

McRae v American United Transp. Inc.

2020 NY Slip Op 35542(U)

March 17, 2020

Supreme Court, Bronx County

Docket Number: Index No. 25922/2019E

Judge: John R. Higgitt

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

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JASON MCRAE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 25922/2019E

AMERICAN UNITED TRANSPORTATION INC. and
"JOHN DOE/JANE DOE", a fictitious name for an
unknown driver of the vehicle owned by AMERICAN
UNITED TRANSPORTATION INC.,

Defendants.
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John R. Higgitt, J.

Upon plaintiff's September 23, 2019 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; defendant American United Transportation's ("America United") January 20, 2020 affirmation in opposition and the exhibits submitted therewith; plaintiff's January 27, 2020 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendant American United's liability for causing the subject accident is granted.

This is a negligence action to recover damages for personal injuries plaintiff sustained in a motor vehicle accident that took place on April 25, 2019. In support of his motion plaintiff submits the pleadings, the police accident report and his affidavit.

Plaintiff averred that a motor vehicle belonging to defendant American United struck him while he was riding his bicycle within the pedestrian crosswalk at the intersection of Amsterdam Avenue and 178th Street. Plaintiff also averred that he had a pedestrian crossing signal in his favor and that he checked for traffic before attempting to cross the intersection. Plaintiff further averred that as he was in the middle of the crosswalk he was struck by defendant American United's vehicle, which fled the accident scene.

Under Vehicle and Traffic Law §1146(a), a driver must exercise due care to avoid colliding with a pedestrian in a roadway. A driver must yield the right of way to pedestrians who are already within an intersection (*see Kirchgaessner v Hernandez*, 40 AD3d 437 [1st Dept 2007]), and the driver has a duty to see what is there to be seen and exercise reasonable care to avoid an accident (*see Vehicle and Traffic Law §1146[a]; Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]).

Plaintiff made a prima facie showing that the operator of defendant American United's vehicle violated Vehicle and Traffic Law § 1146 by failing to keep a proper lookout and failing to exercise due care to avoid striking plaintiff.

In opposition to plaintiff's motion defendant America United failed to raise a triable issue of fact as to its liability. Defendant American United asserts that the motion should be denied because plaintiff failed to submit evidence in admissible form, relying solely on a "self-serving" affidavit. However, an affidavit submitted by an interested party is competent evidence and may be sufficient to discharge the interested party's summary judgment burden (*see Miller v City of New York*, 253 AD2d 394, 395 [1st Dept 1998]). Defendant American United also challenges the admissibility of the police accident report; however, plaintiff's unrefuted affidavit was sufficient to meet her prima facie burden (*see Santana v Danco Inc.*, 115 AD3d 560 [1st Dept 2014]).

Defendant America United argues that the motion should be denied because there is a question of fact as to how the accident occurred. Defendant America United provided a MV-104 accident report containing statements made by Mario Castro, the driver of its vehicle, to the effect that the accident occurred because plaintiff sideswiped the American United vehicle. Castro's unsworn self-serving MV-104 accident report is hearsay and insufficient to raise a triable issue of fact (*see Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]).

Defendant American United further asserts that the motion is premature because depositions have not been completed. The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Castaneda, supra; Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]). Notably, defendant American United did not provide an affidavit from Castro in connection with this motion, and no reason was given for its failure to do so.

The court notes that plaintiff did not seek (and the court has not considered) dismissal of defendant American United's affirmative defense of plaintiff's comparative fault (*see CPLR 2214[a]; cf. Poon v Nisanov*, 162 AD3d 804 [2nd Dept 2018]).

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendant America United's liability is granted.

This constitutes the decision and order of the court.

Dated: March 17, 2020



John R. Higgitt, J.S.C.