

Glanzrock v Marrone
2019 NY Slip Op 34777(U)
May 22, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-604453
Judge: Joseph C. Pastorella
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NYSCEF DOC. NO. 58

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SHORT FORM ORDER

INDEX No. 17-604453

CAL. No. 18-01633MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 10-24-18 (001)
MOTION DATE 11-28-18 (002)
ADJ. DATE 01-23-19
Mot. Seq. # 001 - MD
002 - MD

-----X
MATTHEW GLANZROCK,

Plaintiff,

- against -

GERARD MARRONE,

Defendant.
-----X

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Upon the following papers read on these motions to vacate the note of issue and for summary judgment : Notices of Motions and supporting papers filed by defendant dated September 14, 2018 and October 12, 2018 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers filed by plaintiff on October 17, 2018 and January 2, 2019 ; Replying Affidavits and supporting papers filed by defendant on January 18, 2019 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order vacating the note of issue and certificate of readiness and removing this action from the trial calendar is denied; and it is further

ORDERED that the motion by defendant for an order granting summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Matthew Glanzrock as a result of a motor vehicle accident which occurred on July 13, 2016, on West Jericho Turnpike, near its intersection with Oakwood Road, in the Town of Huntington, New York. The accident allegedly occurred when a vehicle owned and operated by defendant Gerard Marrone struck the plaintiff as he was crossing West Jericho Turnpike. A compliance conference was held in this action on August 15, 2018 and the note of issue and certificate of readiness were filed by plaintiff on September 5, 2018.

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Defendant now moves for an order vacating the note of issue and striking the action from the trial calendar on the ground that the certificate of readiness filed by plaintiff improperly states that discovery is complete and that all necessary or proper proceedings have been completed. More specifically, defendant alleges that plaintiff failed to comply with discovery demands, dated August 10, 2017, for authorizations. Defendant also seeks leave to extend the time for making a summary judgment motion. In support, defendant submits, *inter alia*, an affirmation of his attorney, the pleadings, his post-deposition demand for discovery, and correspondence to plaintiff regarding same. Plaintiff opposes the motion, arguing that outstanding discovery does not warrant vacating the note of issue. In opposition, plaintiff submits, *inter alia*, an affirmation of his attorney, his response to the post-deposition demand for discovery, and a copy of a compliance conference order dated August 15, 2018.

While parties to litigation are entitled to “full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR 3101 [a]), the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (*Arons v Jukowitz*, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; see *Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). Section 202.21 (e) of the Uniform Rules for Trial Courts (22 NYCRR) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue “upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect.” A court, however, may deny a motion to vacate the note of issue, even when discovery demand outstanding, if the defendant had ample time to complete the disclosure process (*Remark Elec. Corp. v Manshul Const. Corp.*, 242 AD2d 694, 662 NYS2d 592 [2d Dept 1997]; *Simmons v Kemble*, 150 AD2d 986, 541 NYS2d 875 [3d Dept 1989]; *Bycomp, Inc. v New York Racing Assn., Inc.*, 116 AD2d 895, 498 NYS2d 274 [3d Dept 1986]). In addition, § 202.7 (a) of the Uniform Rules for Trial Courts (22 NYCRR) provides that a motion relating to disclosure must be supported by an affirmation that counsel “has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” The affirmation of good-faith effort “shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held” (Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [c]).

In this case, the affirmation of good faith submitted with defendant’s motion is insufficient to vacate the note of issue, as it fails to demonstrate that there were communications between the parties evidencing a diligent effort to resolve the alleged dispute (see *Martinez v 1261 Realty Co., LLC*, 121 AD3d 955, 995 NYS2d 581 [2d Dept 2014]; *Murphy v County of Suffolk*, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]; *Deutsche v Grunwald*, 110 AD3d 949, 973 NYS2d 335 [2d Dept 2013]; *Matter of Greenfield v Board of Assessment Review for Town of Babylon*, 106 AD3d 908, 965 NYS2d 555 [2d Dept 2013]; *Mironer v City of New York*, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]). The purported affirmation of good faith merely references correspondence sent from defendant to plaintiff, and attaches one letter as an exhibit in support. Further, there is no explanation as to why defense counsel did not raise the issue of the plaintiff’s failure to comply with discovery at the compliance conference. The record demonstrates that on August 15, 2018, defendant stipulated that disclosure was complete and that the matter was ready for trial. Accordingly, the motion to vacate the note of issue is denied. Further, the branch of defendant’s motion for leave to extend the filing of a summary judgment motion is denied as moot, as defendant timely served and filed a summary judgment motion on November 28, 2018.

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Defendant moves for summary judgment in his favor and dismissal of the complaint on the grounds that plaintiff's negligence was the sole proximate cause of the accident. In support, defendant submits, *inter alia*, transcripts of the parties' deposition testimony, transcripts of the deposition testimony of two non-party witnesses, Laura Mancia and Detective Daniel Murphy, photographs of the intersection and the police accident reports. Plaintiff opposes the motion, arguing that defendant has failed to eliminate all issues of fact as to whether he breached his duty of care to plaintiff. In opposition, plaintiff submits, *inter alia*, an affirmation of an expert, Gregory L. Witte.

At his deposition, defendant testified he was driving home from his office when the accident occurred. Defendant testified at the time of the accident he was traveling east on West Jericho Turnpike, that the traffic signal at the intersection of Oakwood Road was green as he passed through, and that he was driving under the posted speed limit. Defendant also testified he did not see any cars or pedestrians in the intersection or on the road prior to the collision, and that he did not see the plaintiff until he was on the hood of his vehicle, immediately after the accident. At his deposition, Mr. Glanzrock testified that he had no memory of the night of the accident, due to a traumatic brain injury that he suffered as a result of the impact of the collision.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The driver of a motor vehicle has a statutory duty to use due care to avoid colliding with pedestrians on the roadway, as well as a common-law duty to see that which he or she should have seen through the proper use of his or her senses (*Barbieri v Vokoun*, 72 AD3d 853, 855, 900 NYS2d 315 [2d Dept 2010]; see Vehicle and Traffic Law § 1146; see also *Benn v New York Presbyterian Hosp.*, 120 AD3d 453, 456, 990 NYS2d 584, 588 [2d Dept 2014]; *Vasquez v County of Nassau*, 91 AD3d 855, 938 NYS2d 109 [2d Dept 2012]). Vehicle and Traffic Law § 1146 provides that a driver "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." The driver of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout (*Fried v Misser*, 115 AD3d 910, 982 NYS2d 574 [2d Dept 2014]; *Allen v Echols*, 88 AD3d 926, 931 NYS2d 402 [2d Dept 2011]). Generally, as there can be more than one proximate cause of an accident, it is for the trier of fact to determine same (see *Ardanuy v RB Juice, LLC*, 164 AD3d 1296, 83 NYS3d 634 [2d Dept 2018]; *Lukyanovich v H.L. Gen. Contrs., Inc.*, 141 AD3d 693, 35 NYS3d 463 [2d Dept 2016]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]). The defendant testified at his deposition that he did not see the plaintiff until after the accident occurred. Accordingly, the defendant failed to demonstrate, prima facie, that he kept a proper lookout and that his alleged negligence did not contribute to the accident (see *Fried v Misser*, *supra*; *Brandt*

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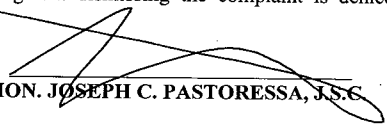
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v *Zahner*, 110 AD3d 752, 752-753, 974 NYS2d 482 [2d Dept 2013]; *Topalis v Zwolski*, 76 AD3d 524, 906 NYS2d 317 [2d Dept 2010]; *Spicola v Piracci*, 2 AD3d 1368, 768 NYS2d 867 [4th Dept 2003]).

As defendant failed to meet his prima facie burden, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Accordingly, the motion by defendant for summary judgment dismissing the complaint is denied.

Dated: May 22, 2019


HON. JOSEPH C. PASTORESSA, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION