Sheldrick v Fugger
2019 NY Slip Op 34362(U)
August 28, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 621988/2018
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER **INDEX NO. 621988/2018**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

JOSEPH SHELDRICK,

Plaintiff,

-against-

MARK FUGGER,

Defendant.

ORIG. RETURN DATE: April 24, 2019
FINAL RETURN DATE: July 8, 2019
MOT. SEQ. # 001 MotD

PLTF'S ATTORNEY:
ROSENBERG & GLUCK, LLP
1176 PORTION ROAD
HOLTSVILLE, NEW YORK 11742

DEFT'S ATTORNEY:
ROE & ASSOCIATES
1055 FRANKLIN AVE, SUITE 204
GARDEN CITY, NEW YORK 11530

Upon the following papers read on this motion for partial summary judgment: Notice of Motion and supporting papers by the plaintiff, dated March 20, 2019; Affidavits and supporting papers by the defendant, dated June 28, 2019; Replying Affidavits and supporting papers by the plaintiff, dated July 3, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Joseph Sheldrick for an order pursuant to CPLR 3212, granting partial summary judgment in his favor on the issue of liability and striking defendant's affirmative defense of comparative negligence, is granted to the extent provided herein, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on September 17, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Joseph Sheldrick to recover damages for injuries he allegedly sustained on June 18, 2018, when his motor vehicle collided with a vehicle owned and operated by defendant Mark Fugger.

Plaintiff now moves for partial summary judgment in his favor as to defendant's negligence, arguing that defendant's actions were the sole proximate cause of the accident in question, that defendant failed to yield the right-of-way, and that defendant violated Vehicle and Traffic Law § 1141. Plaintiff also moves for an order dismissing defendant's affirmative defense of comparative negligence. In support of his motion, plaintiff submits copies of the pleadings and his own affidavit.

In his affidavit, Joseph Sheldrick states that at approximately 9:58 p.m. on the date in question he was operating a motor vehicle southbound in the left lane of North Ocean Avenue, near its intersection with Fairview Avenue, in the Town of Brookhaven, New York. He indicates that North Ocean Avenue runs north and south, and that Fairview Avenue run east and west, terminating in a T-intersection with

the west side of North Ocean Avenue. Plaintiff states that the two northbound lanes and two southbound lanes of North Ocean Avenue are separated by a center turning lane. He avers that as his vehicle approached North Ocean Avenue's intersection with Fairview Avenue at approximately 45 miles per hour, defendant's vehicle was located in that center turning lane, facing northbound. Plaintiff indicates that as his vehicle entered the intersection, defendant's vehicle initiated a left turn toward Fairview Avenue, and collided with his driver's side door. Plaintiff further states that he had only seconds to react to defendant's vehicle, and that there was no way for him to avoid the collision.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of New York & New Jersey*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A plaintiff "is no longer required to show freedom from comparative fault in order to establish his [or her] prima facie entitlement to judgment as a matter of law on the issue of liability" (*Merino v Tessel*, 166 AD3d 760, 760, 87 NYS3d 554 [2d Dept 2018]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see Aponte v Vani*, 155 AD3d 929, 64 NYS3d 123 [2d Dept 2017]; *Ricciardi v Nelson*, 142 AD3d 492, 493, 35 NYS3d 724 [2d Dept 2016]). Vehicle and Traffic Law § 1141 states that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." A driver is also negligent "where he or she failed to see that which, through proper use of his or her senses, he or she should have seen" (*Aponte v Vani*, *supra* at 930). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Giwa v Bloom*, 154 AD3d 921, 921-922, 62 NYS3d 527 [2d Dept 2017], quoting *Yelder v Walters*, 64 AD3d 762, 764, 883 NYS2d 290 [2d Dept 2009]).

Here, plaintiff established a prima facie case of entitlement to judgment in his favor on the issue of defendant's liability for his alleged injuries, and as to his own freedom from comparative negligence (*see Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Smith v Fuentes*, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]; *see generally Alvarez v Prospect Hosp.*, *supra*; *Rodriguez v City of New York*, *supra*). The fact that defendant was "unable to complete his left turn without being struck by the plaintiff's vehicle demonstrates that he violated Vehicle and Traffic Law § 1141 by failing to yield

the right of way to any vehicle approaching from the opposite direction which was so close as to constitute an immediate hazard" (*Shashaty v Gavitt*, 158 AD3d 830, 831, 71 NYS3d 560 [2d Dept 2018] [internal quotations and citations omitted]). With regard to that portion of plaintiffs' motion seeking an order striking defendant's affirmative defense of comparative negligence, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept 2018]). Here, plaintiff's affidavit is sufficient to demonstrate, prima facie, that the sole proximate cause of the subject collision was defendant driver's improper turn into his vehicle's lane of travel. The burden then shifted to defendant to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

In opposition, defendant argues that plaintiff's vehicle was speeding and swerving in the moments prior to the collision, and that plaintiff's instant motion is premature. Defendant submits his own affidavit. In that affidavit, defendant states that at the time, date, and location in question, he was operating his vehicle northbound in the left lane of North Ocean Avenue. He indicates that his headlights were illuminated and that the roadway was straight and level. Defendant avers that he illuminated his left turn signal, entered the center turning lane, and brought his vehicle to a stop at the unregulated intersection of North Ocean Avenue and Fairview Avenue, intending to turn left onto Fairview Avenue. Defendant states that as his vehicle was stopped in the center turning lane of North Ocean Avenue, he observed plaintiff's vehicle traveling southbound in the left lane "a long distance away," which "provid[ed] [him] sufficient time to execute his turn." He indicates that he initiated his left turn, but that as he was turning left, he observed plaintiff's vehicle "swerving and then, seemingly as if trying to correct the swerving movements, move from the left into the right hand southbound lane and speed up to a speed exceeding the 45 mph speed limit." Defendant states that "the front driver's side of [plaintiff's vehicle] struck the front passenger side of [his] vehicle."

Initially, defendant's argument that plaintiff's motion is premature is unavailing. Summary judgment may not be avoided based on a claim that discovery is needed "unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536, 906 NYS2d 331 [2d Dept 2010], quoting *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [2d Dept 1999]; *see Wienfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2d Dept 2017]). Here, there is no evidentiary basis suggesting discovery "might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Skura v Wojtlowski*, 165 AD3d 1196, 1200, 87 NYS3d 100 [2d Dept 2018], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041, 13 NYS3d 139 [2d Dept 2015] [internal quotations and citations omitted]).

As to his own freedom from liability, defendant fails to raise a triable issue. At first glance, the circumstances of this matter generally align with those outlined by the Appellate Division, Second Department in *Brodney v Picinic*, 172 AD3d 673, 99 NYS3d 399 (2d Dept 2019), wherein it found that defendant driver had raised triable issues regarding whether he violated Vehicle and Traffic Law § 1141 by alleging that the plaintiff was speeding. However, upon a review of the moving papers submitted to the lower court in that case, the defendants submitted an expert's affidavit containing objective evidence from the plaintiff vehicle's event data recorder that it was traveling at more than double the posted speed

limit. Here, defendant's argument that plaintiff was speeding is unsupported by any objective evidence and is, therefore, wholly speculative and insufficient to demonstrate his freedom from negligence (*see Cardona v Fiorentina*, 149 AD3d 495, 52 NYS3d 324 [1st Dept 2017]; *Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]). Therefore, the motion by plaintiff for partial summary judgment in his favor as to defendant's negligence is granted.

However, as to that portion of plaintiff's motion seeking an order striking defendant's affirmative defense of comparative negligence, defendant has raised a triable issue. Viewing the facts in the light most favorable to the nonmoving party as it must, defendant's affidavit, wherein he implies that plaintiff's vehicle swerved into his as it had nearly completed its left turn, raises the specter of plaintiff's comparative negligence (*see Shashaty v Gavitt*, *supra*; *Casaregola v Farkouh*, 1 AD3d 306, 767 NYS2d 57 [2003]). Such comparative negligence, if any, regarding whether plaintiff negligently failed to avoid the collision, must be determined by the finder of fact at the damages phase of this proceeding (*see Rodriguez v City of New York*, *supra*). Thus, plaintiff's application for an order striking defendant's affirmative defense of comparative negligence is denied.

Accordingly, the motion is granted to the extent provided herein, and is otherwise denied.

Dated: 8/28/19

HON. PAUL J. BAISLEY, JR., J.S.C.