

Morales v Caparella

2015 NY Slip Op 31327(U)

January 5, 2015

Supreme Court, Queens County

Docket Number: 17951/2013

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

SIMON MORALES, Index No.: 17951/2013
Plaintiff, Motion Date: 12/04/14
- against - Motion No.: 122

RYAN MICHAEL CAPARELLA, Motion Seq.: 2
Defendant.

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The following papers numbered 1 to 12 were read on this motion by defendant, RYAN MICHAEL CAPARELLA, for an order pursuant to CPLR 3212 granting summary judgment to the defendant on the issue of liability and dismissing the plaintiff's complaint; or in the alternative for an order pursuant to 22 NYCRR §202.21(e) striking the instant action from the trial calendar on the ground that all discovery has not been completed and for an order directing the plaintiff to comply with defendant's post EBT demand for authorizations:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, Simon Morales, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 13, 2011, at approximately 8:00 p.m., when his bicycle collided with the defendant's motor vehicle on the west side of First Avenue between 76th Street and 77th Street in New York County, New York.

Plaintiff claims that at the time of the accident, he was riding his bicycle on First Avenue when he collided with the defendant's vehicle which was in the process of parallel parking. Plaintiff states that as a result of the accident he sustained

physical injuries including several herniated and bulging discs in the cervical and lumbar spines.

Sol. Z. Sokel, Esq., counsel for defendant, now moves for an order pursuant to CPLR 3212(b), granting summary judgment in favor of defendant on the issue of liability and dismissing the plaintiff's complaint. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of the plaintiff's bill of particulars; and copies of the transcripts of the examinations before trial of the plaintiff, Simon Morales, the defendant, Ryan Michael Caparella, and nonparty eyewitness, Christopher Conroy.

Plaintiff, age 46, a dish washer and bicycle delivery man, employed by Café 79, testified at an examination before trial held on July 11 2014 that on the date of the accident, December 13, 2011, he was operating a bicycle on his way to work at 79th Street and First Avenue in Manhattan. He stated that the bicycle had reflectors in the front and back but no horn or lights. He was not wearing a bicycle helmet at the time of the accident nor did he have reflectors on his body. He stated that the bicycle lane on First Avenue was on the left side next to the lane for parked cars. He stated that at the time of the accident it was dark out but the road was well lit. He testified that as he proceeded northbound on First Avenue he was looking straight ahead as he passed 76th Street going towards 77th. When he first observed the defendant's vehicle, two seconds prior to the collision, he was about one and a half feet away. He observed that the defendant's vehicle was in the process of parallel parking. The vehicle was stopped and was angling the rear portion into the spot. He stated that he collided with the vehicle when the vehicle suddenly began moving in reverse while attempting to back into the parking space. He stated that he applied his brakes and the bike slowed down but the front tire of the bike struck the vehicle and he was thrown over the handle bars striking the ground with his left knee. He testified that he was not talking to anyone else prior to the accident. He left the scene in an ambulance.

Defendant, Ryan Michael Caparella, a full time violin teacher, testified at an examination before trial on July 11, 2014. He stated that at the time of the accident he had just left a violin lesson and was on his way to teach another one. He was alone in his vehicle and the headlights were on. He stated that at the time of the accident he was parallel parking. He had maneuvered the rear of the vehicle into the space, the front was sticking out of the space and was stopped for two seconds while he was figuring out what to do next. He stated that there was a

bicycle lane adjacent to the parking lane and the front of his vehicle was partially in the bicycle lane. He stated that at the moment of impact he was looking over his left shoulder. He saw the plaintiff driving in the bicycle lane hit the passenger front door of his car with the front tire of the bicycle. When the police arrived at the scene, the defendant told the responding officer that he was parallel parking. He stated that he was backing into the space which necessitated that he cross over the bicycle lane. He stated that he was not fully in the spot and that he had stopped when the plaintiff collided with the car.

Eyewitness, Christopher Conroy, a self-employed CPA, age 36, testified at an examination before trial on April 28, 2014. He stated that at the time of the accident he was standing outside of the "American Trash Bar" smoking a cigarette directly in front of the open parking space. He had come out of the bar after having three or four drinks. He first observed the defendant's vehicle with its left turn signal on attempting to parallel park and he observed the bicycle coming towards the car as it was in the midst of parking. He stated that he did not believe the bicycle was in the bike lane. The vehicle was backing into the space and angled out into the lane of traffic. He stated that the vehicle had been stopped for a couple of seconds at the time of the impact. He stated that the bicycle driver was looking behind him and yelling out something to another delivery person behind him when the bike hit the vehicle. He said the impact was not especially violent and after the bike hit the car the plaintiff fell off the bike. He stated that the area was well lit with street lights.

Defendant's counsel, argues in support of the motion for summary judgment, that there was no negligence on the part of the defendant whose vehicle was stopped while in the process of parallel parking when the plaintiff collided with the vehicle. Defendant contends that the evidence, including the testimony of the nonparty witness, shows that the plaintiff had turned around to speak to someone on a bicycle behind him and did not see the defendant's vehicle in front of him in time to avoid the collision. Defendant contends that the sole proximate cause for the accident was the plaintiff's failure to see the defendant's car in front of him in enough time to stop. Further, the defendant asserts that the plaintiff violated VTL §§ 1231 and 1236 in failing to utilize a headlight, a rear reflector and a bell.

In opposition plaintiff asserts that summary judgment is not appropriate herein because based upon the testimony of the plaintiff there are questions of fact as to whether the defendant was negligent in suddenly putting the car in reverse while

parking after seeing the plaintiff approaching in the bicycle lane. Counsel claims that the evidence contains differing versions of how the accident occurred and what, if anything, could have been done to avoid the accident. In addition, plaintiff contends that although the plaintiff may have violated the VTL by not utilizing a horn or having proper equipment, there is still a question of fact as to whether that violation was a proximate cause of the accident. Plaintiff contends that the defendant saw the plaintiff prior to the collision and suddenly moved his vehicle into reverse and did not make any efforts to avoid the accident.

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. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2d Dept 2005]). 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]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

Based upon a review of the respective pre-trial testimony of the parties this Court finds that the defendant established, prima facie, that the plaintiff was negligent by presenting evidence that the plaintiff failed to observe the defendant's vehicle, which was partially in the bicycle lane, in enough time to slow down and avoid colliding with the defendant's vehicle and therefore the plaintiff was negligent as a matter of law. Bicyclists traveling in the street are subject to the same duties applicable to drivers of motor vehicles (see N.Y. Veh. & Traf. § 1231). Thus, a bicyclist, like the driver of an automobile, is charged with keeping a proper lookout and to see what can be seen through the proper use of his or her senses (see Bennett v Granata, 118 AD3d 652 [2d Dept. 2014]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]). The plaintiff driver had a duty to keep a proper look out and to exercise reasonable care to avoid a collision with another vehicle already in the bicycle lane ahead of him. Here the plaintiff testified that he did not observe the defendant's vehicle until it was less than two feet away from

him. He stated that he only had two seconds to try to avoid the accident. He stated that he slowed down but was not able to avoid colliding with the vehicle. Further, the evidence shows that the defendant was lawfully parking his vehicle and the rear of his vehicle was halfway in the spot at the time of the accident. The plaintiff did not testify as to any negligent acts on the part of the defendant. Although the defendant stated he turned his head and saw the plaintiff prior to the accident, he stated that his vehicle was completely stopped, his vehicle was halfway in the parking spot and there was no evidence presented that he could have done anything to prevent the bike from hitting his car at that point. The defendant's deposition testimony also demonstrated that he was free from fault in the happening of the accident as he established that he did not have sufficient time or warning to take steps to avoid the accident and that the plaintiff's negligence was the sole proximate cause of the accident.

In opposition, the plaintiff failed to raise a triable issue of fact as to whether defendant was negligent in the happening of the subject accident. The plaintiff's testimony that the defendant's vehicle was parking when he first observed it but suddenly moved prior to the accident was insufficient to raise a triable issue of fact as the plaintiff failed to show how the actions of the defendant while parking his vehicle was a proximate cause of the accident (see Strocchia v City of New York, 70 AD3d 926[2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the motion by the defendant for summary judgment dismissing the plaintiff's complaint is granted and the Clerk is directed to enter judgment accordingly.

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

ROBERT J. MCDONALD, J.S.C.