

Nord v Rice
2019 NY Slip Op 31711(U)
June 14, 2019
Supreme Court, New York County
Docket Number: 158342/2017
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

LISA NORD,

Plaintiff,

- v -

EUGENE RICE, WILLIE RICE

Defendant.

INDEX NO. 158342/2017

MOTION DATE 03/22/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment,

pursuant to CPLR 3212, on the issue of liability against defendants and to dismiss any affirmative defense related to comparative negligence is granted. Plaintiff Lisa Nord's motion contends that on February 20, 2017, at the intersection of Columbus Avenue and West 97th Street in the City, County, and State of New York, a vehicle operated by defendant Eugene Rice and owned by defendant Willie Rice, struck and seriously injured plaintiff, when it entered into the crosswalk where plaintiff was a lawful pedestrian. Defendants' oppose the motion.

"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" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Plaintiffs have

made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact.

A plaintiff makes a prima facie showing of entitlement to summary judgment by offering evidence that they were a pedestrian within a crosswalk, with the light in their favor, when they were struck by a defendant's vehicle (*Beamud v Gray* 45 AD3d 257 [1st Dep't] [finding that a lawful pedestrian in a crosswalk who was struck by a turning vehicle was entitled to summary judgment as a matter of law on the issue of liability]). Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

In support of her motion plaintiff attaches the affidavit of plaintiff, the police report, and the deposition of plaintiff. Plaintiff testified at deposition and in her affidavit that she had both a green traffic light and a white pedestrian walk signal in her favor when she was struck by defendants' turning vehicle (Mot, Exh E at 64-66). The police report records defendant driver's admission against interest that he "struck pedestrian who had green walk sign" (*id.*, Exh C). Thus, plaintiff has made a prima facie showing of defendants' negligence and the burden shifts to defendant to raise an issue of fact.

In opposition, defendants allege that an issue of fact exists as to whether defendant Eugene Rice had the right of way at the time of the accident. However, defendant's admission against interest shows that pedestrian plaintiff was in the cross-walk with the light in her favor (*id.*). Defendants' theory, that because plaintiff saw defendants' vehicle prior to being struck, demonstrates that defendants had the right of way is too speculative. Thus, defendants have

failed to raise an issue of fact and plaintiff's motion for summary judgment on the issue of liability is granted.

Upon examination of defendant's own admission against interest as seen above, the Court finds that no such issue of fact exists. Further, regardless of whether defendants' vehicle had already turned or was already traveling on the roadway that plaintiff was crossing when the accident occurred, defendant driver had a duty, pursuant to VTL 1146 to exercise due care in the operation of his vehicle and avoid colliding into plaintiff. Thus, defendants have failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted as to defendant's liability.

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted. While pursuant to *Rodriguez v City of New York*, 31 NY3d 312, 330 [2018], a plaintiff is not obliged to demonstrate whether or not it was comparatively negligent in order to be entitled to partial summary judgment on the issue of defendant's liability, plaintiff's comparative negligence may be determined in a motion for summary judgment when plaintiff has moved for summary judgment to dismiss a defendants' affirmative defense of comparative negligence. Defendants have failed to proffer any evidence as to plaintiff's alleged negligence. Here, plaintiff has met her burden and demonstrated that, as a lawful pedestrian, crossing the street within the crosswalk with the light in her favor, she was free from any contributory negligence and in no way caused the accident. Defendants' speculative assertion that plaintiff could have been contributorily negligent for the accident at issue is insufficient to raise a triable issue of fact. Thus, the affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff are dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of is granted; and
it is further

ORDERED that the branch of plaintiff's motion to dismiss defendants' affirmative
defenses related to comparative negligence of plaintiff is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this
Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

6/14/19
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

**HON. ADAM SILVERA
J.S.C.**