

Murray v Broadway Hgts. Dairy, Inc.

2019 NY Slip Op 34515(U)

January 24, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 612057/2018

Judge: Paul J. Baisley, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SHORT FORM ORDER

INDEX NO. 612057/2018

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

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

 MICHAEL MURRAY,

Plaintiff,

-against-

 BROADWAY HEIGHTS DAIRY, INC.,
 ELIAS CANTILLO, and HUB TRUCK RENTAL,
 CORP.,

Defendants.

ORIG. RETURN DATE: October 30, 2018**FINAL RETURN DATE:** November 30, 2018**MOT. SEQ. #:** 001 MG**PLTF'S ATTORNEY:**
 CELLINO & BARNES, P.C.
 532 BROADHOLLOW ROAD, STE 107
 MELVILLE, NY 11747
DEFT'S ATTORNEY:
 BELLO & LARKIN, ESQS.
 150 MOTOR PARKWAY, STE 405
 HAUPPAUGE, NY 11788

Upon the following papers read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated October 5, 2018; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, dated November 16, 2018; Replying Affidavits and supporting papers by plaintiff, dated November 26, 2018; Other _____; (and after hearing counsel in support and opposed to the motion) it is

ORDERED that the motion by plaintiff Michael Murray for summary judgment in his favor on the issue of negligence is granted; and it is further

ORDERED that parties in the instant action shall appear on February 21, 2019 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York for a preliminary conference.

Plaintiff Michael Murray commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Express Drive North and Commack Road in the Town of Smithtown on April 2, 2018. It is alleged that the accident occurred when the vehicle owned by defendant Hub Truck Rental Corp., leased by defendant Broadway Heights Dairy, and operated by defendant Elias Cantillo struck the blade on the passenger side of the snow plow operated by plaintiff and owned by New York State Department of Transportation while it was stopped at a red traffic light on Express Drive North. At the time of the accident, plaintiff, who was employed with the New York State Department of Transportation and defendant Cantillo, who was employed with Broadway Heights Dairy, were both operating vehicles within the scope of their employment.

Plaintiff now moves for summary judgment in his favor on the issue of negligence on the bases that the accident was caused by defendant Cantillo's negligent operation of defendant Broadway Heights Dairy's leased vehicle, and that, since plaintiff was performing snow plow operations, defendant violated

Murray v Broadway Heights Dairy
Index No. 612057/2018
Page 2

Vehicle and Traffic Law § 1144-a(b) when he failed to use due care as he approached the snow plow. In support of the motion, plaintiff submits, among other things, copies of the pleadings, his own affidavit, a certified copy of the police accident report, and photographs of the snow plow operated by plaintiff. Defendant opposes the instant motion on the grounds that there are material triable issues of fact as to plaintiff's comparative negligence for the happening of the subject accident, and that plaintiff's motion is premature, since discovery has not been conducted. In opposition to the motion, defendant submits his own affidavit.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 324; 76 NYS3d 898 [2018]).

A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety (Vehicle and Traffic Law § 1128 (a); *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668-669, 987 NYS2d 89 [2d Dept 2014]; *see Truckenmiller v Duran*, 125 AD3d 639, 3 NYS3d 367 [2d Dept 2015]). A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se (*see Barbieri v Vokoun*, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept 2010]; *Botero v Erraez*, 289 AD2d 274, 734 NYS2d 565 [2d Dept 2001]).

Here, plaintiff has submitted an affidavit attesting to the fact that the vehicle he was operating, a snow plow owned by New York State Department of Transportation ("NYSDOT"), was struck in the rear passenger side plow wing by the vehicle operated by defendant Cantillo while it was stopped at a red traffic light on the north service road of the Long Island Expressway ("LIE"). In addition, plaintiff avers that at the time of the accident he was engaged in snow clearing operations on the service road of the LIE during the course of an ongoing snow storm as an employee of the NYSDOT, that he was operating one snow plow and his supervisor was operating another snow plow directly behind his vehicle in the same lane, and that the snow plow he was operating was the very first vehicle stopped at the red light in the left turning lane of the north service road of the LIE. Plaintiff explained that the snow plow had overhead flashing amber lights, three steady smaller amber lights on the side and five smaller steady amber lights above the windshield, that it has a plow in the front and "plows/wings" on the driver and passenger sides, that there are steady white beam lights which illuminate the "plows/wings" on both sides and the front plow and back sander, and that there are numerous other flashing lights on the back of the snow plow. Plaintiff further avers that he felt an impact to the rear passenger plow/wing while he was stopped at the red light in the left turning lane waiting for the light to change so he could make a left turn and travel on the south service road, and that immediately following the first impact he felt another one to the same area. Plaintiff avers that the impacts were the result of the dairy truck operated by defendant Cantillo striking the rear wheel of the back passenger "plow/wing" of the snow plow he was

Murray v Broadway Heights Dairy

Index No. 612057/2018

Page 3

operating. Lastly, plaintiff attests that the impacts to the snow plow caused an 8 inch by 3 inch piece of steel to be torn off the plow blade, that the truck operated by defendant Cantillo traveled through the intersection with the wheels on its driver's side elevated and came to a rest after its wheels slammed back down onto the roadway.

This submission is sufficient to establish plaintiff's prima facie entitlement to judgment as a matter of law (*see Rodriguez v City of New York, supra; Singh v Thomas*, 113 AD3d 748, 978 NYS2d 865 [2d Dept 2014]; *Rivera v Corbett*, 69 AD3d 916, 892 NYS2d 790 [2d Dept 2010]). Plaintiff's evidence demonstrated that defendant Cantillo was negligent when he made an unsafe lane change in violation of Vehicle and Traffic Law § 1128 [a] (*see Meng Wai Wang v Daily News, L.P.*, 90 AD3d 624, 933 NYS2d 888 [2d Dept 2011]; *Harrison v Bailey*, 79 AD3d 811, 914 NYS2d 187 [2d Dept 2010]), and that his negligent operation of the dairy truck was the sole proximate cause of the subject accident (*see Raza v Gunik*, 129 AD3d 700, *Reyes-Diaz v Quest Diagnostic Inc.*, 123 AD3d 790, 999 NYS2d 98 [2d Dept 2014]; *Walker v Patrix Trucking NY Corp.*, 115 AD3d 943, 982 NYS2d 552 [2d Dept 2014]).

In addition, the evidence shows defendant Cantillo violated Section 1144-a of the Vehicle and Traffic Law by entering the lane immediately adjacent to the snow plow being operated by plaintiff (*see Matter of Forman v New York State Dept. of Motor Vehs.*, 110 AD3d 1075, 973 NYS2d 780 [2d Dept 2013]; *Matter of Russell v Adduci*, 140 AD2d 844, 528 NYS2d 232 [3d Dept 1988]). Vehicle and Traffic Law § 1144-a requires every operator of a motor vehicle to exercise due care to avoid colliding with a hazard vehicle which is parked, stopped or standing on the shoulder or any portion of such highway and displaying one or more amber lights pursuant to Vehicle and Traffic Law § 375 (41) (3), and that such due care shall include, but is not limited to moving from a lane which contains or is immediately adjacent to the shoulder where such hazard vehicle is displaying one or more amber light is parked, stopped or standing to another lane. Plaintiff stated in his affidavit that he was engaged in snow plowing operations, that the amber lights, along with numerous other lights, on the snow plow were illuminated while he was stopped in the left turning lane of the north service road of the LIE, and that defendant Cantillo approached the lane adjacent to the snow plow by crossing over three lanes of traffic from the far right lane.

In opposition to the motion, defendants have failed to raise a triable issue of fact. Defendants' failed to submit any evidence in opposition to the motion, relying instead on speculative assertions that are inadequate to withstand summary judgment (*see Colandrea v Choku*, 94 AD3d 1034, 943 NYS2d 166 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Of note, defendants did not submit an affidavit by defendant Cantillo setting forth his own version of how the accident occurred in opposition to the motion.

Furthermore, defendants' assertion that plaintiff's summary judgment motion on the issue of negligence is premature, because discovery has yet to be conducted, is without merit. Before a party can defeat or delay a motion for summary judgment claiming ignorance of fact due to uncondacted discovery (*see CPLR 3212 [f]*), a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party (*see Berkeley v Fed. Bank & Trust v 229 E. 53rd St. Assoc.*, 242 AD2d 489, 662 NYS2d 481 [1st Dept 1997]), that the claims in opposition are supported by something more than mere

Murray v Broadway Heights Dairy
Index No. 612057/2018
Page 4

hope or conjecture (*see Neryaev v Solon*, 6 AD3d 510, 775 NYS2d 348 [2d Dept 2004]), and that the party has made reasonable attempts to discover these facts and that the facts sought would give rise to a triable issue (*see Cruz v Ortis El. Co.*, 238 AD2d 540, 656 NYS2d 688 [2d Dept 1997]). Here, defendants failed to make such showing. Accordingly, plaintiff's motion for partial summary on the issue of negligence is granted.

Dated: 1/24/19



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