

Diener v Fernandez

2015 NY Slip Op 30109(U)

January 5, 2015

Supreme Court, Queens County

Docket Number: 6805/2014

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

RUSSELL DIENER, Index No.: 6805/2014
Plaintiff, Motion Date: 12/05/14
- against - Motion No.: 34

MARK ELOY FERNANDEZ, 293 MEDITERRANEAN Motion Seq.: 2
MARKET and PUBLIC SERVICE TRUCK
RENTING, INC.,
Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by the plaintiff for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 13

This is a personal injury action in which Plaintiff, Russell Diener, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 13, 2014, when the bicycle he was riding collided with a truck leased by defendant, 293 Mediterranean Market, from Public Service Truck Renting, Inc. and operated by defendant, Mark Eloy Fernandez. At the time of the accident, plaintiff was riding his bicycle on Newbridge Road in Nassau County, New York, when the defendant's truck made a right turn into a gas station and collided with the plaintiff's bicycle. As a result of the impact, the plaintiff allegedly sustained serious physical injuries.

Plaintiff commenced an action against Mr. Fernandez and his employer, Mediterranean Market, by filing a summons and complaint on April 30, 2014. Issue was joined by service of defendants' verified answer dated May 29, 2014.

Plaintiff now moves, prior to examinations before trial, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages only. In support of the motion, the plaintiff submits an affirmation from counsel, Lisa Michael, Esq; an affidavit from plaintiff, Russell Diener; an affidavit from nonparty eyewitness Gayle Fitzgerald; a copy of the pleadings; and a copy of the police accident report.

In his affidavit dated August 26, 2014, plaintiff states that on the date of the accident, January 13, 2014, he was riding his bicycle northbound along Newbridge Road near the intersection with Hempstead Turnpike in East Meadow, New York, when his bicycle was struck from the rear by a box truck driven by defendant, Mark Eloy Fernandez, and owned/leased by Mediterranean Market. He states that prior to the impact, he did not see the vehicle that struck him nor did he hear any warning signs or honking of a horn. He states that upon impact his body was forced to the ground resulting in injuries to his shoulder, elbow, wrist, neck, back and knees. He states that there was nothing he could do to prevent the accident from happening.

The police report, which is based upon statements made to the police officer by the parties and a nonparty witness states: "Veh #1(defendant), while making a right turn into gas station, did strike bicyclist next to him. Bicyclist was knocked to the ground and bicycle was then run over by rear wheels of vehicle. Bicyclist refused medical attention at scene."

The plaintiff also submits an affidavit from nonparty eyewitness Gayle Fitzgerald. In her affidavit dated August 26, 2014, she states that on January 13, 2014, she was walking into the Chase Bank located on the corner of Newbridge Road and Hempstead Turnpike in East Meadow at approximately 4:00 p.m. She stated that as she was walking to the bank, she noticed a male on a bicycle in the right lane headed northbound on Newbridge Road. She stated that the lane appeared to be separated from the rest of the lanes for bicycles or as a shoulder. As the male was bicycling along Newbridge Road she noticed a white box truck also traveling north on Newbridge Road. She states, "as the driver was approaching the bicyclist he sped up as if he was trying to pass him and then he made a sharp right as if entering the gas station when he struck the bicyclist. The right side front end of the box truck struck the rear tire of the bicyclist who was then

forcefully knocked to the ground." She also states that "there was no indication by the driver of the truck that he was making a right turn. He did not put on his directional turn signal or indicate in any way that he was going to pull into the gas station."

Plaintiff contends that he is entitled to partial summary judgment on the issue of liability on the ground that the defendant driver was negligent in failing to see the plaintiff's bicycle that was next to him as the truck was making the right turn. The plaintiff contends that the defendant was negligent for failing to see that which under the circumstances he should have seen. Counsel asserts the defendant driver was negligent in that he violated section 1146(a) of the Vehicle and Traffic Law which requires drivers to exercise due care to avoid colliding with a bicyclist upon any roadway. Counsel asserts that the defendant was negligent in striking the bicycle in the rear and in approaching the bike from the rear while failing to keep a safe distance in violation of VTL § 1129. Moreover, counsel asserts that the bicyclist with the right of way was entitled to anticipate that the other motorists will obey the traffic laws and yield the right of way.

In opposition to the motion, counsel for defendant, Denise E. Foster, Esq., submits her own affirmation as well as the affidavit of the defendant, Mark Elroy Fernandez. In his affidavit dated November 11, 2014, Fernandez states that at the time of the accident he was driving a box truck that was leased by his employer Mediterranean Market. He states that he was traveling northbound in the right lane of Newbridge Road and he brought his vehicle to a stop at a red traffic signal at the intersection of Hempstead Turnpike. After the light changed to green, he proceeded across Hempstead Turnpike. He states that it was his intention to make a right turn into the Sunoco gas station on the corner of Newbridge Road and Hempstead Turnpike. He states that he activated his right turn signal and checked his right side mirror before making the turn into the gas station. He states that he did not see anything to the right that prevented him from making the right turn. He states that he made the right turn going at a speed of approximately 5 miles per hour. When his vehicle was inside the gas station he heard yelling. He got out of his vehicle and saw the bicycle lying on the sidewalk and the plaintiff was standing and yelling at him. He states that prior to the incident the plaintiff was not in front of him in any of the moving lanes or the shoulder to the right of his lane as he was stopped for the red light. He states that after the light changed to green the plaintiff was not traveling in front of him in any of the northbound moving lanes or on the shoulder to the right of his lane. He states that he did not hear the sound of an impact to his vehicle and he did not feel an impact with his vehicle.

Defendant asserts that the motion must be denied, firstly because it is premature having been made prior to depositions and secondly, because the defendant's affidavit raises genuine issues of material fact which must be resolved by a jury. Counsel asserts that there are issues as to the comparative negligence of the plaintiff for failing to ride his bicycle on the shoulder of the road or near the right hand curb or edge of the of the roadway as he approached the gas station in violation of VTL § 1234. In addition defendant contends that there are questions of fact as to what the defendant did or failed to do in the operation of his truck that would be considered negligent. Defendant also asserts that there are questions of fact as to whether the plaintiff was riding his bicycle with reasonable care and whether the bicycle was being operated in the appropriate place in the road.

Upon review of the plaintiff's motion, the defendant's opposition and the plaintiff's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]). In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (see Bravo v Vargas, 113 AD3d 579 [2d Dept. 2014]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony as well as the deposition testimony of the eyewitness who stated that the defendant failed to activate his right turn signal and made a right turn into the gas station when it was not safe to do so. Plaintiff testified that he was proceeding straight ahead next to the right lane at the same time the truck was turning right and that contact occurred while defendant made the right turn. The defendant testified that although he looked to the right prior to turning, he did not see the plaintiff's vehicle next to the truck prior to the collision.

Vehicle and Traffic Law § 1163(a) states that:

"a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in

section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.”

Further, a driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792 [2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519 [2d Dept. 2006]). In addition, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592[2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

Thus, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting proof that the defendant violated Vehicle and Traffic Law 1163(a) and was negligent making a right turn into the path of the plaintiff's bicycle when it was hazardous to do so and failing to see the plaintiff's bicycle in the shoulder, which under the circumstances, he should have seen (see Charles v William Hird & Co., Inc., 102 AD3d 907 [2d Dept. 2013]; DeLuca v. Cerda, 60 AD3d 721 [2d Dept. 2009]; Miller v Richardson, 48 AD3d 1298 [4th Dept. 2008][plaintiff met its burden by establishing as a matter of law that the sole proximate cause of the accident was defendant's failure to yield the right of way]; Almonte v Tobias, 36 AD3d 636 [2d Dept. 2009]; Stiles v County of Dutchess, 278 AD2d 304 [2d Dept. 2000]). Here the defendant driver admitted that he did not see the plaintiff despite the fact that he looked to the right and looked in his mirror before making the right turn turning right.

Further, the plaintiff established, prima facie, his entitlement to judgment as a matter of law as the evidence submitted in support of his motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of the plaintiff. His affidavit established that he was traveling with the right of way and that he was entitled to anticipate that the truck would obey the traffic laws which required him to yield (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]).

However, in opposition to the plaintiff's prima facie showing, the defendant raised certain material questions of fact as to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno

v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420, 421 [2d Dept. 2005]). A driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle (see Demant v Rochevet, 43 AD3d 981 [2d Dept. 2007]), here, there is a question of fact based upon the defendant's affidavit as to whether the plaintiff failed to keep a proper lookout or failed to exercise due care to avoid a collision with the truck which made a right turn in front of him. There is also a question of fact raised by the conflicting affidavits as to whether defendant actually employed his right turn signal prior to making the right turn thereby putting the plaintiff on notice that defendant intended to turn right (see Vehicle and Traffic Law § 1146; Escobar v Velez, 116 AD3d 735 [2d Dept. 2014]; Palma v Sherman, 55 AD3d 891 [2d. Dept. 2008]).

Accordingly, for all of the above-stated reasons, and looking at the evidence in the light most favorable to the non-moving party, it is hereby,

ORDERED, that the plaintiff's motion for partial summary judgment on the issue of liability is denied.

Dated: Long Island City, N.Y.
January 5, 2015

ROBERT J. MCDONALD
J.S.C.