Pena v Ace-Atlas Corp.
2021 NY Slip Op 32768(U)
December 22, 2021
Supreme Court, Kings County
Docket Number: Index No. 511080/2019
Judge: Larry D. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ANNEURY PENA,

Plaintiff,

-against-

ACE-ATLAS CORP. and JOSE DIGIOVANNI,

Defendants.
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Index No. 511080/2019

DECISION & ORDER
Hon. Larry D. Martin

Plaintiff Anneury Pena commenced this negligence action after a vehicle driven by Defendant Jose DiGiovanni and owned by his employer, co-Defendant Ace-Atlas Corp., struck Pena's vehicle. Following discovery, Pena moves, inter alia, for summary judgment as to liability pursuant to CPLR § 3212 and to strike Defendants' affirmative defenses of comparative and contributory negligence (Seq. No. 3, NYSCEF 54).

I. Background

Immediately preceding the accident, Plaintiff Pena was driving eastbound on Flushing Avenue ("Flushing"), a Queens, NY thoroughfare, and DiGiovanni, in Ace-Atlas's van, was pulling out of a tire shop's parking lot on the same eastern side of Flushing. DiGiovanni alleges he "intended to make a left turn onto Flushing westbound," which required his crossing the eastbound lane, and that, before doing so, he activated his left turn signal, looked for traffic in both directions, and waited until a transit bus driver, who was traveling Flushing eastbound, "stopped before reaching the tire shop, and waved . . . so that [DiGiovanni] could make a left turn." Only once "it was safe to proceed," DiGiovanni says, did he "beg[i]n to slowly and cautiously pass in front of the bus . . . traveling no more than five miles per hour." According to DiGiovanni, Pena

illegally "passed the stopped transit bus in the westbound lane," because the sole eastbound lane "was occupied by the bus" and collided with DiGiovanni's vehicle.

In contrast, Pena maintains that Flushing actually has four lanes—rather than two—and that DiGiovanni struck Pena's vehicle while "attempting to make an improper U-Turn from the [eastern] parking lane" and that DiGiovanni alleged for the first time, at his deposition, that he "reversed in the parking lane against traffic into a driveway and was attempting to make a left turn, not a U turn." The responding police officer's report supports Pena's U-turn theory.[1]

II. Arguments

Pena asks this Court to accept his version of the facts: that DiGiovanni attempted to make a U-turn without yielding to Pena's right-of-way, thereby violating VTL §§ 1160(e) (U-turns),[2] 1141 (left turns),[3] 1143 (entry to roadways from non-roadways),[4] and 388 (owner's liability)[5]. According to New York precedent, Defendant is therefore negligent as a matter of law.

DiGiovanni rebuts that, because Pena illegally "passed the stopped transit bus" going in the wrong direction, Pena is negligent as a matter of law. In support, DiGiovanni offers a Google maps image suggesting that Flushing has only one lane of traffic in each direction at the site of accident. DiGiovanni charges, at bottom, that Pena has failed to carry his burden of establishing prima facie that he is free from comparative fault.

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1 "V1 [Pena] states that he was driving straight when driver of V2 [DiGiovanni] attempted a U-turn from V1's right side causing V2 to strike V1. Driver of V2 states that he was waiting to make U-turn, saw that no cars were coming and attempted to make the U-turn when V1 tried to drive passed him on the left side, causing V2 to strike V1."

2 "U-turns shall be made from and to that portion of the highway nearest the marked center line. . . ."

3 "The driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection . . . ."

4 "The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed . . . ."

5 "Every owner of a vehicle . . . shall be liable . . . for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

III. Discussion

Summary judgment is granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (*see* CPLR § 3212 [b]). To succeed, the movant must make a prima facie showing of entitlement to same, by demonstrating the absence of any material issues of fact (*see Winegrad v. NY Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Still, the opposant may defeat the motion by submitting sufficient evidence to raise a triable issue of fact as to the movant's comparative fault (*see Brown v Mackiewicz*, 120 AD3d 1172, 1173, 992 NYS2d 314, 315 [2d Dept 2014]).

While a VTL violation ordinarily constitutes negligence as a matter of law (*Ricciardi v Nelson*, 142 AD3d 492, 493, 35 NYS3d 724, 725 [2d Dept 2016]), summary judgment is usually inappropriate in negligence cases since whether a party acted reasonably under the circumstances can "rarely be resolved as a matter of law" (*Charles v Garber*, 195 AD2d 585, 600 NYS2d 739 [2d Dept 1993]). In the same vain, since there "can be more than one proximate cause of an accident," the "issue of comparative fault is generally a question for the jury to decide" (*Vuksanaj v Abbott*, 159 AD3d 1031, 1032, 73 NYS3d 224, 226 [2018]).

Moreover, although a driver with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield (*Bennett v Granata*, 118 AD3d 652, 652, 987 NYS2d 424, 425 [2d Dept 2014]), she nonetheless retains the duty to use reasonable care to avoid a collision with a driver who has improperly failed to do so (*Marcel v Sanders*, 123 AD3d 1097, 1097–98, 1 NYS3d 230, 232 [2d Dept 2014]; *Yelder v Walters*, 64 AD3d 762, 764, 883 NYS2d 290, 292 [2d Dept 2009]). Additionally, a VTL violation may be excused if the driver

exercised reasonable care in an effort to comply (*see Brown v State*, 31 NY3d 514, 2018 NY Slip Op 04029 [2018]).

Here, the parties dispute whether, at the time and site of the accident, there were four lanes or two. Both parties oscillate in recounting material facts. Critically, DiGiovanni alleges the involvement of a non-party transit bus driver, to whom he did in fact yield, thereby arguably complying with the VTL provisions that Pena alleges he violated. Furthermore, he alleges that he proceeded carefully and slowly suggesting that he exercised reasonable care in an effort to comply, which may excuse a violation for purposes of liability. True, too, that even if Pena had the right of way, he retained the duty to use reasonable care to avoid colliding with a driver who improperly failed to yield.

Since summary judgment motions "do not allow for credibility assessments on the part of the courts deciding them" (CPLR § 3212 ed. note), Pena has not made a prima facie showing of entitlement judgment as a matter of law and DiGiovanni and Ace-Atlas have submitted sufficient evidence to raise triable issues of fact as to Pena's comparative fault.

Accordingly, it is hereby

ORDERED, Plaintiff's motion for summary judgment (Seq. No. 3) is **denied**.

Dated: **December 22, 2021**

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

Hon. Larry D. Martin, J.S.C.