Kelly v Diaz
2020 NY Slip Op 35355(U)
October 19, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 608553/2020
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER **INDEX NO. 608553/2020**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

ROBERT KELLY,

Plaintiff,

-against-

CHRIS E. DIAZ and M. DIAZ-CABALLERO,

Defendants.

ORIG. RETURN DATE: September 17, 2020
FINAL RETURN DATE: September 17, 2020
MOT. SEQ. #: 001 MG

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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 August 31, 2020; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers filed by defendants, on September 9, 2020; Replying Affidavits and supporting papers filed by plaintiff, on September 16, 2020; Other _____; it is

ORDERED that the motion by plaintiff Robert Kelly for partial summary judgment in his favor on the issue of liability, and to dismiss defendants' first affirmative defense of culpable conduct, is granted; and it is further

ORDERED that a preliminary conference shall be held on November 20, 2020.

This is an action to recover damages for injuries allegedly sustained by plaintiff Robert Kelly as a result of a motor vehicle accident, which occurred on July 27, 2017, on Frowein Road, at or near its intersection with Moriches Middle Island Road, in Moriches, New York. The accident allegedly occurred when a vehicle operated by defendant Chris E. Diaz, and owned by defendant M. Diaz-Caballero, attempted to turn left, crossing into the path of plaintiff's vehicle, causing a collision.

Plaintiff now moves for summary judgment on the issue of defendants' liability, arguing that defendant driver's negligence was the sole proximate cause of the accident. Plaintiff argues that defendant driver violated, inter alia, Vehicle and Traffic Law § 1141 by making a left turn into the path of plaintiff's vehicle, which was traveling with the right-of-way. Plaintiff also seeks, in effect, to dismiss defendants' first affirmative defense of culpable conduct. In support of the motion, plaintiff submits, inter alia, his affidavit and a copy of the police accident report, which bears a stamp that it is "certified." Defendants oppose the motion, arguing that it is premature as no discovery has been completed. Defendants submit the affirmation of their attorney.

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 or into an alley, private road, or driveway 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 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 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]).

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 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*). 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*; *Enrique v Joseph*, *supra*; *Rohn v Aly*, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]).

Plaintiff has established his prima facie entitlement to summary judgment on the issue of liability by demonstrating that defendant driver was negligent, as he 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, by his affidavit, states that he was the seat-belted driver of his vehicle traveling westbound on Frowein Road, approaching its intersection with Moriches Middle Island Road. Plaintiff avers that as he approached the intersection, his direction of travel was governed by a traffic signal, and that it was illuminated green. Plaintiff states that he began to proceed straight through the intersection when suddenly, without warning, defendant driver attempted to make a left turn from eastbound Frowein Road onto northbound Moriches Middle Island Road, and struck his vehicle. Plaintiff states that the accident happened as defendant driver's vehicle was almost adjacent to his vehicle, leaving him no time to react or take evasive action. Plaintiff has also established his prima facie entitlement to summary judgment as to defendant M. Diaz-

Caballero. 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]).

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*). In opposition, defendants submit the affirmation of their attorney, alleging that further discovery is necessary to determine whether triable issues of fact exist as to the happening of the accident. However, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). Further, as defendant driver himself has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (*see Jobson v SM Livery, Inc.* 175 AD3d 1510, 109 NYS3d 376 [2d Dept 2019]; *Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 760, 825 NYS2d 516, 517 [2d Dept 2006]; *see Castro v Rodriguez*, 176 AD3d 1031, 111 NYS3d 55 [2d Dept 2019]; *Stubenhaus v City of New York*, 170 AD3d 1064, 96 NYS3d 662 [2d Dept 2019]). Thus, defendants' submissions fail to rebut plaintiff's prima facie showing that defendant driver's negligence was the sole proximate cause of the accident (*see Rodriguez v City of New York*, *supra*; *Zuckerman v City of New York*, *supra*).

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 his prima facie entitlement by demonstrating that he was traveling with the right-of-way and that the accident happened so quickly due to the action of defendant driver, he was unable to take evasive maneuvers to avoid the collision (*see Richardson v Cablevision Sys. Corp.*, supra; *Jeong Sook Lee-Son v Doe*, *supra*). In opposition, defendants have 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 in his favor on the issue of liability, and to dismiss defendant's first affirmative defense, is granted.

Dated: 10/19/20

HON. PAUL J. BAISLEY, JR., J.S.C.