

**John v Marangiello**

2020 NY Slip Op 35210(U)

April 21, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 613490/2019

Judge: Carmen Victoria St. George

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**ORIGINAL**

**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

*Hon. Carmen Victoria St. George*  
**Justice of the Supreme Court**

**NICO JOHN,**

**Index No.  
613490/2019**

**Plaintiff,**

**Motion Seq:  
001 MD**

**-against-**

**Decision/Order**

**M.B. MARANGIELLO,**

**Defendant.**

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	9-15
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Plaintiff Nico John seeks partial summary judgment in his favor on the issue of liability for the happening of the motor vehicle accident giving rise to this action, a determination that defendant was the sole proximate cause of the accident, and that he, John, is free from comparative fault. Defendant opposes the requested relief.<sup>1</sup>

The accident occurred on December 23, 2017, at approximately 1:30 p.m., on Eastwood Boulevard, Suffolk County, New York. When the collision occurred, plaintiff was proceeding southbound on Eastwood Boulevard and defendant was making a left turn into a parking lot for the Centereach Plaza Mall.

The Court recognizes that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement thereto by submitting sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such *prima facie* showing requires a denial of the motion,

<sup>1</sup> A preliminary conference has not yet been held in this matter.

regardless of the sufficiency of the opposing papers (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts 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, supra* at 324). The Court’s analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendant (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The Court will first address that branch of this motion seeking partial summary judgment on liability.

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries [citation omitted]. A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case” (*Tsyganash v. Auto Mall Fleet Management, Inc.*, 163 AD3d 1033, 1033-34 [2d Dept 2018], citing *Rodriguez v. City of New York*, 31 NY3d 312 [2018]; see also *Poon v. Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Bell v. Angah*, 2018 NY Slip Op 30962 [U] [Sup Ct New York County 2018]; *CPLR §§ 1411, 1412*).

In support of his motion, plaintiff submits, *inter alia*, his affidavit, the pleadings, and one page of a certified police accident report. According to the police accident report, the defendant was not issued any tickets as a result of the accident; however, plaintiff was issued a ticket for violating section 511.1 (a) of the Vehicle and Traffic Law, Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree.

Plaintiff argues that the defendant violated Vehicle and Traffic Law § 1141 by turning directly into the path of plaintiff’s oncoming vehicle, which was lawfully present in the intersection (see *Ducie v Ippolito*, 95 AD3d 1067 [2d Dept 2012]). Vehicle and Traffic Law § 1141 provides 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.”

In his affidavit, plaintiff states that he was driving southbound on Eastwood Boulevard, that he possessed the right of way, and that there were no traffic control devices at the location of the accident. Plaintiff further states that while he was driving, “suddenly and without warning” defendant’s vehicle “failed to yield to my right-of-way and crossed into my path of travel while attempting to make a left turn into a parking lot.” Plaintiff asserts that he braked but was unable to avoid the collision because it happened in the matter of “a few seconds.”

Based upon the foregoing, plaintiff has established his *prima facie* entitlement to summary judgment as a matter of law on the issue of liability only (*Berner v. Koegel*, 31 AD3d 591 [2d Dept 2006]).

Plaintiff further explains in his affidavit that at the location of the impact, southbound Eastwood Boulevard splits into two lanes, and that he was driving in the rightmost lane. According to his affidavit, plaintiff states that there was a vehicle immediately to his left, in the leftmost southbound lane of Eastwood Boulevard that obstructed his view of oncoming northbound traffic, including his view of the defendant's vehicle. Plaintiff further avers that the vehicle to his left "was stopped at the time of the collision, and it is [his] understanding that they had stopped to allow the defendant to turn in front of it."

"Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (internal citation omitted), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v. Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]; see also *Rodriguez v. City of New York*, 31 NY3d 312 [2018]; cf. *Wray v. Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]).

Although plaintiff John does not specifically seek dismissal of defendant's first affirmative defense of comparative negligence, the fact that plaintiff acknowledges that his view of oncoming traffic was obstructed by the stopped vehicle immediately to his left, and that he continued to travel southbound on Eastwood Boulevard, apparently without pausing or stopping, prevents this Court from determining that plaintiff is free from comparative negligence in the happening of the subject accident. The issue of plaintiff's comparative fault will remain open for the jury to determine at trial (*Bell v. Angah*, 2018 NY Slip Op 30962 [U] [Sup Ct New York County 2018]).

Concerning partial summary judgment on the issue of liability, defendant's opposition raises an issue of fact sufficient to defeat this branch of plaintiff's motion. Defendant submits her own affidavit attesting to a materially different version of the subject accident.

According to defendant, she was traveling northbound on Eastwood Boulevard, intending to enter the parking lot to the mall. In order to enter the parking lot, defendant had to make a left turn across the southbound lane of traffic. Further according to defendant, there was only one lane in each direction at the accident location, not multiple lanes as plaintiff stated in his affidavit.

Defendant states that she had her left turn signal on. Before she began her turn, she states that she stopped her car in the northbound lane because southbound traffic on Eastwood Boulevard was backed up and stopped, although the southbound traffic did not block the entrance to the parking lot. Defendant avers that a white SUV was stopped in the southbound lane, just before the parking lot entrance, and that there were other vehicles stopped behind the SUV. The driver of the SUV waved to defendant, indicating that she could proceed with her left turn. The defendant proceeded to turn into the parking lot, characterizing the manner in which she turned as "slowly and completed . . . before the accident occurred." According to her affidavit, plaintiff's vehicle had crossed over the driveway/entrance to the parking lot, and only the rear of

her vehicle was in the southbound portion of Eastwood Boulevard when it was struck in the rear quarter panel on the passenger side by plaintiff's vehicle.

The Court finds that this account of the subject accident is materially different than plaintiff's account wherein he claims that defendant's vehicle crossed into his path of travel "suddenly and without warning." Accordingly, defendant has raised a triable issue of fact sufficient to defeat that branch of plaintiff's motion seeking partial summary judgment on the issue of liability.

Plaintiff's motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 21, 2020  
Riverhead, NY

/S/ HON. CARMEN VICTORIA ST. GEORGE   
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [ X ]