

<b>Murphy v Anzovino</b>
2020 NY Slip Op 35191(U)
September 8, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2019-53307
Judge: Hal B. Greenwald
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SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

\_\_\_\_\_  
KEVIN M. MURPHY,

Plaintiff,

-against-

PAUL N. ANZOVINO,

Defendant  
\_\_\_\_\_

DECISION AND ORDER  
Index No. 2019-53307  
Motion Seq. No. 1

The following documents were reviewed and considered by the Court in reaching the within Decision and Order.

NYSCEF Doc. Nos. 9-20

RELEVANT HISTORY

This action arises from an alleged accident between an automobile driven by Defendant PAUL N. ANZOVINO (ANZOVINO) and a bicycle ridden by Plaintiff KEVIN M. MURPHY (MURPHY) that occurred at 1;30pm on June 15, 2019. It appears both parties were operating their respective vehicles eastbound on Route 55 where it intersects with Freedom Road in the Town of LaGrange in Dutchess County. Plaintiff filed his Complaint on August 15, 2019; Defendant his Answer and Demands on September 5, 2019. On May 11, 2020, Plaintiff moved by Notice of Motion for Partial Summary Judgment on the issue of liability. Opposition was filed on June 12, 2020 and a Reply on June 19, 2020.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (See, *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [s, 1978]; *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 [1968]; *Barrett v. Jacobs*, 255 N. Y. 520 [1931]).

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a

genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment.” (*Esteve v. Abad*, 271 A.D. 725 [1<sup>st</sup> Dept, 1947]).

Generally, the basis for determining summary judgment is that: “[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact.” (*Pullman v. Silverman*, 28 N.Y.3d 1060 [2016]; quoting, *Alvarez v. Prospect Hosp.* 68 N.Y.2d 320 [1986]). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985], “Bare conclusory assertions... ” are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. (*See e.g., Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25 [1933]). If the opposition can show there are questionable issues of fact that require a trial of the action, than summary judgment must be denied. (*Cattonar v. Edward Ermold Co.*, 277 A.D. 564 [1st Dept. 1951]). In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :...even arguably any doubt as to the existence of a triable issue’. (*Baker v. Briarcliff School Dist.*, 205 AD2d 652 [2d Dept., 1994]).

#### PLAINTIFF’S CASE IS BASED UPON AN ATTORNEY AFFIRMATION

Plaintiff’s case is based upon his attorney’s affirmation, (NYSCEF Doc. No. 10) which is being used as a device to introduce Plaintiff’s unsigned deposition testimony and Defendant’s unsigned deposition testimony, both taken December 12, 2019. CPLR 3116 speaks to the signing of depositions and provides that the witness is to sign the deposition, but if the witness fails to do so and return the signed deposition within sixty days, “...it may be used as fully as though signed.” It appears that neither Plaintiff, nor Defendant signed their respective deposition transcripts, but that the unsigned transcripts may properly be utilized as attached to counsel’s affirmation.

Typically, a motion for summary judgment is supported by an individual with personal knowledge of the alleged facts. However, as stated in *Burgdorf v. Kasper*, 83 A.D.3d 1553 (4<sup>th</sup> Dep’t, 2011), and the case at hand, the attorney affirmation is proper “as the vehicle for the submission of acceptable attachments [that] provide ‘evidentiary proof in admissible form,’ ” such as the parties’ depositions (*Zuckerman*, 49 N.Y.2d 557 [1980]; see, *Matter of Perceptron, Inc. [Vogelsong]*, 34 A.D.3d 1215 [4<sup>th</sup> Dep’t, 2006]; *Grossberg Tudanger Adv. v. Weinreb*, 177 A.D.2d 377 [1<sup>st</sup> Dep’t, 1991]).

This would also be true for a party opposing a motion for summary judgment where the attorney affirmation annexes deposition testimony and other evidence instead of relying on affidavits of fact based upon personal knowledge (*see, Olan v. Farrell Lines*, 64 N.Y.2d 1092, [1982]; *City of New York v. First Natl. Ins. Co. of Am.*, 79 A.D.3d 789 [2<sup>nd</sup> Dep’t, 2010]; *Enriquez v. B & D Dev., Inc.*, 63 A.D.3d 780 [2<sup>nd</sup> Dep’t, 2009]). Similar holding was made in *Roos v. King Constr.*, 179 A.D.3d 857 (Sup. Ct. Nassau, 2020). Accordingly, the instant motion for summary judgment is properly supported by an attorney affirmation with attached deposition testimony.

## PLAINTIFF'S CASE

Plaintiff's pending motion seeks a finding of liability against Defendant by reason that "...Defendant's negligent operation of his motor vehicle was the sole proximate cause of the alleged vehicle-on-bicycle collision that resulted in Plaintiff's injuries. Specifically, it is claimed, Defendant failed to pass Plaintiff at a safe distance and, as a result, Defendant's vehicle struck Plaintiff's bicycle." (NYSCEF Doc. No.10, paragraph 4). The Complaint alleges Defendant was solely responsible for the accident and Plaintiff's resultant injuries. (NYSCEF Doc. No.1, paragraph 9). The Complaint further alleges: "...ANZOVINO negligently failed to yield right of way to a bicyclist in the roadway and came into contact with the Plaintiff KEVIN M. MURPHY, a lawful bicyclist at the aforementioned location." (paragraph 7).

Excerpts from MURPHY's deposition claim he was heading eastbound on Rte. 55, just passed a traffic circle, the road was straight and flat. When asked if he was riding on a bike path, he answered no and described the area on the roadway where he was riding. (Transcript page 46, Line 11 to Page 47, Line 9)

- A. So there's a curb. There's a concrete curb and there's a white painted traffic line. The space in between is what we use for cycling.
- Q. Is that designated for cycling?
- A. There's no picture of a bike on it.
- Q. That's something you used for a bikeway?
- A. Yes. Correct.
- Q. Were you aware if that area is formally designated for bikers?
- A. I do not know.
- Q. have you seen other people biking in that area?
- A. Yes, Ma'am.
- Q. So in the one lane of travel, is it on the left or on the right side of that lane where you were biking?
- A. Right side of the lane.
- Q. So passing traffic would pass you on your left side, correct?
- A. Yes, ma'am.

Further, MURPHY advised that the width of the area from the white painted line to the curb is maybe two to three feet, and that a car could not fit in that space. (page 48, Lines 5-11). Plaintiff said that in the area where the accident happened, he is "...between a motor vehicle and a curb.". (Page 50, lines 7-12) and the curb is about 6-8 inches high. (Page 49, lines 10-12).

When questioned about whether he had ever thought about what would happen if a vehicle "were to make a maneuver" (Page 52, lines 13-25), he said he "...stayed heightened on my vigilance..." and had his lights on in broad daylight. Despite his "heightened vigilance", he did not see the vehicle involved in the accident before it allegedly occurred.

Next Plaintiff's counsel attempts to utilize Defendant's deposition testimony to bolster his argument for summary judgment on liability to the extent that Defendant testified he did not see the bicyclist before the accident. In his affirmation Plaintiff's counsel incorrectly misuses the word

“shoulder” in paragraphs 27-30 as well as in his Reply, paragraph 5. There was no mention of a “shoulder” by either party. The area described by Plaintiff was the 2-3-foot area between the white painted line and the curb on the right side of the roadway. An automobile would not fit in such a small area. Webster’s Third New International Dictionary defines shoulder, “...as that land immediately adjacent to and running alongside the main or paved portion of the highway, improved for limited purposes such as allowing distressed automobiles to move out of the flow of traffic.” (*Bottalico v. State*, 59 N.Y.2d 302 [1983]).

If, as Plaintiff’s counsel claims Plaintiff was riding on the “shoulder” this would be a Vehicle & Traffic law violation on Plaintiff’s part. While the shoulder is technically part of the road, it is not constructed as a place on which to travel. (*Worden v. State*, 221 App.Div. 671 [3<sup>rd</sup> Dep’t, 1927]; aff’d 228 App.Div. 739 [3<sup>rd</sup> Dep’t, 1930]; *Gould v. State*, 130 Misc. 776 [Court of Claims, 1927]). It does not appear plaintiff was riding on a shoulder area.

No doubt that a driver is “...required to keep a reasonably vigilant lookout for bicyclists...” (*Palma v Sherman* 55 A.D.3d 891 [2<sup>nd</sup> Dept, 891]). However, in *Palma* it was the bicyclist who was negligent and violated the motorists right of way. The Appellate Division reversed the lower court and found that summary judgment dismissing the complaint would be proper. In *Shui-Kwan Lui v Serrone*, 1003 A.D.3d 620 (2<sup>nd</sup> Dep’t, 2013) the Appellate Division reversed the trial court and denied summary judgment on liability. However, the basis for this decision was the issue of comparative fault, which has since been resolved in *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018). *Rodriguez* states in relevant part: “To be entitled to partial summary judgment in a comparative negligence case, a plaintiff does not bear the double burden of establishing a prima facie case of defendant’s liability and the absence of his or her own comparative fault.” The key, however, is whether the Plaintiff has established the defendant’s liability as a matter of law.

#### DEFENDANT’S OPPOSITION

Defendant’s counsel repeats some of the testimony from both parties. In summation, the car and the bicycle were moving in the same direction on Rte. 55. Plaintiff claims he rides his bicycle between the white painted line and the curb, on the right side of the roadway. He has two options if a car moves where he is biking; go into the curb or into the car. Plaintiff claims his bike was hit on it’s left rear side, but what is of interest, is he fell to his left, behind the Defendant’s car, which had passed him. Despite having to abide by the same rules as a motorist, *Baker v. Nassau County Activity League*, 265 A.D.2d 515 (2<sup>nd</sup> Dep’t, 1999); *Hyatt v. Messana*, 67 A.D.3d 1400 (4<sup>th</sup> Dep’t, 2009) see *Vehicle and Traffic Law 1231*; and despite claiming he was “vigilant”, Plaintiff says he did not see the car involved in the accident before he fell to the ground.

Defendant alleges he felt a bump on the right passenger rear of his car and when his wife said “oh my gosh, there’s a bicyclist. Defendant responded: (NYSCEF Doc. No. 16, page 17 lines 10-21 as follows:

- Q. Was that after you felt of heard the bump?  
A. Very much so, yes.  
Q. At that point when your wife said that to you, did you make any observations in the roadway where you were driving?  
A. **I looked in my mirrors.**

- Q. What, if anything did you see in your mirrors?**  
**A. I saw a bicyclist start to fall.**  
(emphasis added).

So after looking in his mirrors, which certainly indicates towards the rear of the Defendant's vehicle, not adjacent to or in front of, but behind the Defendant's vehicle, he sees the Plaintiff **start to fall**. (emphasis added). Not only does Plaintiff fall to his left, after being purportedly hit on the left side of his bike by a car, but he doesn't fall into the car, but falls after the car has passed him, since he fell behind the car. There is no testimony from either party as to where the Plaintiff was riding at the time of his fall, was it on the roadway itself, or the 2-3 feet between the white painted line and the curb. Did Plaintiff hit something on the roadway and fall? Swerve around something and fall? Hit the Plaintiff's car and fall?

Defendant cited several cases in support of its position that liability was not established. In *Gee v Malik*, 116 A.D.3d 918 (2<sup>nd</sup> Dep't, 2014) the Appellate Court affirmed summary judgment dismissing the complaint as the bicyclist in *Gee* was found to have rear-ended the defendant's car; A pre-*Rodriguez* case, *Garner v. Fox*, 265 A.D.2d 525 (2<sup>nd</sup> Dep't, 1999) partial summary judgment on liability in a motor vehicle/pedestrian accident was denied; another pre-*Rodriguez* case *Abrmanson v. Weller*, 224 A.D.2d 566 (2<sup>nd</sup> Dep't, 1996) was unimportant to the case at hand.

It is unclear to this Court where liability lies in this case. Neither party saw the other's vehicle at the time of the alleged accident. Neither party can unequivocally state where on the roadway or between the white painted line and the curb they were traveling.

By reason of all the foregoing it is

ORDERED that the Motion for Partial Summary Judgment by Plaintiff KEVIN M. MURPHY on the issue of Defendant PAUL N. ANZOVINO's liability is **denied**.

ORDERED, that parties and counsel shall appear for a virtual status conference on **October 19, 2020 at 10:00 A.M.** An email providing both the virtual link to participate as well as a telephone number will be forthcoming, please ensure this Court has email addresses for all parties.

The foregoing constitutes the decision and order of this court.

Date: September 8, 2020  
Poughkeepsie, New York

ENTER:

  
HON. HAL B. GREENWALD, J.S.C.

Joseph E. O'Connor, Esq.  
O'Connor & Partners, PLLC  
*Attorneys for Plaintiff*  
255 Wall Street  
Kingston, NY 12401

Richard B. Schoenberg, Esq.  
Law Office of John Trop  
*Attorneys for Defendants*  
90 Crystal Run Road, Suite 108  
Middletown, NY 10941

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.**