

Funabashi v Vista Elec. Contrs., Inc.

2014 NY Slip Op 32820(U)

March 31, 2014

Supreme Court, Westchester County

Docket Number: 61202/2012

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR §5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KEVIN FUNABASHI,

Plaintiff,

DECISION & ORDER

-against-

Index No. 61202/2012

VISTA ELECTRICAL CONTRACTORS, INC. and
FRANK MULLER, JR.,
Defendants.

Motion Seq. 001

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Hubert, A.J.S.C.

This is a personal injury action arising from an accident that occurred on June 21, 2010, at approximately 7:00 a.m. on a dry and sunny morning at the intersection of Western Highway and Leber Road in Rockland County, New York. At the time of the accident, Plaintiff Kevin Funabashi, an experienced cyclist, was riding his bicycle northbound on Western Highway, a local road, in a residential area. Plaintiff testified at his deposition that as he approached the intersection, which is not controlled by traffic signals, a van approaching from the opposite direction made a left turn onto Leber Road directly in front of him, causing him to swerve and skid off the road, fly off his bicycle, and land on a rock wall on the side of the road. The van was being driven by Defendant Frank Muller, an employee of Vista Electrical Contractors, who was on his way to a job site.

Plaintiff now moves for partial summary judgment pursuant to CPLR § 3212 against Defendants on the issue of liability. In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law,

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tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” on which the party rests his or her claim, or must demonstrate an “acceptable excuse” for having failed to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); *see also Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. In an action to recover for personal injuries, in order to prevail on a motion for summary judgment on the issue of liability, a plaintiff has the burden of establishing not only that the defendant was negligent, but also that the plaintiff was free from comparative fault. *Lanigan v. Timmes*, 111 A.D.3d 797, 975 N.Y.S.2d 148 (2d Dep’t 2013)(internal citations omitted).

Plaintiff states that Muller has offered no non-negligent reason for the accident. This Court agrees. Muller testified at his deposition that he simply didn’t see Plaintiff’s bicycle and did not realize that anything had happened until he “heard a scream coming from behind the van.” Plaintiff testified that he saw Muller’s van approaching, but the van turned directly in front of him. Muller’s co-worker, who was driving another van behind him, also testified at his deposition that he saw Plaintiff swerve off the road to avoid colliding with Muller’s van. There are no conflicting accounts as to the manner in which the accident occurred. Plaintiff has therefore satisfied his burden of showing his prima facie entitlement to judgment as a matter of law. *See Anzel v Pistorino*, 105 A.D.3d 784, 962 N.Y.S.2d 700 (2d Dep’t 2013)(plaintiff demonstrated her prima facie entitlement to judgment as a matter of law on issue of liability by establishing that defendant violated VTL § 1141 when she made a left turn directly into the path

of plaintiff's oncoming vehicle); *Russo v. Scibetti*, 298 A.D.2d 514, 748 N.Y.S.2d 871 (2d Dep't 2002)(same).

In opposition, Defendants argue that Plaintiff "saw the other vehicle well before the intersection, and his speed and the decisions that he made after he saw the other vehicle all led, at least in part, to his crashing into the rock wall." This Court disagrees. A person riding a bicycle is granted all of the rights and is subject to all of the duties applicable to the driver of a vehicle. VTL § 1231. The driver of a vehicle intending to make a left turn into an intersection must yield the right of way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard. VTL § 1141. In this case, Plaintiff had the right of way and was entitled to anticipate that Muller would obey traffic laws requiring him to yield. *Moreno v. Gomez*, 58 A.D.3d 611, 872 N.Y.S.2d 143 (2d Dep't 2009). According to deposition testimony, there was nothing obstructing Defendant Muller's view, it was a dry and sunny morning, and Plaintiff was wearing an orange jersey. A driver is negligent where an accident occurs because he or she failed to see that which, through the proper use of senses, should have been seen. *Todd v. Godek*, 71 A.D.3d 872, 895 N.Y.S.2d 861 (2d Dep't 2010).

The Court finds that Defendants have failed to raise a genuine issue of fact as to whether Plaintiff was negligent in some manner in riding his bicycle. Accordingly, it is hereby:

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of liability is GRANTED; and it is further

ORDERED, that the action shall proceed to an inquest on the issue of damages; and it is further

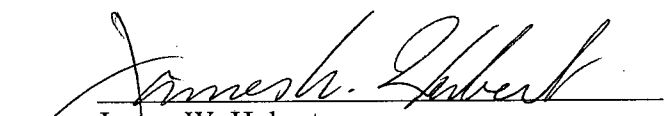
ORDERED, that the parties appear in the Settlement Conference Part, Room 1600, on

May 19, 2014, at 9:30 a.m. to schedule the inquest; and it is further

ORDERED that plaintiffs shall serve a copy of this Order with notice of entry upon defendant within ten days of entry.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 3/ , 2104


James W. Hubert
Acting Supreme Court Judge