial court is justified in holding that the acts of parties are negligent per se. The questions of negligence and contributory negligence are usually questions of fact to be determined as such (***Kellegher v Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company,*** 171 NY 309 [1902]). "The standard to be applied in deciding a motion for judgment as a matter of law was whether the trial court could find that by no rational process could the trier of fact base a finding in favor of the party opposing the motion (***Burns v Mastroianni, etc,*** 173 AD2d 754 [2nd Dept 1991]). A driver is negligent in failing to see that which under the facts and circumstances he should have seen by the proper use of his senses (***Burns v Mastroianni, etc,*** supra; ***Lesster v Jolicofur et al,*** 120 AD2d 574 [2nd Dept 1986]). The question of whether the defendant satisfied his duty of care in operating his vehicle is a jury question (***Rague v Staten Island Coach Company, Inc.,*** 288 NY 206 [1942]). In light of the testimony by the defendant about his limited

obstructed view, and in light of the testimony of Mr. Danowski that he did not see a light on the bicycle and that the plaintiff was wearing dark clothing, there are factual issues concerning whether the defendant satisfied his duty of care in operating his vehicle.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). A rear-end collision is sufficient to create a prima facie case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle (***Macauley v ELRAC, Inc. et al***, 6 AD3d 584, 775 NYS2d 78 [2004]). Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2000]). In the instant action, Mr. Danowski placed the plaintiff 's decedent traveling northbound in front of the defendant's vehicle. This creates a prima facie case of liability and imposes a duty of explanation by the defendant for striking the bicycle. In support of this application for summary judgment, the defendant has failed to come forward with a reasonable explanation for the happening of the accident except that he did not see the plaintiff until after the impact when the body came flying into his windshield. The defendant did not know what speed he was traveling prior to the accident, he testified he did not slow his vehicle although his view was obstructed, dusk was settling in, and there were shadows. He offered no testimony that he slowed his vehicle going into the curve and up the incline despite these conditions affecting his view. He was unable to give testimony concerning how far ahead he could see while driving in the vicinity of the accident within ten feet of the accident and never saw the decedent before striking his bicycle.

Based upon the foregoing, it is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint. In a death case, the plaintiff is not held to the degree of proof required in a case in which the injured party could testify to his version of the accident or can himself describe the occurrence (***Noseworthy v City of New York,*** 298 NY 76, 272 AD 1001, [1948]). In a death case, the defendant must carry the burden of proof as to any contributory negligence on the part of the deceased (***Rochford v Delaware, Lackawanna and Western Railroad Company,*** 179 Misc 231, 38 NYS2d 435 [Supreme Court of New York, Trial Term, Oneida County 1942]). Because this court determined that defendant failed to meet his initial burden, it is unnecessary to consider whether the plaintiff's opposition papers raised a triable issue of fact (*see*, ***Facci v Kaminsky***, 18 AD3d 806, [2d Dept 2005]).

Accordingly, motion (002) by the defendant for an order granting summary judgment dismissing the complaint is denied.

Dated: October 20, 2009

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION