SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

----------X

GARFIELD MARTIN,

Plaintiff,

- against -

ANAZARIO PARRA and QUEST LIVERY LEASING LLC d/b/a QUEST DELIVERY,

Defendants.

----------X

DECISION AND ORDER

Index No. 29757/2018E

John R. Higgitt, J.

Upon plaintiff's May 7, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' May 31, 2020 affirmation in opposition; plaintiff's May 31, 2020 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject accident, dismissal of defendants' first, second, third and sixth affirmative defenses, and CPLR 3126 relief is granted in part.

This is a negligence action to recover damages action for personal injuries plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on May 7, 2017. In support of his motion plaintiff submits the pleadings, the police accident report, the transcript of plaintiff's deposition testimony, and the affidavit of a non-party witness.

Plaintiff testified that he was traveling southbound on Buffalo Avenue near its intersection with Eastern Parkway in Kings County when he had to come to a stop due to a red traffic signal. Plaintiff testified that he intended to make a left turn onto Eastern Parkway. Plaintiff testified that as the traffic light turned green in his favor, allowing his vehicle to move forward, he began to make his left turn. At that time, defendants' vehicle, which was traveling northbound on Buffalo Avenue and which had a red traffic signal controlling its direction of travel, crossed the double yellow line into the southbound lane of oncoming traffic, passing the stopped cars in front of it and running the red

light at the intersection at high speed. Defendants' vehicle then crossed back into the northbound lane and collided with the front of plaintiff's vehicle, which was in the process of making the turn onto Eastern Parkway, tearing off plaintiff's front bumper.

Non-party witness Erik Washington averred that at the time of the accident he was a pedestrian near the subject intersection when he noticed defendants' vehicle cross the double yellow line into the southbound lane, run the red light at the intersection at high speed, and collide with the front of plaintiff's vehicle.

A violation of Vehicle and Traffic Law § 1126(a), which prohibits the hazardous crossing to the left of official roadway markings, constitutes negligence per se (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). Furthermore, under Vehicle and Traffic Law § 1120(a), a driver should drive his or her vehicle in the right lane of the roadway. A party can show that he or she is entitled to summary judgment by demonstrating that another party entered a lane of moving traffic when it was not safe to do so (*see Sanchez v Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]). Furthermore, under Vehicle and Traffic Law § 1111, any driver facing a steady red traffic signal should stop at a clearly marked stop line and should remain stopped until an indication to proceed is shown, and it is safe to do so. A driver that causes an accident by failing to stop at a red traffic light before entering an intersection is negligent as a matter of law (*see Tiefenthaler v Islam*, 66 AD3d 588 [1st Dept 2009]). A driver in his or her proper lane is not required to anticipate that a driver in the opposite direction will cross over into the former's lane of travel (*see Benedetto v New York*, 166 AD2d 209 [1st Dept 1990]).

Defendants assert that the motion should be denied because questions of fact exist as to how the accident occurred. Notably, however, defendant Parra failed to submit any admissible evidence (such as an affidavit) to contradict plaintiff's assertions, relying instead on the inadmissible hearsay police report (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]).

The aspect of plaintiff's motion seeking dismissal of defendants' first affirmative defense alleging lack of personal jurisdiction -- improper service -- is granted. Plaintiff provided an affidavit of service that demonstrates that service was complete (*see Newman & Leventhal, Inc. v Sanders*, 115 AD2d 360 [1st Dept 1985]). Defendants do not provide any admissible evidence opposing plaintiff's assertion that service of process was proper.

As to the aspect of plaintiff's motion seeking dismissal of defendants' third affirmative defense alleging plaintiff's comparative fault, plaintiff provided sufficient evidence to demonstrate that plaintiff bears no such fault. In opposition, defendants offered no evidence in admissible form raising a triable issue of fact.

The aspect of plaintiff's motion seeking dismissal of defendants' sixth affirmative defense, alleging collateral estoppel as to any issue that has been resolved in arbitration, is granted, without opposition.

The aspect of plaintiff' motion seeking dismissal of defendants' second affirmative defense is denied. While inartfully drafted, the second affirmative defense alleges, in effect, that plaintiff's injuries do not satisfy the "serious injury" requirement of Insurance Law § 5102(d). Plaintiff offered no evidence in admissible form establishing that he did sustain a threshold injury. (Of course, plaintiff was not required to do so obtain summary judgment on the issue of defendants' liability).

The aspect of plaintiff's motion seeking to strike defendants' answer for failure to appear for deposition as required by the March 8, 2019 case scheduling order, and the May 10, 2010, August 2, 2019, December 20, 2019, and March 13, 2020 compliance conference orders, is granted in part.

"The drastic sanction of striking pleadings is only justified when the moving party shows, conclusively, that the failure to disclose was willful, contumacious or in bad faith" (*Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). The sanction of preclusion may be imposed even where the failure to disclose was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]). The sanction imposed should be commensurate with and

proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]; *Christian, supra*). To avoid the imposition of a sanction, the non-disclosing party must set forth a reasonable excuse for the failure to disclose (*see Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11 [1st Dept 2000]). Given the nature and extent of defendants' disobedience, the preclusion penalty imposed below is appropriate.

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendants' liability is granted; and it is further

ORDERED, that the aspects of plaintiff's motion seeking dismissal of defendants' first, third and sixth affirmative defenses are granted, and those defenses are dismissed; and it is further

ORDERED, that the aspect of plaintiff's motion to strike defendants' answer for failure to appear for deposition is granted to the extent that defendant Parra is precluded from testifying at trial and offering an affidavit in connection with summary judgment motions; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

Dated: June 30, 2020

John R. Higgitt, J.S.C.