

Cortese v 117 N.Y. Ave. LLC
2020 NY Slip Op 35248(U)
August 31, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618225/2016
Judge: George M. Nolan
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SHORT FORM ORDER

INDEX No. 618225/2016
CAL. No. 201902084MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 3/11/20 (005 & 006)
MOTION DATE 4/16/20 (007)
ADJ. DATE 7/9/20
Mot. Seq. # 005 MD
 # 006 XMD
 # 007 MD

-----X
LUCIANO S. CORTESE,

Plaintiff,

- against -

117 NEW YORK AVENUE LLC, AMERICAN
CHOPHOUSE ENTERPRISES, LLC, d/b/a
PRIME RESTAURANT, UNIQUE VALET,
INC., SCOTT S. SABINO and ETH A.
PUGLIESE,

Defendants.
-----X

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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers filed by defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, on February 19, 2020; Notice of Cross Motion and supporting papers filed by plaintiff, on February 20, 2020; filed by defendant Eth A. Pugliese, on May 4, 2020; Answering Affidavits and supporting papers filed by defendant Eth. A. Pugliese, on May 4, 2020; filed by plaintiff, on May 5, 2020; filed by defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, on May 5, 2020; Replying Affidavits and supporting papers filed by plaintiff, on May 4, 2020; filed by defendant Eth. A. Pugliese, on June 9, 2020; Other _____; it is

ORDERED that the motion (#005) by defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, the cross motion (#006) by plaintiff Luciano S. Cortese, and the motion (#007) by defendant Beth. A. Pugliese, s/h/a Eth A. Pugliese, are consolidated for the purposes of this determination; and it is further

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ORDERED that the motion by defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, for summary judgment dismissing the complaint as asserted against them is denied; and it is further

ORDERED that the cross motion by plaintiff Luciano S. Cortese for, inter alia, summary judgment in his favor on the issue of the liability against defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC is denied; and it is further

ORDERED that the motion by defendant Beth A. Pugliese for summary judgment dismissing the complaint and all cross claims against her is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Luciano S. Cortese as a result of a motor vehicle accident, which occurred on June 12, 2016, at approximately 12:30 p.m., on New York Avenue, near the premises known as 117 New York Avenue, Huntington, New York. The accident allegedly occurred when a vehicle owned by defendant Beth A. Pugliese, s/h/a Eth A. Pugliese, and operated by defendant Scott S. Sabino, an employee of defendant Unique Valet, Inc. (Unique), collided with plaintiff, who was operating a bicycle northbound on New York Avenue. At the time of the accident, Unique contracted with defendant American Chophouse Enterprises LLC d/b/a Prime Restuarant (Prime) to provide valet services.

Defendants Unique, Sabino and Prime now move for summary judgment dismissing the complaint, arguing that plaintiff's conduct was the sole proximate cause of the accident, as he failed to yield the right of way, failed to keep a safe distance, and was negligent per se, as he was riding his bicycle on the sidewalk in violation of the Code of the Town of Huntington § 159-9 (A). In support of the motion, defendants submit, inter alia, the uncertified police accident report and the transcripts of the deposition testimony of the parties and of non-parties Jeffrey Pugliese and Kenneth C. Anna.

Plaintiff opposes the motion and cross-moves for summary judgment in his favor as against Unique, Sabino and Prime, arguing that Sabino failed to yield before exiting the driveway of Prime, in violation of, inter alia, Vehicle and Traffic Law § 1143, resulting in the collision with plaintiff, who was operating his bicycle with the right-of-way. In support of his cross motion, plaintiff submits a photograph of New York Avenue in front of Prime. Pugliese opposes plaintiff's cross motion, arguing that plaintiff was the sole proximate cause of the accident as he was operating his bicycle in violation of, inter alia, Vehicle and Traffic Law §§ 1234, 1129 (a) and Code of the Town of Huntington Town § 159-9 (A).

Defendant Pugliese also moves for summary judgment in her favor dismissing the complaint and all cross claims of her co-defendants, arguing that Sabino was not negligent in the operation of her vehicle, and that plaintiff was the sole proximate cause of the accident. In support of her motion, Pugliese submits the affirmation of her attorney. Plaintiff opposes the motion, arguing that Sabino's negligence was the sole proximate cause of the accident, and that, as owner of the vehicle, Pugliese is liable pursuant to Vehicle and Traffic Law § 388. Plaintiff submits, in opposition, the affirmation of his attorney.

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As an initial matter, the Court notes that the uncertified police accident report submitted by Unique, Sabino and Prime, which was also relied upon by Pugliese, is not in admissible form and will not be considered in the determination of the motion (*see* CPLR 4518 [a]; *Han Hao Huang v "John Doe,"* 169 AD3d 1014, 94 NYS3d 572 [2d Dept 2019]; *Adobea v Junel,* 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]).

"[A] person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle" (*Palma v Sherman,* 55 AD3d 891, 891, 867 NYS2d 111 [2d Dept 2008]; *see* Vehicle and Traffic Law § 1231). In addition, a bicyclist is required to use reasonable care, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in danger (*see Flores v Rubenstein,* 175 AD3d 1490, 109 NYS3d 390 [2d Dept 2019]; *Palma v Sherman, supra*). Vehicle and Traffic Law § 1146 provides that a motor vehicle driver "shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary." In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists (*see Chilinski v Maloney,* 158 AD3d 1174, 158 AD3d 1174 [4th Dept 2018]; *Palma v Sherman, supra; see also* Vehicle and Traffic Law § 1146). A motorist is also required to "see that which through the proper use of [his or her] senses [he or she] should have seen" (*Bongiovi v Hoffman,* 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see Shvydkaya v Park Ave. BMW Acura Motor Corp.,* 172 AD3d 1130, 100 NYS3d 320 [2d Dept 2019]; *Berish v Vasquez,* 121 AD3d 634, 993 NYS2d 567 [2d Dept 2014]). To meet his or her burden on a summary judgment motion, a defendant in a negligence action must establish, prima facie, that he or she was not at fault in the happening of the accident (*see Matias v Bello,* 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; *King v Perez,* 160 AD3d 708, 71 NYS3d 358 [2d Dept 2018]).

A restaurant providing valet parking services can be held liable for the negligence of the service whose attendants are alleged to have caused an accident to a third party, where the service is an independent contractor with which the restaurant has contracted (*see Evans v Norecaj,* 172 AD3d 576, 102 NYS3d 15 [1st Dept 2019]; *Spadaro v Parking Sys. Plus, Inc.,* 113 AD3d 833, 979 NYS2d 627 [2d Dept 2014]). This duty arises when there is an ability and opportunity to control the conduct of the restaurant's contractors and an awareness of the need to do so (*see Evans v Norecaj, supra*).

Defendants Unique, Sabino and Prime have failed to establish a prima facie case of entitlement to summary judgment dismissing the complaint, as triable issues of fact remain as to how the accident occurred (*see Matias v Bello, supra; Searless v Karczewski,* 153 AD3d 957, 60 NYS3d 431 [2d Dept 2017]; *see generally Calderon-Scotti v Rosenstein,* 119 AD3d 722, 989 NYS2d 514 [2d Dept 2014]; *Gause v Martinez,* 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012]). Defendants submit the transcript of the deposition of plaintiff who testified that he was riding his bicycle northbound on New York Avenue at the time of the accident. Plaintiff testified that he was riding on the roadway, that he was traveling with traffic, and that parked cars, a white line, and the curb was to his right and moving traffic was to his left. Plaintiff testified that he did not ride on the sidewalk at any point during his journey. Plaintiff testified that as he approached Prime on his left, his lane of travel was not governed by a traffic signal. He testified that as he approached Prime, he observed the vehicle Sabino was operating, and that it was stopped in the parking lot of Prime, immediately in front of the entrance. Plaintiff testified that he observed Sabino accelerate the vehicle straight across New York Avenue, approaching a parking lot

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directly across the street. Plaintiff testified that as he observed Sabino's vehicle enter his path of travel, he attempted to stop his bicycle, but was unable to avoid a collision, as he had less than a second to react. Plaintiff collided with the back half of the passenger side of the vehicle.

Sabino testified that on the date of the accident, he was working as a valet for Unique, parking vehicles for patrons of Prime. Sabino testified that there are two main parking lots where he would park cars, the first being immediately in front of the restaurant, and the second being the subject parking lot, which is directly across the street from Prime. Sabino testified that the second parking lot is controlled by a gate, that a "clicker" is used to operate the gate, and that the clicker is attached to a cone near the entrance to the lot. Sabino testified that on the date of the accident, he was operating Pugliese's vehicle with the intent of parking it in the lot across the street. He testified that he stopped at the exit of the first parking lot, looked both ways, and began crossing New York Avenue. He testified that he was operating the vehicle at between three to four miles per hour, that the weather conditions were clear and sunny, and that traffic on New York Avenue was moderate. Sabino testified that he did not see plaintiff on his bicycle until after the collision.

Here, the differing deposition testimony submitted by defendants in support of their motion supports different conclusions as to fault and contributory negligence (*see Cho v Demelo*, 175 AD3d 1235, 108 NYS3d 159 [2d Dept 2019]; *Cruz v Valentine Packaging Corp.*, 167 AD3d 707, 89 NYS3d 316 [2d Dept 2018]; *Goulet v Anastasio*, 148 AD3d 783, 48 NYS3d 731 [2d Dept 2017]). Generally, as there can be more than one proximate cause of an accident, it is for the trier of fact to determine same (*see Ardanuy v RB Juice, LLC*, 164 AD3d 1296, 83 NYS3d 634 [2d Dept 2018]; *Lukyanovich v H.L. Gen. Contrs., Inc.*, 141 AD3d 693, 35 NYS3d 463 [2d Dept 2016]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]). Sabino testified that he did not see plaintiff until after the accident occurred. Accordingly, viewing the facts in the light most favorable to the plaintiff, the moving defendants have failed to demonstrate, prima facie, that Sabino kept a proper lookout and that his alleged negligence did not contribute to the accident (*see Higashi v M&R Scarsdale, LLC*, 176 AD3d 788, 111 NYS3d 92 [2d Dept 2019]; *Brandt v Zahner*, 110 AD3d 752, 752-753, 974 NYS2d 482 [2d Dept 2013]; *Topalis v Zwolski*, 76 AD3d 524, 906 NYS2d 317 [2d Dept 2010]).

As Unique, Sabino and Prime have failed to meet their prima facie burden, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (*see* (CPLR 3212 [b]; *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])).

Turning to the motion by Pugliese for summary judgment dismissing the complaint and cross claims as asserted against her, she has failed to demonstrate prima facie entitlement to summary judgment. Vehicle and Traffic Law § 388 provides that an owner of a motor vehicle is vicariously liable for the negligence of those whom the owner allows to drive his or her vehicle (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 811 NYS2d 302 [2006]; *Jung v Glover*, 169 AD3d 782, 93 NYS3d 390 [2d Dept 2019]). Pugliese admitted during her deposition that she is the owner of the subject vehicle, and that Sabino operated it with her permission and consent (*see* CPLR 3018 [a]). As questions of fact exist with respect to the negligence of Sabino as the operator of the vehicle,

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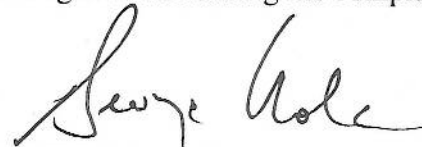
summary judgment in Pugliese's favor is not appropriate (*see Country-Wide Ins. Co. v National R.R. Passenger Corp., supra*).

With respect to plaintiff's cross motion for summary judgment in his favor on the issue of defendants' 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 (*see Rodriguez v City of New York*, 31 NY3d 312, 319, 76 NYS3d 898 [2018]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). Here, plaintiff failed to establish his prima facie entitlement to summary judgment on the issue of liability. As explained above, the deposition testimony of the parties presents conflicting evidence as to how the accident occurred (*see Sanders v Sangemino*, __ AD3d __, 124 NYS3d 820 [2d Dept 2020]; *Cho v Demelo; supra; see also Stukas v Streiter*, 83 AD3d 18, 22, 918 NYS2d 176 [2d Dept 2011]). As plaintiff has failed to eliminate triable issues of fact as to whether Sabino was negligent and, if he, himself, was negligent, and whether this negligence caused or contributed to the accident, plaintiff's cross motion for summary judgment on the issue of liability is denied (*see Tejada v Cedeno*, 173 AD3d 808; 99 NYS3d 686 [2d Dept 2019]).

As to plaintiff's application for an order awarding costs for attorney's fees and sanctions, pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR 130-1.1[a]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c]). Here, plaintiff's submissions in support of his application for sanctions are insufficient to establish that Unique, Sabino and Prime's attorney engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (*see Pinnock v Mercy Med. Ctr.*, 180 AD3d 1086, 119 NYS3d 566 [2d Dept 2020]; *Pearlman v Pearlman*, 163 AD3d 730, 81 NYS3d 407 [2d Dept 2018]; *Youcheng Wu v Jian Xu*, 137 AD3d 1016, 26 NYS3d 706 [2d Dept 2016]). Accordingly, the application for attorney fees is denied.

Accordingly, the motion by defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, for summary judgment dismissing the complaint as asserted against them is denied, the cross motion by plaintiff for summary judgment in his favor on the issue of the liability, and for sanctions against defendants Unique Valet, Inc., Scott S. Sabino, and American Chophouse Enterprises LLC, is denied, and the motion by defendant Beth A. Pugliese dismissing the complaint and all cross claims against her is denied.

Dated: August 31, 2020



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION