

**Lopez v Capparelli**

2019 NY Slip Op 34531(U)

September 6, 2019

Supreme Court, Westchester County

Docket Number: Index No. 64147/2018

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
ALEJANDRO LOPEZ,

Plaintiff,

DECISION & ORDER  
Index No. 64147/2018  
Seq # 1

-against-

FRANCESCO CAPPARELLI and F. CAPPARELLI  
LANDSCAPE DESIGN INC.,

Defendants.  
-----X

The following papers were read on the plaintiff's motion seeking an order of summary judgement on the issue of liability:

Notice of Motion/Affirmation/Exhibits 1-7	1-9
Affirmation in Opposition/ Exhibits A-E	10-15
Reply Affirmation	16

The plaintiff, Alejandro Lopez ("Lopez"), commenced this action seeking damages for alleged injuries sustained in a motor vehicle accident. The plaintiff alleges that on December 9, 2017, he was struck by a vehicle operated by the defendant, Francesco Capparelli ("Capparelli") and owned by F. Capparelli Landscape Design, Inc., while crossing the street at the intersection of Mamaroneck Avenue and New Street in the Village of Mamaroneck, New York.

The plaintiff now files the instant motion seeking summary judgment on the issue of liability, arguing that, under New York case law, if he can establish a statutory violation of a traffic law, absent a justifiable excuse, it constitutes negligence as a matter of law and

the defendant was in clear violation of various motor vehicle statutes, by failing to yield the right of way to him while attempting to turn the vehicle.

In support of the motion, the plaintiff relies upon an attorney's affirmation, a certified copy of the police report, his affidavit, a witness affidavit, photographs, and a copy of the pleadings. The defendants oppose the motion, submitting an attorney's affirmation and Capparelli's affidavit with the pleadings. Capparelli states in his affidavit that at the time of the accident, it was dark and there was a layer of snow on the ground. He states that he has not had the opportunity to testify with respect to the accident. The defendants' attorney argues that summary judgment is an inappropriate remedy at this stage because discovery has not been completed and outstanding issues remain as to whether there is any possible legal or factual basis of whether the plaintiff was comparatively negligent when crossing the street, such as whether the plaintiff continued to look both ways as he crossed the street.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, (*Winegrad @ 853*).

"A plaintiff in a negligent action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Wray v Gatella*, 172 AD3d 1446, 1447 [2d Dept 2019]). "To be entitled to partial summary judgment a plaintiff does not bear the...burden of establishing...the absence of his or her own comparative fault" (*Id.*).

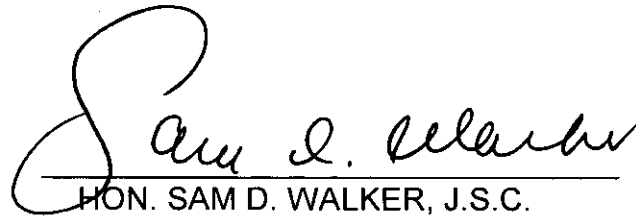
"A pedestrian who has the right of way is entitled to anticipate that motorists will obey the traffic laws that require them to yield" (*Id.*). Here, the plaintiff has established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit, stating that at the time of the accident he was walking within the marked crosswalk with a green traffic signal in his favor and was more than half-way across Mamaroneck Avenue, when Capparelli failed to yield the right of way, striking him. The plaintiff's affidavit was also sufficient to establish, prima facie, that he was not at fault in the cause of the accident, by stating that he exercised due care by waiting for the pedestrian signal and by looking for oncoming traffic before entering the crosswalk and that he did not see Capparelli's vehicle prior to the impact (*Id.*). In opposition, the defendants failed to raise a triable issue of fact as to Capparelli's negligence or the plaintiff's comparative negligence. The fact that it was dark and there was snow on the ground does not provide Capparelli with a non-negligent defense.

Accordingly, based on the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
September 6, 2019

  
HON. SAM D. WALKER, J.S.C.