Robb v City of New York
2021 NY Slip Op 30785(U)
March 12, 2021
Supreme Court, New York County
Docket Number: 154579/2014
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART**

Justice

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ANDREW ROBB,

Plaintiff,

- v -

THE CITY OF NEW YORK, BRENDON GRANT, ARON PRERO, KNIGHTS COLLISION EXPERTS, INC.

Defendant.

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INDEX NO. 154579/2014

MOTION DATE 01/02/2020, 05/05/2020, 01/04/2021

MOTION SEQ. NO. 009 010 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 355, 356

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400

were read on this motion to/for DISMISSAL.

In this action, plaintiff (Andrew Robb) claims that while operating his motorcycle on the northbound lane of the FDR Drive at approximately 12 Noon on August 29, 2013, he sustained injuries as a result of a slippery substance that was left on the roadway following an automobile accident at the same location earlier in the day.

Pending before the court are three motions. The first is Motion #009, filed by defendant Knights Collision Experts, Inc. ("KCE"), seeking an order pursuant to CPLR §§1003, 3212,

granting KCE summary judgment in its favor and dismissing the Summons and Complaint and all cross-claims against it. The second is Motion #010, filed by defendant Aron Prero ("Prero"), seeking an order pursuant to CPLR §3212, granting summary judgment to Prero on the grounds that no triable issues of fact exist on the issue of liability, because his vehicle was stopped and or stopping at the time he was rear-ended by plaintiff's motorcycle. The third is Motion #011, filed by defendant City of New York (the "City"), which seeks an order pursuant to CPLR §3212 granting summary judgment to the City, dismissing the complaint, and all cross-claims against the City, and striking the name of said defendant from the caption of this matter. All motions were fully briefed, and oral arguments on Motions #009 and #010 were heard before this court on January 14, 2021.

The function of the court, when presented with a motion for summary judgment, is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Motion #009 Wherein KCE Seeks Summary Judgment

KCE had previously moved for summary judgment and that motion was decided in a decision dated January 24, 2018 by Justice Kathryn E. Freed (the "Justice Freed decision").[1] The decision provided, in relevant part:

> Although the towing contract between KCE and The City of New York "does not in any way require [KCE] to perform any 'clean up" duties, or to perform any 'wash down' activities on any roadways," the permit granted to KCE by the City required, *inter alia*, that it comply with Vehicle and Traffic Law section 1219(c), which states that "[a]ny person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle." This, in and of itself, creates an issue of fact regarding whether KCE had a duty to clean any dangerous substance on the roadway from which it towed a vehicle. Thus, KCE is not entitled to summary judgment dismissing the complaint.
>
> […]
>
> Officer Rosa, who responded to the first accident, said that the roadway was wet and that KCE would routinely clean the area after an accident. Thus, this testimony raises additional issues regarding the scope of KCE's duties and the condition of the accident site.
>
> […]
>
> Additionally, plaintiff correctly asserts that where, as here, a motion for summary judgment is clearly premature as having been filed prior to a preliminary conference, and no discovery has been conducted, such application must be denied […] KCE's motion for summary judgment is thus denied with leave to renew after the completion of discovery.
>
> ORDERED that the branch of the motion, pursuant to CPLR 3212, for summary judgment seeking dismissal of plaintiff's claims against defendant Knights Collision Experts, Inc. is denied with leave to renew after the completion of discovery […]

In opposition to the instant motion, plaintiff argues that KCE failed to present any new information since Justice Freed's decision was issued, and that issues of fact remain.

With regard to the first point, this court finds that KCE did indeed present new information from three witnesses that were deposed during discovery after Justice Freed's decision had been issued and contrary to plaintiff's argument that Justice Freed's findings

[1] The Justice Freed decision was issued under index number 154878/2016. That action was consolidated with the instant action.

established the "law of the case," the court (Freed, J.) had granted KCE leave to renew its motion upon completion of discovery. As set forth below, however, there remains a material issue of fact, upon which summary judgment in KCE's favor cannot be granted.

Here, it is undisputed that KCE has a contract with co-defendant City of New York (the "City") to perform emergency towing and road service, including removal of disabled vehicles from the pertinent roadways to any designated destination, and that the contract does not, on its face, require KCE to perform any "clean up" duties, or to perform any "wash down" activities on any roadways. KCE's primary argument in support of its motion is that it was under no duty to maintain or clean the roadway after the earlier incident. Therefore, it bore no responsibility with respect to the condition of the road at the time of plaintiff's accident and, consequently, because it owed no duty to the plaintiff, it cannot be found to be in breach of such duty.

The following facts are undisputed: Approximately 90 minutes before the subject accident, there was an earlier incident wherein KCE towed two vehicles away. As a general practice, KCE's tow trucks were equipped with brooms, shovels and "Absorb-All" (a/k/a Speedy Dry). Absorb-All is a "kitty-litter type of substance" that is used to absorb and clean-up fluid spills at vehicular accidents, such as gasoline, oil and radiator fluid. When Absorb-All is used, the Sanitation Dept has to clean it up and cart it away in a process that usually takes an hour. On some occasions, when Absorb-All is not used, the roadway pavement is washed down with water from a hose. (The use of a hose would not be done by KCE, but by the FDNY or some other agency).

KCE further avers that they would only place Absorb-All if they were explicitly directed to do so by the NYPD. With respect to the incident that occurred earlier that same day, KCE is adamant that they did not use Absorb-All. KCE further argues:

> […] photographs confirm that there was no wetness, no washdown, and no slippery substance that was caused or contributed to by defendant KNIGHTS [KCE]. The photographs confirm that the area

behind that vehicle, into the rear of which vehicle plaintiff's motorcycle contacted, was completely dry and without any product, liquid, or anything else in the roadway.

Plaintiff argues that the FDNY performed a "wash down of hazardous vehicular fluids after the first accident... by use of a hose..." […] Yet, plaintiff offers no proof at all that any "hazardous vehicle fluids" actually were present after the first accident […] there is no evidence that any fluid was leaked from a vehicle towed by defendant KNIGHTS [KCE].

In contrast, plaintiff testified at his EBT, in relevant part, as follows:

p. 83
Q. After the accident while you were on the ground […]
A. […] There were stains on my shorts.

p. 84
O. What about this place when you were on the ground that you smelled reminded you of the scene, was there a particular smell, what was it like?
A. Like an accident scene. Burning oil, you know, radiator fluid, stuff that happens when things slam into each other.
Q. You indicated that you had some stains on your clothing at the scene of the accident. Were they wet?
A. They were moist, yes.

p. 85
Q. Which parts of your clothes were wet? Was it the shorts, the sneakers, the shirt, none of it, one part or the other?
A. The shorts and the shirt.

pp. 90-91
Q. […] what do you believe led to your vehicle sliding?
A. Bad conditions on the roadway.
O. Consisting of what?
A. Left over from the prior accident.
O. Left over what?
A. Automotive fluids. usually anti-freeze, oil gets dumped sometimes, transmission fluid.

The all-important question concerning the condition of the ground at the time of the accident remains in dispute. Plaintiff, in addition to testifying as quoted above, also argues in his papers that a report from the FDNY states that a "wash-down of a fuel spill" occurred. Nevertheless, KCE contends that the ground was "completely dry."

Accordingly, KCE's motion for summary judgment is DENIED.

Motion #010 Wherein Prero Seeks Summary Judgment

In the instant case, it is undisputed that a car attempted to merge onto the highway, causing a number of cars to suddenly decrease their speed. Four vehicles then collided with each other – Vehicle 1, Vehicle 2, Vehicle 3 and Vehicle 4 (which was driven by Prero). Plaintiff, (Aron Robb), who was on a motorcycle, subsequently collided with Prero's car (Vehicle 4).

In the instant motion, Prero moves for summary judgment on the basis that he was hit from behind by plaintiff (Robb). As Prero correctly argues, it is well settled that a rear-end collision with a stopped or stopping vehicle creates a presumption that the operator of the following vehicle was negligent and that when a rear-end collision occurs, the driver of the front vehicle is entitled to summary judgment on liability.

In opposition, Plaintiff argues that issues of fact exist as to whether Prero made an unsafe lane change, in violation of Vehicle and Traffic Law §1128 by moving from his existing lane on the roadway into plaintiff's lane, and that an issue of fact remains as to whether Prero's "maneuver" was safe at the time it was made.

VTL § 1128 (Driving on roadways laned for traffic) provides:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Here, plaintiff testified at his EBT, in relevant part, as follows:

> p. 29
> A. The conditions were normal, unremarkable. It was a sunny day. The traffic volume seemed pretty light and there were a few cars around, not bumper to bumper. It was midday. Business as usual and approaching the non-merge for the entrance ramp, the cars in my lane started braking. It looked like someone was coming on the entrance ramp and suddenly everyone started braking.

p. 31
Q. Prior to the moment of impact, were you in the left lane?
A. I was, and as soon as the braking commenced, I tried to get over to the right to have more room.

p. 44-45
Q. How soon after he started braking, did you start to brake?
A. Quite quickly. Less than a second.
Q. And what did your bike do in response to when you started braking?
A. The rear wheel slid a little bit to the left and I was attempting to maneuver to the right.
Q. Do you know why your rear wheel slid a little?
A. I don't. I was applying braking front and rear and just felt a little slip to the left.
Q. Did your bike stay upright throughout braking?
A. Yes, it did.
Q. Did you see what was happening in front of the car in front of you as braking was starting?
A. It seemed all the cars were in the process of braking very rapidly.

p. 46-47
Q. When you began braking and your wheels slid a little, were you able to regain control of your bike?
A. No.
Q. What happened then?
A. I was braking and trying to maneuver to the right and when the wheel slid, I was still trying to get to the right. I was able to get my front end around the car in front of me and the corner of the — the right rear corner of his bumper impacted the center of my bike on the left side and then the rear end came parallel to the bumper and my leg was pinched between the bike and the bumper and that smashed my tib and fib and then the bike righted and as it was headed northbound again it just fell on its side as I came to a stop.
Q. You testified that the vehicle in front of you was also trying to maneuver into the right lane; is that correct?
A. Yes.

p. 75-76
Q. The car in front of you was in the left lane, correct, that you came in contact with?
A. Yes. I think he was moving over to the right lane as well. He was transitioning.
Q. When you say you think his car was moving over to the right lane, was any part of that vehicle in front of you in the right lane?
A. I didn't look for where the white line was, but when I got off, I was in the right lane and looked up to see the guy who stopped and it seemed like I was directly in his line so --

p. 82
Q. You indicated earlier that before the impact between you and the vehicle in front of you, that you slid?
A. Yes, I did.
Q. Other than sliding, was there anything else that you noticed with respect to the braking of your vehicle?
A. I was still trying to maneuver, but while braking, while trying to make progress to the right lane, I couldn't get there. There was a loss -- I couldn't gain any ground that way. I couldn't get any traction.

It is well settled that "A rear-end collision with a stopped *or stopping* vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision *[italics added]*" (Samouhi v. Retamales, 180 A.D.3d 1099 [Sup. Ct. App. Div. 2nd Dept. 2020]). Further, "[i]n a chain collision accident, the operator of the middle vehicle may establish *prima facie* entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle" (Bardizbanian v. Bhuiyan, 181 A.D.3d 772 [Sup. Ct. App. Div. 2nd Dept. 2020]. Here, it is undisputed that prior to the accident, Prero's car was directly in front of plaintiff; that Prero's vehicle collided with the vehicles in front of him (Vehicles 1, 2 and 3); and that Prero's vehicle was either stopped, or in the process of stopping, at the time plaintiff collided with Prero.

Lastly, plaintiff's claim that Prero violated VTL §1128 by making an illegal lane change at the moment of impact, is not supported by the record. Here, plaintiff admits that *he himself* had applied the brakes and was trying to "maneuver to the right" in an attempt to avoid a collision with the car right in front of him.

Accordingly, Prero's motion for summary judgment is GRANTED.

Motion #011 Wherein KCE Seeks Summary Judgment

In this motion, the City argues that the complaint and all cross-claims against the City should be dismissed because the City was not a proximate cause of the alleged accident. Specifically, the City argues that there is neither admissible nor competent evidence of any spill or substance on the roadway of the FDR where this accident occurred; that there is no evidence

from plaintiff that there was a substance or spill on the roadway that required clean up by the City defendant; that plaintiff cannot maintain a claim against the City alleging a failure to clean the FDR from a "mysterious substance" as the proximate cause of the motor vehicle accident; and that based upon the allegations set forth by plaintiff in his pleadings and the testimony in this matter, plaintiff cannot demonstrate how any condition attributable to the City's alleged ownership, operation and/or control of the roadway was the proximate cause of the incident.

As a preliminary matter, this court finds that the City's motion is timely, as the Governor's Executive Orders, which were issued in response to the Covid-19 pandemic, had tolled deadlines to serve a "notice" or a "motion."

With respect to the City's argument that there was no spill or substance on the roadway that could have been the proximate cause of plaintiff's accident, the court notes that plaintiff testified to the contrary in his EBT (see quotes from plaintiff's EBT, with respect to motion #009 above). Furthermore, plaintiff argues that a police officer reported that the roadway was wet on the scene of the prior accident, and that based on the certified climatological data, such wetness could *not* have been attributed to precipitation. Plaintiff also argues that the FDNY report of the first accident shows that part of what was done was "Hazardous materials spill control and confinement," under FDNY radio code 10-36 - code 3, which equates to the code for "Automobile emergency...any type of automobile accident or washdown of a fuel spill."

As noted *supra*, with respect to Motion #009, the important question concerning the condition of the ground at the time of the accident remains in dispute. The City's remaining contentions are unavailing. Accordingly, the City's motion is DENIED.

Conclusion

It is hereby ORDERED that Motion Sequence #009 is DENIED; Motion Sequence #010 is GRANTED; and Motion Sequence #011 is DENIED. Defendant Prero is awarded summary judgment in his favor, and the complaint is DISMISSED WITH PREJUDICE with respect to defendant Prero.

3/12/2021
DATE

HON. J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE