

Zaky v Almeyda

2020 NY Slip Op 33485(U)

October 13, 2020

Supreme Court, Kings County

Docket Number: 525163/18

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 525163/18
Motion Date: 8-17-20
Mot. Seq. No.: 1

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TAREK Z. ZAKY,

Plaintiff,

-against-

DECISION/ORDER

ERIC ALMEYDA,

Defendant.

-----X

The following papers numbered 1 to 2 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident, the plaintiff moves for an order pursuant to CPLR § 3212 granting him partial summary judgment on the issue of liability.

This lawsuit arises out of a motor vehicle accident that occurred on April 26, 2018, at the intersection of 34th Avenue and 41st Street, Queens, New York. In support of the motion, the plaintiff submitted, *inter alia*, the deposition transcript of the defendant and a copy of the uncertified police accident report. Plaintiff did not submit a copy of his own deposition transcript.

Defendant testified that at the time of the accident, he was traveling on 34th Avenue towards its intersection with 41st Street and was only able to see the traffic light controlling the first intersection past that intersection. He maintained that the light controlling that intersection

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remained green at all relevant times. He further maintained that he did not see the traffic light controlling the intersection of 34th Avenue and 41st Street because it was blocked by a downed tree. After entering the intersection, he was struck by a motor vehicle that came from his right. According to the police report, the plaintiff was operating that vehicle.

The description of the accident contained in the uncertified police report, in relevant part, is as follows:

AT T/P/O DRIVER [THE PLAINTIFF] OF VEHICLE 1 STATES WAS DRIVING THROUGH INTERSECTION WITH GREEN LIGHT WHEN VEHICLE 2 WENT THROUGH RED LIGHT STRIKING HIS VEHICLE IN THE REAR 1 FORCING HIS VEHICLE TO SPIN AND STRIKE VEHICLE 3 PUSHING THAT VEHICLE IN TO VEHICLE 4. VEHICLE 2 [THE DEFENDANT] STATES HAD GREEN LIGHT WHEN VEHICLE 1 WENT THROUGH RED LIGHT CAUSING HIS VEHICLE TO STRIKE VEHICLE 1. VIDEO FOOTAGE VIEWED FROM 41-02 34 AVENUE SHOWS VEHICLE 2 PROCEEDING THROUGH A RED LIGHT STRIKING VEHICLE 1....

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first “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” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; see also CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion “the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers” (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal

quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York*, 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661).

While it is true that a driver who enters an intersection against a red traffic light in violation of Vehicle and Traffic Law § 1110(a) is negligent as a matter of law (*see Wynter v. City of New York*, 173 A.D.3d 1122, 1123, 104 N.Y.S.3d 645, 647; *Napolitano v. Sanderson*, 167 A.D.3d 1024, 88 N.Y.S.3d 354; *Jiang-Hong Chen v. Heart Tr., Inc.*, 143 A.D.3d 945, 946, 39 N.Y.S.3d 504; *Joaquin v. Franco*, 116 A.D.3d 1009, 1010, 985 N.Y.S.2d 131), the plaintiff failed to submit any admissible proof that the defendant ran the red light. The defendant made no such admission at his deposition and while the uncertified police report reflects that there is a video tape showing that he did run the red light, the videotape was that submitted inadmissible form. Moreover, since the police report was not certified as a business record, it constituted inadmissible hearsay (*see CPLR 4518[a]*; *Gezelter v. Pecora*, 129 A.D.3d 1021, 1022–23, 13 N.Y.S.3d 141, 143–44; *Hazzard v. Burrowes*, 95 A.D.3d 829, 943 N.Y.S.2d 213; *Hernandez v. Tepan*, 92 A.D.3d 721, 722, 938 N.Y.S.2d 475; *Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d at 936, 937 N.Y.S.2d 602), except for any portion of the report which contained a party admission (*see Gezelter, supra.*; *Jackson v. Trust*, 103 A.D.3d 851, 852, 962 N.Y.S.2d 267; *Scott v. Kass*, 48 A.D.3d 785, 786, 851 N.Y.S.2d 649; *Kemenyash v. McGoey*, 306 A.D.2d 516, 516, 762 N.Y.S.2d 629). The defendant did not admit to the reporting police officer that he disregarded the red light. To the contrary, he maintained that the light was green in his favor.

Accordingly, it is hereby

ORDRED that the motion is **DENIED** regardless of the sufficiency of the opposing papers.

This constitutes the decision and order of the Court.

Dated: October 13, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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