Patterson v White
2021 NY Slip Op 31717(U)
May 10, 2021
Supreme Court, Kings County
Docket Number: 502027/2020
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 10th day of May, 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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DAMION NICARDO PATTERSON,

Plaintiff,

-against-

ROGER O. WHITE and EGERTON A. WHITE,

Defendant.

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Index No.: 502027/2020

DECISION AND ORDER

Motion Sequence #1

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	12-17,
Opposing Affidavits (Affirmations)	21-23,
Reply Affidavits (Affirmations)	25

After a review of the papers and oral argument on the motion the Court finds as follows:

This lawsuit arises out of a motor vehicle accident which allegedly occurred on May 14, 2019. Plaintiff, Damion Nicardo Patterson (hereinafter the "Plaintiff") alleges in his Complaint that he suffered personal injuries when the vehicle owned by Defendant Egerton A. White and operated by Defendant Roger O. White (hereinafter the "Defendants") collided with him as he rode his electric bicycle. The collision occurred on Church Avenue at or near its intersection with East 98th Street, in the County of Kings, City and State of New York.

The Plaintiff now moves (Motion Sequence #1) for an order pursuant to CPLR 3212 granting partial summary judgment against the Defendants on the issue of liability. The Plaintiff contends that the collision occurred when the Defendants' vehicle turned right, without signaling and without observing the

presence of the Plaintiff. The Plaintiff contends that as a result, the Defendant driver was negligent as a matter of law given that he turned right without signaling and without ensuring that the right turn could be made with reasonable safety. In opposition, the Defendants contend that there is at least an issue of fact regarding whether the Plaintiff or Defendant driver were negligent and a proximate cause of the accident. Defendants contend that at the time of the collision the Plaintiff attempted to pass the Defendant driver on the right, after the Defendant Driver had already started his right turn.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

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." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. It is true that "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case..." they can show "...that

the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2nd Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the Plaintiff's motion, the Court finds that the Plaintiff has met his *prima facie* burden. In his affidavit, the Plaintiff testified that he was driving his electric bicycle on East 98th Street as he witnessed the "Infinity [Defendant's vehicle] was still at the stop line when the light turned green and had no turn indicators or hazard lights on, only brake lights." The Plaintiff thereafter stated that "[a]s I reached the pedestrian crosswalk on East 98th Street at its intersection with Church Avenue, the Infiniti accelerated and suddenly started to make a right turn from East 98th Street onto Church Avenue." The Plaintiff also noted that "[w]hen the Infiniti suddenly and unexpectedly turned right, he struck the front left side of my bike with the middle of the passenger side of his car, knocking me and my bike to the ground and injuring me." (See Plaintiff's Motion, Affidavit). This is sufficient for the Plaintiff to meet his *prima facie* burden, as "[d]rivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident." *Zweeres v. Materi*, 94 A.D.3d 1111, 1111, 942 N.Y.S.2d 625, 626 [2d Dept 2012]. Moreover, the Plaintiff alleged a violation of VTL 1163(a) in that the Defendant did not have his turning signal on. *See* 1163(a) of the Vehicle and Traffic Law.

In opposition, the Defendant has raised a material issue of fact. The Defendant relies on his affidavit and a certified police accident report. In his affidavit, the Defendant merely states that "[a]fter the bus had completed its turn onto Church Avenue, I started to make a right turn onto Church Avenue." The Defendant then states that "[a] bicyclist who had been riding behind me in the same direction attempted to pass my vehicle from the right and struck my rear passenger door." (See Affirmation in Opposition, Affidavit of Defendant, Paragraphs 9 and 10). The Court finds that the affidavit of the Defendant driver stating that the bicycle struck his rear passenger door is sufficient to raise an issue of fact to be resolved

at trial. *See Welch v. Suffolk Coach, Inc.*, 162 AD3d 1097, 1098, 80 N.Y.S.3d 114, 116 [2d Dept 2018]; *Mohr v. Carlson*, 120 AD3d 1206, 1208, 992 N.Y.S.2d 321, 323 [2d Dept 2014]. There is clearly a material issue of fact raised by the conflicting testimony of the parties as to how the accident occurred. However, notwithstanding this material issue, the Plaintiff has alleged the Defendant's failure to engage his turning signal and the Defendant has not refuted this allegation. That failure is a violation of VTL 1163(a) and constitutes negligence. Therefore the Defendant driver was negligent and a proximate cause of the accident. *See Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]. Accordingly, the motion is granted to that extent.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiffs' motion (motion sequence #1) for partial summary judgment is granted, subject to a determination of comparative liability at trial.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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