

Perry v McDonald

2020 NY Slip Op 34884(U)

July 2, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 18-612645

Judge: Martha L. Luft

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.

SHORT FORM ORDER

INDEX No. 18-612645
CAL. No. 20-00031MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 3-26-20
ADJ. DATE 6-16-20
Mot. Seq. # 001 - MG

-----X
BRYAN PERRY,

Plaintiff,

- against -

ERIN MCDONALD,

Defendant.
-----X

ECONOMOU & ECONOMOU, P.C.
Attorney for Plaintiff
85 Cold Spring Road, Suite 200
Syosset, New York 11791

GENTILE & TAMBASCO, ESQS.
Attorney for Defendant
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers read on this e-filed motion for partial summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiff, on February 18, 2020 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability and to dismiss defendant's affirmative defense of culpable conduct is granted.

This action was commenced by plaintiff Bryan Perry to recover damages for injuries he allegedly sustained on September 12, 2015, at approximately 4:30 p.m., when his motorcycle was struck by a vehicle owned and operated by defendant Erin McDonald, on Straight Path Road, at or near its intersection with Little East Neck Road, in Babylon, New York. The accident allegedly occurred when defendant attempted to make a left turn from the southbound lanes of Straight Path Road onto Little East Neck Road, and struck plaintiff's motorcycle, which was traveling north on Straight Path Road.

Plaintiff now moves for summary judgment on the issue of defendant's negligence and to dismiss defendant's affirmative defense of culpable conduct. Plaintiff argues that defendant violated, inter alia, Vehicle and Traffic Law § 1141 by making a left turn into the path of plaintiff's motorcycle, which was traveling with the right-of-way. In support of the motion, plaintiff submits, inter alia, the transcripts of the deposition testimony of the parties, his affidavit, and the uncertified police accident report. Defendant does not oppose the motion.

Bryan v McDonald
Index No. 18-612645
Page 2

Initially, the Court notes that the uncertified police report submitted in support of plaintiff's motion cannot be considered for the instant motion (*see Ganchrow v Kremer*, 157 AD3d 771, 69 NYS3d 352 [2d Dept 2018]; *Torres v Kalloff*, 128 AD3d 1052, 8 NYS3d 597 [2d Dept 2015]).

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, 87 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion 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 Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Kerolle v Nicholson*, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588, 90 NYS3d 66 [2d Dept 2018]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection must 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 (*see Brodney v Picini*, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]; *Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Giannone v Urdahl*, 165 AD3d 1062, 86 NYS3d 562 [2d Dept 2018]; *Lebron v Mensah*, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]). Thus, a driver who attempts to make a left turn when it is not reasonably safe to do so is in violation of this provision of the Vehicle and Traffic Law (*see Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Krajiniak v Jin Y Trading, Inc.*, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]). Although the operator of a vehicle with the right-of-way is entitled to assume that other drivers will obey traffic laws requiring them to yield (*see Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; *Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 96 NYS3d 302 [2d Dept 2019]; *Enriquez v Joseph*, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]), the driver with the right-of-way also has a duty to keep a proper lookout to avoid collisions with other vehicles (*see Matias v Bello*, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; *Miron v Pappas*, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; *Mark v New York City Tr. Auth.*, 150 AD3d 980, 55 NYS3d 128 [2d Dept 2017]). Nonetheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield the right-of-way is not comparatively negligent for failing to avoid the collision (*see Jeong Sook Lee-Son v Doe*, *supra*; *Enriquez v Joseph*, *supra*; *Rohn v Aly*, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]). To establish prima facie entitlement to judgment as a matter of law on the issue of negligence, a plaintiff is no longer required to show freedom from

Bryan v McDonald
Index No. 18-612645
Page 3

comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *see Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Heard v Schade*, 172 AD3d 1335, 99 NYS3d 666 [2d Dept 2019]; *Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Marks v Rieckhoff, supra*).

Plaintiff has established his prima facie entitlement to summary judgment on the issue of liability by demonstrating that defendant was negligent, as she violated Vehicle and Traffic Law § 1141 (*see Brodney v Picinic*, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]; *Ming-Fai Jon v Wager, supra*; *Giannone v Urdahl, supra*; *Yu Mei Liu v Weihong Liu*, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; *Smith v Fuentes*, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]). Plaintiff testified that he was operating his motorcycle on Straight Path Road, approaching its intersection with Little East Neck Road. He testified that it was lightly raining at the time, but that he could see the intersection clearly. He testified that there was a traffic signal governing his lane of travel, that it was green as he approached it, and that it remained green at the time of the collision. Plaintiff testified that defendant suddenly turned left from the southbound lanes of Straight Path into his path of travel. He further testified that he attempted to brake, but was unable to avoid the collision, as he only had a “split second” to react. Therefore, the evidence that defendant’s vehicle was unable to complete the turn without plaintiff’s motorcycle colliding with it shows that defendant violated Vehicle and Traffic Law § 1141 by turning left when it was not reasonably safe to do so (*Shashatay v Gavitt*, 158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]; *Giwa v Bloom*, 158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]).

Plaintiff having established prima facie entitlement to summary judgment, the burden now shifts to defendants to submit evidentiary proof in admissible form which raises a triable issue of fact (*see Zuckerman v City of New York, supra*; *Yu Mei Liu v Weihong Liu, supra*). Defendant fails to oppose the motion. Therefore, the branch of plaintiff’s motion for summary judgment on the issue of liability is granted.

As to the branch of plaintiff’s motion seeking to dismiss defendants’ affirmative defense of comparative negligence, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law” (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed” (*Fireman’s Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

While a plaintiff is no longer required to show freedom from comparative fault (*see Rodriguez v City of New York, supra*; *Bloechle v Heritage Catering, Ltd., supra*; *Catanzaro v Edery, supra*; *Marks v Rieckhoff, supra*; *Auguste v Jeter, supra*), the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant’s affirmative defense of comparative negligence (*Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). Plaintiff has established, prima facie, entitlement to the relief

Bryan v McDonald
Index No. 18-612645
Page 4

requested. Plaintiff has established his prima facie entitlement by demonstrating that he was traveling with the right-of-way and that he attempted evasive maneuvers to avoid the collision (*see Richardson v Cablevision Sys. Corp.*, supra; *Jeong Sook Lee-Son v Doe*, supra; *Matias v Bello*, supra). As defendant has failed to oppose the motion, defendant has failed to raise a triable issue of fact with respect to plaintiff's comparative negligence. Therefore, plaintiff's application to dismiss defendant's affirmative defense is granted.

Accordingly, the motion by plaintiff for partial summary judgment on the issue of liability and to dismiss defendant's affirmative defense of culpable conduct is granted.

Dated: July 2, 2020


A.J.S.C.
HON. MARTHA L. LUFT

FINAL DISPOSITION NON-FINAL DISPOSITION