

Gomez v Yarimi

2020 NY Slip Op 33073(U)

September 9, 2020

Supreme Court, Kings County

Docket Number: 502853/2018

Judge: Lara J. Genovesi

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.

KINGS COUNTY CLERK
FILED
2020 SEP 11 PM 2:12

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 9th day of September 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X
ANIBAL GOMEZ,

Index No.: 502853/2018

Plaintiff,

DECISION & ORDER

-against-

SARIT YARIMI and AVRAHAM YARIMI,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	16-24
Opposing Affidavits (Affirmations) _____	27-30
Reply Affidavits (Affirmations) _____	32

Introduction

Defendants, Sarit Yarimi and Avraham Yarimi, move by notice of motion, sequence number one, pursuant to CPLR § 3212 for summary judgment. Plaintiff, Anibal Gomez, opposes this application.

Background

Plaintiff allegedly sustained personal injuries on August 6, 2016, as a result of an automobile accident. It is undisputed that plaintiff was operating his bicycle with the

101
②

direction of traffic on Quentin Road, riding towards the intersection with East 18th Street. Defendant, Sarit Yarimi, was driving a Nissan Rogue on East 18th Street, towards the intersection with Quentin Road. Defendant testified that the green light was in her favor as she continued through the intersection (*see* NYSCEF Doc. # 22, Yarimi EBT at 18-19, 24). She did not look to her left or right while approaching the intersection (*see id.* at 30-31). Defendant testified that she was looking straight ahead when entering the intersection. She did not notice any bicyclists on the road prior to the accident (*see id.* at 32). She first noticed the plaintiff “when he went into me” (*id.*). She testified that she does not know her rate of speed for certain; she guessed that it was 25 miles per hour (*see id.* at 23).

Plaintiff testified that he first observed the red light approximately half a block from the intersection. He did not see the light change as he approached the intersection but cannot recall if it was still red when he reached the intersection (*see* NYSCEF Doc. # 23, Plaintiff EBT at 20). When asked if he stopped at the intersection, plaintiff testified that he slowed down. When asked again, he testified that he did stop “because there was a car coming” (*see id.* at 21).

Q. For how long did you come to a stop before the crosswalk?

A. Second.

Q. At that time, what color was the light?

A. I think it was red.

Q. While you were at a stop, did you look to your left?

A. To my right.

Q. Is that the direction from which traffic would be coming on East 18th Street?

A. Yes.

Q. And when you looked, did you see any cars coming?

A. No.

(*id.* at 22).

Three to four seconds after plaintiff began to move his bike again, the accident occurred (*see id.* at 23). The bicycle was still partially in the crosswalk at the moment of impact (*see id.* at 27). Plaintiff saw the vehicle one second prior to impact (*see id.*). He testified that he did not have time to swerve or do anything to avoid the accident (*see id.*). Plaintiff's deposition testimony is silent as to how fast the parties were travelling.

In opposition, plaintiff provided an affidavit "to supplement [his] examination before trial testimony and support the affirmation in opposition to the motion submitted", wherein he stated that

4. The speed limit is not posted in the area where the collision occurred. I believe it is twenty-five miles per hour. At the time of the contact from defendants' vehicle, I had just begun to move from a stop and my bicycle was only traveling at or about two miles per hour. In my estimation, defendants' vehicle was traveling at least forty miles per hour at the time of the impact. My estimation is based on my visual observation of the vehicle prior to the collision, experience as a bicyclist, many years of experience as a passenger in various motor vehicles, the severity of the very hard impact, the seriousness of my injuries, the violent manner in which the impact struck my bicycle and I to the ground, and that three to four car lengths of the moving lane was clear of traffic before I entered the intersection.

5. Not only was the defendant driver traveling at an excessive speed for the roadway conditions at the time of the incident, but she did not appear to take any action to avoid the collision, such as steering to the side, slowing, or giving any warning of her approach. In fact, it seems that she never saw me or my bicycle prior to the collision. I believe that if she had been driving at or around the speed limit for the area and keeping a proper lookout, the collision would not have occurred.

(NYSCEF Doc. # 29, Plaintiff Affidavit).

Plaintiff provided photographs of the damage to the front left side of defendant's vehicle (*see* NYSCEF Doc. # 28). Plaintiff also provided a certified copy of the police report (*see* NYSCEF Doc. # 30). Under Accident Description/Officers notes, the report states "at T/P/O vehicle one states she was traveling southbound on East 18 street when bicyclist collided with her vehicle causing damage. Bicyclist states that he was riding westbound with traffic on Quentin Road when he collided with vehicle one sustaining pain to face, back, chest, lower right leg removed to Maimonides. No other injuries reported" (*id.*). "The certified police report for the incident reveals that the defendant driver was cited with code '4', 'driver inattention' (NYSCEF Doc. # 27, Affirmation in Opposition at ¶ 28).

The note of issue was filed on October 23, 2019.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v.*

Nassau Health Care Corp., 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; see also *Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

“Defendants moving for summary judgment in a personal injury action must demonstrate, prima facie, that they did not proximately cause the plaintiff’s injuries” (*Wilson v. Mazewski*, 175 A.D.3d 1352, 105 N.Y.S.3d 888 [2 Dept., 2019], quoting *Fargione v. Chance*, 154 A.D.3d 713, 62 N.Y.S.3d 444 [2 Dept., 2017]). “Since, however, there can be more than one proximate cause of a plaintiff’s injuries, defendants do not carry their burden simply by establishing that another party’s actions were a proximate cause; they must establish their own freedom from comparative fault” (*Fargione v. Chance*, 154 A.D.3d 713, 62 N.Y.S.3d 444 [2 Dept., 2017], citing *Bentick v. Gatchalian*, 147 A.D.3d 890, 48 N.Y.S.3d 171 [2 Dept., 2017]).

“In general, a person riding a bicycle on a roadway is granted the rights, and is subject to the duties, applicable to a vehicle driver” (*Lindner v. Guzman*, 163 A.D.3d 947, 82 N.Y.S.3d 476 [2 Dept., 2018], citing Vehicle and Traffic Law § 1231). “A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position” (*Flores v. Rubenstein*, 175 A.D.3d 1490, 109 N.Y.S.3d 390 [2 Dept., 2019]),

quoting *Palma v. Sherman*, 55 A.D.3d 891, 867 N.Y.S.2d 111 [2 Dept., 2008]).

“[D]rivers with the right-of-way can also be held to be comparably at fault if they did not use reasonable care to avoid a collision with the driver who failed to yield the right-of-way” (*Wilson v. Mazewski*, 175 A.D.3d 1352, *supra*, citing *Fargione v. Chance*, 154 A.D.3d 713, *supra*).

A driver with the right-of-way is entitled to anticipate that a motorist will obey traffic laws which require him or her to yield (*see Luke v. McFadden*, 119 A.D.3d at 533, 987 N.Y.S.2d 909; *Francavilla v. Doyno*, 96 A.D.3d at 715, 945 N.Y.S.2d 425; *Zuleta v. Quijada*, 94 A.D.3d 876, 877, 943 N.Y.S.2d 111). When a driver with the right-of-way has only seconds to react to a vehicle which has failed to yield, the driver with the right-of-way is not comparatively at fault for failing to avoid the accident (*see Smith v. Omanes*, 123 A.D.3d 691, 998 N.Y.S.2d 198; *Bennett v. Granata*, 118 A.D.3d 652, 987 N.Y.S.2d 424; *Yelder v. Walters*, 64 A.D.3d 762, 764, 883 N.Y.S.2d 290).

(*Fuertes v. City of New York*, 146 A.D.3d 936, 45 N.Y.S.3d 562 [2 Dept., 2017]).

In the instant case, defendants met their burden to establish entitlement to summary judgment as a matter of law. Defendants provided the parties' deposition testimony. It is undisputed that defendant driver had the right of way as she proceeded straight on East 18th Street to the intersection with Quentin Road, with the green light in her favor. It is also undisputed that plaintiff stopped at the red light but inched up to continue through the intersection when the accident occurred. Further, as defendant testified that she did not see the plaintiff until one second prior to the accident, she cannot be comparatively at fault for failing to avoid the accident (*see Fuertes v. City of New York*, 146 A.D.3d 936, *supra*; *cf. Tapia v. Royal Tours Service Inc.*, 20 Misc.3d 1109(A),

867 N.Y.S.2d 21 [Sup. Ct. 2008], *mod.*, 67 A.D.3d 894, 889 N.Y.S.2d 225 [2 Dept., 2009] [where the defendant testified that he saw plaintiff 10 seconds before the accident and where plaintiff was visible approaching the intersection and entering the crosswalk to a non-party witness from across the street]). In the instant case, although plaintiff testified that she looked straight while driving through the intersection, she has the right to anticipate that plaintiff would obey the red light (*see Fuertes v. City of New York*, 146 A.D.3d 936, *supra*).

In opposition, plaintiff failed to raise a triable issue of fact. Defendant was not certain of her rate of speed but at her deposition estimated that she travelled 25 miles per hour at the time of the accident. Plaintiff's deposition testimony was silent as to rate of travel. However, plaintiff provided his affidavit where he estimates that defendant drove 40 miles per hour. Even considering this affidavit, this is insufficient to raise a triable issue of fact as to the rate of travel. Plaintiff stated that he makes this "estimation" based on a number of factors, including visual observation of the vehicle, experience as a bicyclist, experience as a passenger in motor vehicles, the severity of the impact, the seriousness of his injuries, "the violent manner in which the impact struck my bicycle and I to the ground, and that three to four car lengths of the moving lane was clear of traffic before I entered the intersection" (NYSCEF Doc. # 29). However, plaintiff's allegation that defendant travelled 40 miles per hour is speculative and thus insufficient to raise a question of fact, in light of plaintiff's testimony that he first saw defendant's vehicle one second prior to impact (*see Batts v. Page*, 51 A.D.3d 833, 858 N.Y.S.2d 748 [2 Dept., 2008]; *Yelder v. Walters*, 64 A.D.3d 762, 883 N.Y.S.2d 290 [2 Dept., 2009]; *see*

generally *Fernandez v. American United Transportation, Inc.*, 177 A.D.3d 704, 113 N.Y.S.3d 145 [2 Dept., 2019]).

Plaintiff further contends that questions of fact also exist as to whether defendant “saw what there was to be seen” given the police report indication of “driver inattention” (NYSCEF Doc. # 27, Affirmation in Opposition at ¶¶ 28-29). This too is speculative and insufficient to raise a triable issue of fact, given that there is no indication that the officer who completed the report witnessed the accident. Where, such as here, the police officer did not observe the accident, and there is no additional evidence to support the conclusion that the driver was inattentive, the notation in the police report that an apparent contributing factor was driver inattention is insufficient to raise a triable issue of fact (see *Tapia v. Royal Tours Service Inc.*, 20 Misc.3d 1109(A), *supra*).

Conclusion

Accordingly, the defendant’s motion for summary judgment on the issue of liability is granted. In opposition, plaintiff failed to raise a triable issue of fact.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

KINGS COUNTY CLERK
FILED
2020 SEP 11 PM 2:11

To:

Kathleen E. Beatty, Esq.
Cellino & Barnes, P.C.
Attorney for Plaintiff

Melissa A. Marano, Esq.
James G. Billelo & Associates
Attorney for Defendant