

Dominguez v Algieri
2020 NY Slip Op 34863(U)
August 26, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618458/2017
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 618458/2017

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

OMAR DOMINGUEZ,

Plaintiff,

-against-

VICTORIA L. ALGIERI
and STEVEN ALGIERI,

Defendants.

ORIG. RETURN DATE: JUNE 18, 2020
FINAL SUBMISSION DATE: AUGUST 6, 2020
MTN. SEQ. #: 001
MOTION: MG; CASEDISP

PLAINTIFF'S ATTORNEY:
HARMON, LINDER & ROGOWSKY
3 PARK AVENUE, 23RD FLOOR
SUITE 2300
NEW YORK, NEW YORK 10016
212-732-3665

ATTORNEY FOR DEFENDANTS:
SCAHILL LAW GROUP P.C.
1065 STEWART AVENUE
SUITE 210
BETHPAGE, NEW YORK 11714
516-294-5200

Upon the **E-file document list** numbered 13 to 29 read on defendants' application for an Order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability; it is

ORDERED that defendants' motion for an Order, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to prove a *prima facie* case of liability against the moving defendants, Victoria L. Algieri and Steven Algieri, is hereby **GRANTED** for the reasons set forth herein.

Plaintiff Omar Dominguez commenced this action by the filing of a summons and complaint on September 22, 2017, to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred at approximately 11:50 p.m. on December 11, 2016, at the intersection of Horseblock Road and Granny Road in Suffolk County, New York. Plaintiff alleges

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that he was riding a pedal-operated bicycle in the street when the accident occurred. Issue was joined on November 14, 2017. Plaintiff thereafter filed an amended complaint on November 6, 2019, and defendants served their answer on November 21, 2019. Upon the completion of discovery, a Compliance Conference Order was issued on March 12, 2020. Defendants now move for summary judgment on the issue of liability on the grounds that they were not negligent and were free from all fault in the accident. In support of their motion, defendants submit an attorney affirmation, a certified police accident report, the pleadings, and the deposition transcript of defendant Steven Algieri ("Algieri"). Plaintiff opposes the motion and submits an attorney affirmation, portions of his deposition transcript, a copy of the police report code sheet, and plaintiff's verified bill of particulars. Defendants reply by attorney affirmation and include a complete transcript of plaintiff's deposition testimony.

Algieri testified at his deposition that on December 11, 2016, he was traveling west on Horseblock Road in the right hand lane when the accident occurred at the intersection of Granny Road. Algieri testified that Horseblock Road is a two-way street with two traveling lanes for traffic heading west and east, Granny Road is a two-way street with one traveling lane, and that the intersection is governed by a traffic signal. Algieri further testified that the traffic signal at the intersection was solid green in the direction of his travel as he approached and entered the intersection. Algieri further testified that he was looking straight ahead and traveling 20-25 miles per hour when he approached the intersection. Algieri further testified that, as he was proceeding westbound through the intersection, with a green light still in his favor, plaintiff "popped out of nowhere" and came directly in front of his moving vehicle. Algieri further testified that he applied his brakes but was unable to avoid contact with plaintiff's bicycle. Algieri testified that plaintiff was wearing all dark clothes and there were no lights on his bicycle.

Plaintiff testified at his deposition that prior to the accident he was traveling on the shoulder of Horse Block Road and was going to make a left turn onto Granny Road. Plaintiff testified that when he entered the intersection the light in his direction of travel was green. Plaintiff further testified that prior to the accident, he was making a left turn onto Granny Road in order to arrive at the church, which was approximately 500 feet north of Horseblock Road. Plaintiff further testified that prior to the accident, the headlight on his bicycle was not on, his cellular phone was playing music loudly, and he had consumed eight or nine "small" Modelo beers and smoked marijuana.

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Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The 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 eliminate any material issue of fact (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 burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (see *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790; *Burns v City of Poughkeepsie*, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Chimbo v Bolivar, supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

Pursuant to Vehicle and Traffic law § 1231, “every person riding a bicycle ... upon a roadway shall be ... subject to all of the duties applicable to the driver of a vehicle....” Thus, a bicyclist is held to the same duty of care as an operator of a motor vehicle and must comply with all provisions of the Vehicle and Traffic Law (see *Palma v Sherman*, 55 AD3d 891, 867 NYS2d 111 [2d Dept 2008]). Vehicle and Traffic Law § 1141 requires that “[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.” Vehicle and Traffic Law § 1163 provides, in pertinent part, that “no person shall turn a vehicle at an intersection unless the vehicle is in proper position ... or turn a vehicle from a direct course or move right of left upon a roadway unless and until such movement can be made with reasonable safety.” The general rule under Vehicle and Traffic Law § 1120 is that a “vehicle shall be driven upon the right half of the roadway,” with limited exceptions not applicable herein. It has been determined that a violation of a standard of care imposed by

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the Vehicle and Traffic Law constitutes negligence *per se* (*Lebron v Mensah*, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; *Barbaruolo v Difede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; *Ciatto v Lieberman*, 266 AD2d 494, 698 NYS2d 54 [2d Dept 1999]; see also *Barbieri v Vokoun*, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept 2010]; *Smith v State of New York*, 121 AD3d 1358, 1358-59, 955 NYS2d 329 [3d Dept 2014]).

In accordance with these statutory duties, it has been established that a driver with the right of way is entitled to anticipate that other motorists will obey traffic laws that require them to yield the right-of-way (see *Lebron v Mensah*, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; *Bullock v Calabretta*, 119 AD3d 884 [2d Dept 2014]; *Kucar v Town of Huntington*, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]; *Todd v Godek*, 71 AD3d 872 [2d Dept 2010] *Kann v Maggies Paratransit Corp.*, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; *Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). A driver is not required to anticipate that a vehicle going in the opposite direction will cross over into oncoming traffic (*Barbaruolo v Difede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]). Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he should have seen (see *Laino v Lucchese*, 35 AD3d 672, 827 NYS2d 249 [2d Dept 2006]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle" (*Gause v Martinez*, 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012], quoting *Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]; *Bonilla v Calabria*, 80 AD3d 720 [2d Dept 2011]; *Gardner v Smith*, 63 AD3d 783 [2d Dept 2009]; *Cox v Nunez*, 23 AD3d 427 [2d Dept 2005]). There can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question of fact for the jury to decide (see *Bullock v Calabretta*, 119 AD3d 884, 989 NYS2d 862 [2d Dept 2014]; *Bonilla v Calabria*, 80 AD3d 720 [2d Dept 2011]; *Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]). The fact that a party violated the Vehicle and Traffic Law would not preclude a finding that comparative negligence by another party contributed to the accident (see *Gardner v Smith*, 63 AD3d 783 [2d Dept 2009]; *Cox v Nunez*, 23 AD3d 427 [2d Dept 2005]). Nevertheless, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively at fault for failing to avoid the collision" (*Yu Mei Liu v Weihong*

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Liu, 163 AD3d 611, 612, 81 NYS3d 75 [2d Dept 2018]; *Figueroa v Diaz*, 107 AD3d 754, 755, 967 NYS2d 109 [2d Dept 2013]).

Here, it is undisputed from the deposition testimony of the parties that plaintiff was traveling eastbound on Horseblock Road and defendant Algieri was traveling westbound on Horseblock Road and that the traffic light at the intersection of Horseblock Road and Granny Road was green prior to the subject accident. It is further undisputed that prior to the accident, plaintiff was attempting to make a left turn onto Granny Road to reach his destination, which was located approximately 500 feet north of Horseblock Road. It is further undisputed that the accident occurred late at night, plaintiff was wearing dark clothing, plaintiff had consumed alcohol and marijuana prior to the accident, and plaintiff's bicycle had no illuminated lights.

Based upon the testimony of the parties, defendants demonstrated their *prima facie* entitlement to summary judgment as a matter of law by establishing that plaintiff violated Vehicle and Traffic Law §§ 1141 and 1163 by making a left turn directly into the path of the Algieri vehicle when it was not reasonably safe to do so, and that these violations were the proximate cause of the subject accident (see *Yu Mei Liu v Weihong Liu*, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; *Trzepacz v Jara*, 11 AD3d 531, 782 NYS2d 852 [2d Dept 2004]; see also *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]). In addition, inasmuch as Algieri had the right-of-way, he was entitled to anticipate that plaintiff would obey the traffic laws, which required him to yield to Algieri's vehicle and not to proceed into the intersection (see *Yoon v Chen*, 127 AD3d 1023, 7 NYS3d 471 [2d Dept 2015]; *Kucar v Town of Huntington*, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]). Defendants established that plaintiff failed to operate his bicycle with due care and to maintain control over his bicycle to avoid the collision (see Vehicle and Traffic Law § 1129 [a]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Napolitano v Galletta*, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; *Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]).

Having made the requisite *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to raise a triable issue of fact (see *Kerolle v Nicholson*, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]; *Yu Mei Liu v Weihong Liu*, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; see also

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Bene v Dalessio, 135 AD3d 679, 22 NYS3d 237 [2d Dept 2016]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). Plaintiff, however, failed to raise a triable issue of fact as to his negligence in failing to see what there was to be seen and in attempting to make a left turn when it was hazardous to do so. Plaintiff did not refute the testimony of Algieri that plaintiff “popped out of nowhere” and proceeded to travel directly in front of Algieri’s vehicle. As such, there is no evidence to contradict Algieri’s testimony that he did not have enough time to react and could not have avoided the accident. Furthermore, plaintiff failed to raise a triable issue of fact as to whether Algieri was comparatively at fault in the operation of his vehicle (see ***Simeone v Cianciolo***, 118 AD3d 864, 988 NYS2d 257 [2d Dept 2014]). Plaintiff’s claim that the collision may have been caused by the speed of Algieri’s vehicle or as to what Algieri saw or should have seen is unsupported by any probative evidence in admissible form and amounts to sheer conjecture and speculation (see ***Clark v Amboy Bus Co.***, 117 AD3d 892, 985 NYS2d 901 [2d Dept 2014]; ***Loch v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; ***Trzepacz v Jara***, 11 AD3d 531, 782 NYS2d 852 [2d Dept 2004]).

There being no triable question of fact raised by plaintiff, defendants are entitled to summary judgment dismissing the complaint as against them pursuant to CPLR 3212 (see e.g. ***Yu Mei Liu v Weihong Liu***, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; ***Lebron v Mensah***, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; ***Ahearn v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***Heath v Liberato***, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]; ***Loch v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; ***Moreback v Mesquita***, 17 AD3d 420, 793 NYS2d 148 [2d Dept 2005]; ***Trzepacz v Jara***, 11 AD3d 531, 782 NYS2d 852 [2d Dept 2004]).

The foregoing constitutes the **Decision** and **Order** of the Court.

Dated: August 26, 2020


HON. JOSEPH FARNETI
Acting Justice Supreme Court

 X FINAL DISPOSITION

_____ NON-FINAL DISPOSITION