| **Mendel v Massre** |
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| 2021 NY Slip Op 30793(U) |
| March 3, 2021 |
| Supreme Court, Kings County |
| Docket Number: 504696/2018 |
| Judge: Lara J. Genovesi |
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 3rd day of March 2021.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

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KESLER MENDEL,

Index No.: 504696/2018

Plaintiff,

DECISION & ORDER

-against-

RALPH MASSRE,

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | NYSCEF Doc. No.: |
|---|---|
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed | 25, 26 |
| Opposing Affidavits (Affirmations) | 39 |
| Reply Affidavits (Affirmations) | |

***Introduction***

Plaintiff, Kesler Mendel, moves by notice of motion, sequence number two, pursuant to CPLR § 3212, for summary judgment on the issue of liability and striking all related affirmative defenses from defendant's answer. Defendant, Ralph Massre, opposes this motion.

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***Background***

This action involves a motor vehicle accident on April 11, 2016 on Coney Island Avenue between Avenue I and Avenue J in Brooklyn, New York. It is undisputed that Coney Island Avenue has four moving lanes, two southbound and two northbound, and one parking lane on either side of the road. It is also undisputed that the accident occurred in the middle of the road, where defendant's vehicle in part crossed into oncoming traffic.

Plaintiff Kesler Mendel testified at an Examination Before Trial ("EBT") on September 20, 2019 with a Russian interpreter (*see* NYSCEF Doc. # 33, Plaintiff EBT). Plaintiff testified that he was driving southbound in the left moving lane on Coney Island Avenue (*see id.* at 18). This portion of Coney Island Avenue is divided by a yellow line where vehicles cannot make U-turns (*see id.*). Plaintiff did not see defendant's vehicle prior to the accident and first saw defendant's vehicle during the collision when defendant "exited on U-turn" and "turned into" plaintiff while plaintiff was moving (*see id.* at 19-22). Defendant struck the front fender and the front door on the left side of plaintiff's vehicle (*see id.* at 21). Plaintiff did not do anything to distract him from driving and was not using lip balm (*see id.* at 20, 21, 28).

Defendant Ralph Massre testified at an EBT on August 17, 2020 (*see* NYSCEF Doc. # 34, Defendant EBT). Defendant testified that he was driving northbound in the right moving lane (*see id.* at 13, 18). Parked school buses took up the parking lane and both moving lanes (*see id.* at 18). "Traffic started to go around the school buses," and defendant moved from the right moving lane to the left moving lane (*see id.*). Defendant

stopped for approximately five to ten seconds, checked to make sure that there was no oncoming traffic, and saw two or three cars driving toward him in the southbound direction (*see id.* at 21, 24). Defendant moved "left to go around the bus" drove around the school buses (*see id.* at 18, 26). Defendant "had to" drive in a "yellow lane" that divides the two directions of traffic on Coney Island Avenue (*see id.* at 18). Defendant annexed an aerial image of Coney Island Avenue between Avenues I and J, which displays that the north and southbound directions of the Avenue are separated by a yellow lane with hatched yellow markings (*see* NYSCEF Doc. # 39, Exhibit B). The image is not dated (*see id.*). When defendant drove through the yellow lane, he crossed over the yellow marked area, and was "not fully," but "partially," driving against oncoming traffic (*see* NYSCEF Doc. # 34, Defendant EBT at 20). Defendant saw plaintiff's vehicle drive toward him from about 50 to 75 feet away and saw plaintiff "putting Chapstick on" and "looking down" (*see id.* at 21, 27). Plaintiff's vehicle "slightly varied into the yellow lane as well" (*see id.*). Defendant turned his vehicle as far right as possible without hitting the school bus, stopped, and honked his horn to get plaintiff's attention (*see id.* at 27, 30). Defendant's vehicle was stopped in the yellow lane for "about 10 to 15 seconds. Could have been 20" (*see id.* at 28). Plaintiff "didn't even look up," and the front passenger side of defendant's vehicle contacted the front driver's side of plaintiff's vehicle (*see id.* at 26, 27).

This action was commenced by the filing of the summons and complaint on March 7, 2018 (*see* NYSCEF Doc. # 1). Issue was joined on May 4, 2018 (*see* NYSCEF Doc. # 5). Note of issue was filed on May 20, 2020 (*see* NYSCEF Doc. # 12).

***Discussion***

***Summary Judgment***

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]).

> Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment has the burden of establishing freedom from comparative negligence as a matter of law (*see Inesta v. Florio*, 159 A.D.3d 682, 71 N.Y.S.3d 161; *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124; *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282). "In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident" (*Ellis v. Vazquez*, 155 A.D.3d 694, 695, 63 N.Y.S.3d 530; *see Fried v. Misser*, 115 A.D.3d 910, 911, 982 N.Y.S.2d 574; *Brandt v. Zahner*, 110 A.D.3d at 753, 974 N.Y.S.2d 482; *Topalis v. Zwolski*, 76 A.D.3d 524, 525, 906 N.Y.S.2d 317). The issue of comparative fault is generally a question for the trier of fact (*see* CPLR 1411; *Inesta v. Florio*, 159 A.D.3d 682, 71 N.Y.S.3d 161; *Gezelter v. Pecora*, 129 A.D.3d

> 1021, 1022, 13 N.Y.S.3d 141; *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d at 777, 949 N.Y.S.2d 124; *Allen v. Echols*, 88 A.D.3d 926, 927, 931 N.Y.S.2d 402).

(*Ballentine v. Perrone*, 179 A.D.3d 993, 114 N.Y.S.3d 696 [2 Dept., 2020]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic" (*Browne v. Logan Bus Co., Inc.*, 156 A.D.3d 856, 65 N.Y.S.3d 780 [2 Dept., 2017], quoting *Lee v. Ratz*, 19 A.D.3d 552, 798 N.Y.S.2d 80 [2 Dept., 2005]; *see Barbaruolo v DiFede*, 73 A.D.3d 957, 900 N.Y.S.2d 671 [2 Dept., 2010]; *Sullivan v Mandato*, 58 A.D.3d 714, 873 N.Y.S.2d 96 [2 Dept., 2009]; *Snemyr v Morales-Aparicio*, 47 A.D.3d 702, 850 N.Y.S.2d 489 [2 Dept., 2008]). "Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126 (a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making" (*Browne v. Logan Bus Co., Inc.*, 156 A.D.3d 856, *supra*, quoting *Foster v. Sanchez*, 17 A.D.3d 312, 792 N.Y.S.2d 579 [2 Dept., 2005]; *see Rodriguez v Gutierrez*, 138 A.D.3d 964, 31 N.Y.S.3d 97 [2 Dept., 2016]; *Pearson v Northstar Limousine, Inc.*, 123 A.D.3d 991, 999 N.Y.S.2d 478 [2 Dept.,

2014]; *DiSiena v Giammarino*, 72 A.D.3d 873, 898 N.Y.S.2d 664 [2 Dept., 2010]; *Marsicano v Dealer Stor. Corp.*, 8 A.D.3d 451, 779 N.Y.S.2d 102 [2 Dept., 2004]; *Gadon v Oliva*, 294 A.D.2d 397, 742 N.Y.S.2d 122[2 Dept., 2002]).

In the case at bar, plaintiff met his prima facie showing of entitlement to summary judgment as to liability. Both parties testified that defendant drove through the yellow lane in the center of Coney Island Avenue (*see* NYSCEF Doc. # 33, Plaintiff EBT at 19-22; NYSCEF Doc. # 34, Defendant EBT at 18-20). While the Court does not consider the aerial image of Coney Island Avenue provided by defendant because the image is not dated, defendant testified that as he drove his vehicle through the yellow lane, and that he "partially" drove against oncoming traffic in the southbound lane (*see* NYSCEF Doc. # 34, Defendant EBT at 20). Both parties testified further that the accident occurred while defendant's vehicle was in the yellow lane (*see* NYSCEF Doc. # 33, Plaintiff EBT at 20; NYSCEF Doc. # 34, Defendant EBT at 20). In opposition, defendant did not provide a nonnegligent explanation for driving through the yellow lane, partially against oncoming traffic.

Although plaintiff met his prima facie burden as to liability, he did not make a prima facie showing that he is free from comparative fault (*see Criollo v. Maggies Paratransit Corp.*, 155 A.D.3d 683, 63 N.Y.S.3d 516 [2 Dept., 2017]; *Gobin v. Delgado*, 142 A.D.3d 1334, 38 N.Y.S.3d [2 Dept., 2016]; *Vainer v. DiSalvo*, 79 A.D.3d 1023, *supra*). The Police Accident Report annexed to plaintiff's motion is not certified, and therefore there is not the proper foundation for the admissibility of the report (*see* CPLR § 4518(a); *see generally Yassin v. Blackman*, 188 A.D.3d 62, 131 N.Y.S.3d 53 [2 Dept.,

2020]). It is unclear from plaintiff's testimony whether he saw defendant's vehicle moving prior to the collision, and whether he could have done anything to avoid the collision. Defendant testified that he was stopped in the yellow lane for at least 10 seconds and honked his horn prior to the collision (*see* NYSCEF Doc. # 34, Defendant EBT at 27, 28). Further, plaintiff's and defendant's conflicting testimonies regarding whether plaintiff was looking up or distracted immediately before the collision creates a question of fact as to whether plaintiff failed to keep the proper lookout, or that his alleged negligence, if any, did not contribute to the accident (*see Ballentine v. Perrone*, 179 A.D.3d 993, supra). Although plaintiff relies on *Tsai v. Zong-Ling Duh* for the proposition that plaintiff cannot be comparatively negligent when defendant crossed into oncoming traffic, the facts in that case are not analogous. In *Tsai*, defendant's vehicle, which was stopped at a red light, was struck by a vehicle that crossed into oncoming traffic and faced with an instantaneous cross-over emergency leaving virtually no opportunity to avoid the collision (*see Tsai v. Zong-Ling Duh*, 79 A.D.3d 1010, 913 N.Y.S.2d 748 [2 Dept., 2010]). Here, although defendant's vehicle crossed over, he testified that he was at a complete stop for 10-20 seconds prior to the collision, and therefore plaintiff's comparative negligence remains an issue of fact.

***Conclusion***

Accordingly, defendant's motion for summary judgment is partially granted as to liability and is denied as to the issue of comparative fault. This constitutes the decision and order of this case.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

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