

Nunez v Pimentel

2020 NY Slip Op 30888(U)

February 10, 2020

Supreme Court, Bronx County

Docket Number: 26696/2016E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



JIMMY INOA NUNEZ,

Index No. 26696/2016E

-against-

Hon. MARY ANN BRIGANTTI

YODANNY S. PIMENTEL

Justice Supreme Court

The following papers numbered 1 to 5 were read on this motion (Seq. No. 1)
for SUMMARY JUDGMENT LIABILITY noticed on September 13, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4
Replying Affidavit and Exhibits	No(s).	5

Upon the foregoing papers, the plaintiff Jimmy Inoa Nunez ("Plaintiff") moves for an order (1) pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability against the defendant Yodanny S. Pimentel ("Defendant"); (2) pursuant to CPLR 3212, granting him partial summary judgment declaring the absence of any comparative negligence or other culpable conduct on his part; and (3) pursuant to CPLR 3211(b) and/or 3212, dismissing the First and Eighth Affirmative Defense set forth in Defendant's answer. Defendant opposes the motion¹.

As an initial matter, the Court finds that this motion is timely. When Plaintiff filed his note of issue (April 17, 2019), this action was assigned to Justice John R. Higgitt, J.S.C. This action was not re-assigned to the undersigned until August 5, 2019 (by order dated August 5, 2019). Defendant provides no evidence that Justice Higgitt requires summary judgment motions to be made within 60 days of the note of issue's filing. Accordingly, the deadline for making such a motion was 120 days after April 17, 2019 - or August 15, 2019 (CPLR 3212[a]). Plaintiff indeed made this motion by electronic means on August 15, 2019, therefore the motion is timely and will be considered on its merits.

Background

This matter arises out of an alleged motor vehicle accident that occurred between a vehicle operated by Plaintiff and another vehicle operated by Defendant. Plaintiff supports his motion with, among other things, the deposition testimony of himself and Defendant, and a copy of the police accident report. Plaintiff testified that the accident occurred at the intersection of "Walter and 182 in the Bronx" (Pl. EBT at 9). Both streets were one-way streets with parking on both sides (*id.* at 9-10), and there was a stop sign on "Walter" (*id.* at 10), but no traffic control device facing 182nd Street (*id.*). Plaintiff testified that it was dark outside as it was 11:00PM (*id.* at 11), and he had his headlights on (*id.* at 12).

¹Defendant's allegedly untimely opposition papers will be considered because Plaintiff was not prejudiced by the late filing as he was able to submit substantive reply papers (*see Narvaez v. Wadsworth*, 165 A.D.3d 407, 408 [1st Dept. 2018]).

Motion is Respectfully Referred to Justice:
Dated:

Plaintiff testified that he was traveling at about 25 miles per hour, and he was on 182nd Street and the other driver had a stop sign; apparently, he did not stop and he hit me" (*id.* at 15). Plaintiff's vehicle was "passing the intersection" at the time of the accident (*id.*). He testified that he did not see the other vehicle prior to the impact, and the "front of the other vehicle" came into contact with the "left side" of his vehicle on the driver's side door (*id.* at 15-16). Plaintiff testified that there was nothing he could do to avoid the impact because the other vehicle "came out of nowhere" (*id.* at 17). Plaintiff testified that he told police officers that there was a stop sign and the other driver, it seemed to him, "didn't respect the sign" and "crash[ed]" into Plaintiff (*id.* at 22).

Defendant testified that the accident occurred on "182nd and Walton" (Def.'s 2/8/19 EBT at 10). He testified that he was traveling on Walton Avenue at the time (*id.*, and as he approached 182nd Street on Walton there was a stop sign for traffic on Walton (*id.* at 12), but no stop sign for vehicles on 182nd Street (*id.*). Defendant testified that he came to a complete stop on Walton and "[I]ooked, didn't see anyone coming, and I went forward again, and I stopped again, and as I was about to pull out all of the sudden I got impacted or I got hit" (*id.* at 14). Defendant stated that both streets were one-way with one lane of travel (*id.*). Defendant stated that he came to a stop, looked to his right, and saw "nothing" (*id.* at 15). When asked if anything was obstructing his view to the right, Defendant responded that there was a vehicle parked at 182nd, at the "edge of the parking" (*id.* at 15-16). When traveling on 182nd street that vehicle would have been on the left side (*id.* at 16). Defendant described the parked vehicle as an "SUV" (17) or a "big truck" (Def 9-24-18 EBT at 19), and the front of it was "going up" onto Walton Avenue (2-9-19 EBT at 19). Defendant came to a stop for the stop sign, noticed the SUV to his right (*id.* at 20) but did not see any vehicles approaching or stopped at 182nd (*id.*). Defendant testified that he then "made another stop and then I didn't see anything and I pulled out" (*id.*). When asked if he could clearly see down 182nd Street when he stopped for the second time, Defendant responded: "No, it was dark" (*id.*). Defendant further testified that even if the sun was out, he didn't think that he could have seen a clear path down 182nd Street "because of the vehicle that was stopped there" (*id.* at 20-21). He explained that the SUV was still obstructing his view of East 182nd Street and preventing him from being able to see "completely" (*id.* at 21). Defendant did not stop a third time at the intersection before proceeding. When he did so, he suddenly felt an impact from another vehicle (*id.* at 22-23). Defendant testified that he didn't see the other vehicle before the impact "because there wasn't any light" (*id.* at 23). He stated that the "front part" of his vehicle came into contact with "the driver side" of the other vehicle (*id.* at 23). At an earlier EBT, Defendant testified that the points of impact were the "bumper front, on the driver's side" of the other vehicle, and the "corner of the bumper" on the passenger side of his vehicle (9-24-19 EBT at 22). The first time Defendant saw the other vehicle was when it "crashed into" him (*id.* at 24).

Plaintiff also submits a copy of the police accident report, however none of the statements contained in the report may be deemed "admissions" as Defendant merely states in the report that his vehicle struck

Plaintiff's vehicle with no further elaboration of what occurred. Since there is no indication that the drafting officer witnessed the accident, it must be disregarded as inadmissible hearsay (*see Fay v. Vargas*, 67 A.D.3d 568 [1st Dept. 2009]).

Relying on the above submissions Plaintiff alleges that he is entitled to summary judgment on the issue of Defendant's liability and the issue of Plaintiff's lack of comparative negligence. Defendant opposes the motion asserting that there are issues of fact as to whether Plaintiff was operating his vehicle without headlights at the time of the accident.

Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

Applicable Law and Analysis

It is settled that drivers with the right of way are entitled to anticipate that other vehicles will obey traffic laws that require them to yield, and they have "no duty to watch for and avoid a driver who might fail to stop at a stop sign" (*Harrigan v. Sow*, 165 A.D.3d 463, 464 [1st Dept. 2018]). Drivers with the right of way do have a duty to exercise reasonable care to avoid collisions with other vehicles that are already in the intersection (*Nevarez v. S.R.M. Mgt. Corp.*, 58 A.D.3d 295 [1st Dept. 2008], and to observe what should be observed (see *Basabe v. Carrozza*, 106 A.D.3d 641 [1st Dept. 2013]), because such a driver is "still obliged to be vigilant for oncoming traffic" (see *Calcagno v. Rodriguez*, 91 A.D.3d 468, 472 [1st Dept. 2012]). Nevertheless, a driver with the right of way and with only seconds to react to a vehicle that failed to yield is not comparatively negligent (*Fuertes v. City of New York*, 146 A.D.3d 936 [2d Dept. 2017]; see also *Gonzalez v. Bishop*, 157 A.D.3d 460, 461 [1st Dept. 2018]).

In this matter, Plaintiff has demonstrated prima facie that Defendant was negligent, and that his negligence was a proximate cause of the accident. Plaintiff testified that he proceeded through the intersection with no traffic control device when he was suddenly struck by Defendant's vehicle that had failed to yield at a stop sign. Defendant's testimony fails to raise a triable issue of fact as to whether his negligence was a proximate cause of the accident, or stated another way, whether Plaintiff actions were the sole proximate cause of this accident (see generally Savall v. New York City Tr. Auth., 173 A.D.3d 566, 567 [1st Dept. 2019]). Defendant admitted that he proceeded into the intersection despite having a partially obstructed view down 182nd Street. Defendant thus failed to ensure that his path forward was clear before proceeding, and therefore he failed to yield at the stop sign to Plaintiff's oncoming vehicle (Pace v. Robinson, 88 A.D.3d 530, 531 [1st Dept. 2011]; Vehicle and Traffic Law §1142[a]). Plaintiff is therefore entitled the summary judgment on the issue of Defendants' liability.

Plaintiff, however, failed to eliminate all triable issues of fact as to whether he was comparatively negligent. Defendant testified that prior to the accident he could partially see down 182nd Street and it was "dark" and there "wasn't any light" and he stated that the other vehicle was "coming without lights, apparently." Contrary to Plaintiff's contentions, Defendant's testimony denying that he saw any light coming from the 182nd Street prior to the impact, - when viewed in a light most favorable to Defendant - sufficiently raises issues of fact as to whether Plaintiff's headlights were illuminated, thus warranting denial of Plaintiff's motion with respect to the issue of his comparative fault and Defendant's First and Eighth affirmative defenses (see Palmer v. Ecco III Enterprises, Inc., 153 A.D.3d 1267, 1268 [2d Dept. 2017]).

Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of Defendant's liability is granted, and it is further,

ORDERED, that Plaintiff's motion is otherwise denied.

The parties are directed to appear for their previously-scheduled pre-trial conference on **March 11, 2020, at 9:30AM, IAS Part 15, Room 702.**

This constitutes the Decision and Order of this Court.

Dated: 2/10/2020

Hon. Mary Ann Brigantti
Hon. Mary Ann Brigantti J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT