

<b>Thomas v Haimowitz</b>
2019 NY Slip Op 34541(U)
August 14, 2019
Supreme Court, Rockland County
Docket Number: Index No. 033114/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
DASHAWN THOMAS,

*Plaintiff,*

-against-

ADAM S. HAIMOWITZ,

*Defendant.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

**DECISION & ORDER**

Index No.: 033114/2018

(Motion # 1)

The following papers, numbered 1-5, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting partial summary judgment in favor of Plaintiff on the issue of liability:

<b><u>PAPERS</u></b>	<b><u>NUMBERED</u></b>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-G"	1-2
AFFIRMATION IN OPPOSITION/AFFIDAVIT OF BERNARD ADLER (EXHIBIT A)/EXHIBIT B	3-4
AFFIRMATION IN REPLY	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on June 1, 2018, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined with the filing of Defendant's Answer through the NYSCEF system on June 26, 2018. The action arises from a pedestrian knockdown which occurred on January 10, 2018, at approximately 11:40 a.m., at the northeast corner of the intersection of North Airmont Road and Route 59, in the County of Rockland, State of New York.

In support of Plaintiff's summary judgment motion, he submits a copy of the video recording made by Defendant's Dashboard Camera, which shows the happening of the subject

occurrence, as well as the examinations before trial of the parties. Defendant Haimowitz testified, and the video shows, that defendant was driving in the right hand lane on Route 59, as he approached the intersection of North Airmont Road. He further testified that he was intending to make a right hand turn onto North Airmont Road but brought his vehicle to a stop at the intersection, as the traffic light was red and he was waiting for the signal to change to a green arrow or a green light. Mr. Haimowitz testified that after the traffic light changed, he proceeded and struck Plaintiff. Defendant testified that his field of vision was not obstructed when he began to make his right-hand turn and that he did not see Plaintiff at any time before he struck him.

In the video, it appears that Plaintiff, who was walking on North Airmont Road, was intending to cross Route 59. He testified that he observed that the traffic light was red for vehicles traveling on Route 59. Plaintiff testified, and the video confirms, that he took several steps into the intersection, within the cross-walk lines, when he was struck by Defendant's vehicle, which had begun to make a right hand turn onto North Airmont Road. Based upon the video, it also appears that at the moment of contact between Defendant's vehicle and Plaintiff, the traffic light for vehicles traveling on Route 59 was green.

Plaintiff asserts that he is entitled to summary judgment as a matter of law based upon the Defendant's violation of Vehicle and Traffic Law Sec. 1146(a) "Drivers to exercise due care", which states in relevant part:

Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.

Plaintiff argues that Defendant violated this statute by failing to see Plaintiff prior to striking him, particularly where, as here, he admits that his view was in no way obstructed and Defendant does not contend that the roads were icy or that he was suddenly confronted with an emergency situation not of his own creation. Moreover, he contends that pursuant to Rodriguez v. City of

New York, 31 N.Y.2d 312, 76 N.Y.S.3d 898 (2018), any comparative negligence on Plaintiff's

In opposition thereto, Defendant asserts that summary judgment must be denied as Plaintiff's negligence was the sole proximate cause of the motor vehicle accident. He asserts that the video shows that Plaintiff is not seen activating the pedestrian cross light; that he was distracted by his cell phone and ear buds and that he failed to look at the applicable traffic and pedestrian light at the intersection before proceeding. Defendant also submits the expert affidavit of Bernard Alder, P.E., who visited the subject site on April 1, 2019, some 16 months after the accident, to examine the timing sequence of the traffic signals. Mr. Adler opines that Plaintiff, as a pedestrian, did not pay proper attention to see whether he had an appropriate safe walking condition and thus the accident was caused by his failure to observe a steady red "DON'T WALK" pedestrian display.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

"A violation of the Vehicle and Traffic Law constitutes negligence as a matter of

law." Gluck v. New York City Tr. Auth, 118 A.D.3d 667, 669, 987 N.Y.S.2d 89 (2d Dept. 2014). Moreover, a driver is bound to see what is there to be seen through the proper use of his or her senses, and is negligent for the failure to do so. Shui-Kwan Lui v. Serrone, 103 A.D.3d 620, 959 N.Y.S.2d 270 (2d Dept. 2013). Additionally, a driver also has a duty to exercise reasonable care under the circumstances to avoid an accident. Id.

Thus, one issue before this Court is whether Defendant, in failing to see Plaintiff before striking him, violated VTL Sec. 1146(a). In Shui-Kwan Lui v. Serrone, 103 A.D.3d at 620-621, the Court held that plaintiff established that defendant was negligent as a matter of law, as he violated VTL Sec. 1146(a), where he admitted to not seeing the infant who was riding a bicycle at the intersection, and struck her as he made his right turn. Likewise, in Smith v. State, 121 A.D.3d 1358, 1359, 995 N.Y.S.2d 329 (3d Dept. 2014), the claimant established that defendant violated VTL Sec. 1146(a), where defendant testified that he never saw claimant until the moment of impact, along with evidence regarding the ample sight distance at the intersection, and his failure to exercise due care to avoid a collision. See also Rose v. Paulino, 123 A.D.3d 899, 999 N.Y.S.2d 141 (2d Dept. 2014)(plaintiff established her entitlement on the issue of liability by demonstrating that while she was crossing the street, she was struck by the defendant's vehicle, and defendant admitted that he failed to look at the entire crosswalk and did not see plaintiff at any time before the accident.); Bush v. Kovacevic, 140 A.D.3d 1651, 33 N.Y.S.3d 623 (4<sup>th</sup> Dept. 2016)(plaintiff established her prima facie entitlement to judgment as a matter of law on the issues of defendant's negligence and proximate cause by establishing that she was crossing the street within the crosswalk when she was struck by defendant's vehicle which was making a left turn.)

Here, the Court finds that Defendant violated VTL Sec. 1146(a) in that he failed to exercise due care to avoid colliding with a pedestrian, where the video clearly shows that Defendant had an unobstructed view of Plaintiff who was in the cross-walk at the time of contact and Defendant admits to not seeing the pedestrian at any time before he struck him.

Additionally, the Court finds that this violation of VTL Sec. 1146(a) was a proximate cause of the subject occurrence. Defendant does not claim that he was confronted with an emergency such as Plaintiff coming out between two parked cars, or that he was unable to stop due to the presence of ice on the road.

The impact of questions of comparative negligence on a motion for summary judgment was very recently resolved by the Court of Appeals in Rodriguez v. City of New York, 31 N.Y.2d 312, 76 N.Y.S.3d 898 (2018), wherein the court noted:

[T]o be entitled to partial summary judgment 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.

When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries, and if so, the comparative fault of each party is then apportioned by the jury. Id. at 374.

Here, Defendant argues that Plaintiff is negligent in failing to activate the pedestrian cross light; that he was distracted by his cell phone and ear buds and that he failed to look at the applicable traffic and pedestrian light at the intersection before proceeding. While these may be valid claims with respect to Plaintiff's actions or lack thereof, any allegations of comparative negligence on Plaintiff's part in the instant matter does not preclude a grant of summary judgment to Plaintiff for his violation of a statute and the jury will determine the comparative fault of each party at the time of trial.

Nor is there any merit to Defendant's argument that summary judgment must be denied because there are triable issues of fact as to whether Plaintiff's actions are the sole proximate cause of the subject occurrence. In Colpan v. Allied Central Ambulette, 97 A.D.3d 776, 949 N.Y.S.2d 124 (2d Dept. 2012), when rejecting the sole proximate cause argument, the court noted that although the vehicle operated by the defendant had the right-of-way and was

entitled to anticipate that the plaintiff would obey the traffic laws, the defendant driver also had a duty to exercise due care to avoid colliding with the plaintiff, as required by VTL Sec. 1146(a). See also Dillon v. Denny, 60 Misc.3d 578, 76 N.Y.S.3d 399 (Sup. Ct Nassau County 2018)(summary judgment granted based upon violation of Sec. 1146(a) in pedestrian knockdown notwithstanding issues of whether plaintiff exercised due care in crossing the street.) In the instant matter, Defendant failed to see what was there to be seen- namely, Plaintiff's presence in the cross-walk-prior to striking him. This violation of a statute was a proximate cause of the subject occurrence. Thus, Plaintiff's actions, even if negligent, cannot constitute the sole proximate cause of the subject occurrence.

Lastly, it must be noted that Defendant's submission of an expert affidavit in no way demonstrates a triable issue of fact sufficient to deny summary judgment. As an initial matter, there are no claims made involving the sequencing of the traffic control devices. Moreover, there was no showing made that the alleged area tested or observed by the expert was in the same condition it was at the time of the accident. Mossberg v. Crow's Nest marina of Oceanside, 129 A.D.3d 683, 684, 10 N.Y.S.3d 319 (2d Dept. 2015). Additionally, absent the inability or incompetence of jurors, on the basis of their day-to-day experience and observation, to comprehend the issues and to evaluate the evidence, the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper. Kulak v. Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 148, 386 N.Y.S.2d 87 (1976). Here, it is within the province of the jury to make the determination of whether a cause of the accident was Plaintiff's failure to pay proper attention to see whether he had an appropriate safe walking condition and/or he failed to observe a steady red "DON'T WALK" pedestrian display.

Accordingly, it is hereby

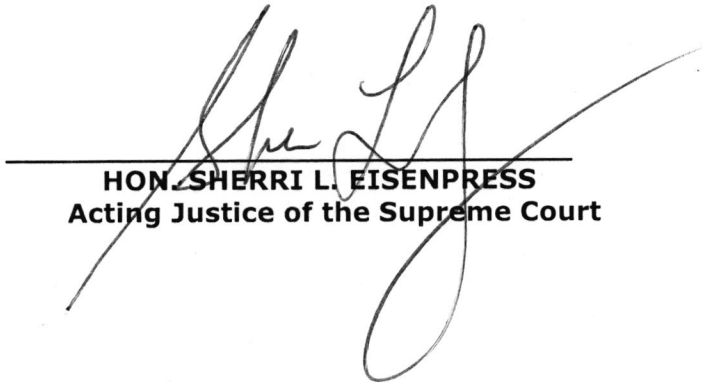
**ORDERED** that Plaintiffs' Notice of Motion for Summary Judgment on the issue of liability is granted in its entirety; and it is further

**ORDERED** that counsel shall appear in the Trial Readiness Part on **WEDNESDAY**,

**SEPTEMBER 18, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York  
August 14, 2019

  
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**HON. SHERRI L. EISENPRESS**  
**Acting Justice of the Supreme Court**

To: All parties (via NYSCEF)