

**Felix v Polakoff**

2018 NY Slip Op 34268(U)

October 15, 2018

Supreme Court, Bronx County

Docket Number: Index No. 23870/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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OLANGY FELIX,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 23870/2017E

YOSEF POLAKOFF,

Defendant.

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John R. Higgitt, J.

Upon defendant’s April 17, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff’s July 11, 2018 notice of cross-motion and the affirmation, affidavits and exhibits submitted in support thereof; defendant’s July 25, 2018 affirmation in reply; plaintiff’s August 20, 2018 affirmation in reply and the exhibit submitted therewith; defendant’s motion for summary judgment is denied and plaintiff’s cross-motion to preclude evidence is denied.

In this action emanating from a collision between plaintiff’s bicycle and defendant’s motor vehicle at an intersection, defendant moves for summary judgment on the ground that he did not breach a duty owed to plaintiff. Defendant argues that plaintiff, who was travelling the wrong way down a one-way street, violated Vehicle and Traffic Law §§ 1231, 1234(a) and 1127(a) and was the sole proximate cause of the accident.

Defendant testified at his deposition that he was driving eastbound on East 186th Street, a two-way street. Defendant approached the intersection with Bennett Avenue, a one-way street for southbound traffic. Traffic on Bennett Avenue was controlled by a stop sign. As defendant entered the intersection, he checked the pedestrian crosswalks and also checked to his left for traffic coming from Bennett Avenue. Seeing none, he proceeded through the intersection. Plaintiff, coming from defendant’s right, struck defendant’s vehicle on its right side.

Plaintiff testified at his deposition that as he approached the intersection he slowed down “a

little” to check for traffic and, seeing none, proceeded through the intersection. Traffic entering the intersection from defendant’s direction of travel was controlled by a yield sign.

Defendant also submits a video purporting to depict the accident taken from the surveillance camera of a nearby school, as well as two still photographs extracted from the video. The video and photographs were the subjects of a January 25, 2018 notice to admit served upon plaintiff by defendant. The notice to admit sought admissions that (1) the video depicted a collision between a motor vehicle and a bicycle at the subject intersection, (2) the collision depicted was the subject collision, (3) the video depicted plaintiff riding a bicycle, (4) the video fairly and accurately depicted the subject collision, (5) the first photograph accurately depicted plaintiff riding a bicycle on the date of the accident, and (6) the second photograph accurately depicted the contact between plaintiff and defendant’s vehicle.

Plaintiff did not respond to the notice to admit within the time to do so; therefore, the matters on which admissions were requested were deemed admitted (*see* CPLR 3123[a]; *Wagner v 119 Metro, LLC*, 59 AD3d 531 [2d Dept 2009]). Plaintiff has not sought a protective order with respect to the notice to admit or to withdraw his admissions.

“An admission made pursuant to a notice to admit is not merely evidence of the fact admitted, but rather conclusively resolves that fact” (*Central Nassau Diagnostic Imaging, P.C. v GEICO*, 28 Misc 3d 34, 36 [App Term 1st Dept 2010]). Defendant laid a proper foundation for admission of video through plaintiff’s implicit admission, through failure to respond to the notice to admit, that the video “fairly and accurately shows the collision involving plaintiff on August 26, 2016” (*see In re T.-B. Children*, 168 AD2d 396 [1st Dept 1990]; *cf. Khalil v Marion*, 200 AD2d 500 [1st Dept 1994]).

Plaintiff cross-moves in limine to preclude the video. Plaintiff, however, cannot now use a motion “in limine” to avoid the consequences of his failure to comply with the requirements

regarding notices to admit (*see Allen v Hiraldo*, 144 AD3d 434 [1st Dept 2016]). Because plaintiff admitted that the video “fairly and accurately shows the collision involving plaintiff on August 26, 2016,” he may not now challenge its admissibility.

In any event, defendant failed to establish prima facie entitlement to summary judgment. Although clear that plaintiff was negligent,<sup>1</sup> “the transcript of the defendant’s deposition testimony, submitted in support of his motion, presented a triable issue of fact as to whether he failed to see what was there to be seen through the proper use of his senses” (*Rojas v Solis*, 154 AD3d 985, 986 [2d Dept 2017]; *Nevarez v S.R.M. Mgmt. Corp.*, 58 AD3d 295 [1st Dept 2008]). “Although a motor vehicle driver traveling with the right-of-way is entitled to assume that other drivers will obey the traffic laws, the driver traveling with the right-of-way still has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles” (*Matias v Bello*, 2018 NY Slip Op 06522, at \*1 [2d Dept 2018]). Plaintiff also raised an issue of fact as to whether defendant heeded the yield sign that governed defendant’s direction of travel.


Accordingly, it is

ORDERED, that defendant’s motion for summary judgment is denied; and it is further

ORDERED, that plaintiff’s cross-motion to preclude defendant’s introduction of a video is denied.

This constitutes the decision and order of the court.

Dated: October 15, 2018

  
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John R. Higgitt, A.J.S.C.

<sup>1</sup> Plaintiff admits to having driven his bicycle the wrong way down a one-way street in violation of Vehicle and Traffic Law § 1127(a), applicable to plaintiff pursuant to Vehicle and Traffic Law § 1231, and such violation constitutes negligence as a matter of law (*see Gonzalez v Bishop*, 157 AD3d 460 [1st Dept 2018]).