SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PRESENT: Donna-Marie E. Golia, JSC Part 21

CHARLES R. MEALING,

Plaintiff,

v

GARY D. CLARK,

Defendant.

Index No. 703062/2020
Motion Date: 8/16/2021
Motion Seq. No.: 002

DECISION & ORDER

The following electronically filed papers numbered EF15 to EF22 and EF27 to EF31 read on this motion by plaintiff for summary judgment and to strike defendant's first affirmative defense regarding plaintiff's alleged culpable conduct and/or comparative negligence:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, Exhibits, Affidavit of Service.....	EF15 – EF22
Affirmation in Opposition, Exhibits.....	EF27 – EF28
Affirmation in Reply, Exhibits, Affidavit of Service.....	EF29 – EF31

Plaintiff Charles R. Mealing ("plaintiff") moves, pursuant to CPLR 3212, for summary judgment on liability and to strike defendant's first affirmative defense regarding his alleged culpable conduct and/or comparative negligence. Defendant Gary D. Clark ("defendant") opposes the motion. Upon the papers submitted, plaintiff's motion is denied, as discussed more fully below.

Plaintiff commenced this action for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on January 8, 2020 on 99th Avenue at or near its intersection with 217th Street in Queens, New York. Plaintiff alleges that defendant operated his vehicle on the wrong side of the roadway and struck his vehicle head-on when he was stopped eastbound at a stop sign. Specifically, plaintiff notes that while 99th Avenue runs in an eastbound direction, defendant operated his vehicle in a westbound direction when he turned left on 99th Avenue from Hempstead Turnpike.

In his motion, plaintiff argues that defendant solely caused the alleged accident by striking his vehicle head-on when he operated his vehicle on the prohibited side of the roadway in violation of various provisions of the Vehicle and Traffic Law, including, *inter alia*, §§ 1142, 1101 and 1146. Plaintiff contends that since defendant's vehicle was traveling in the wrong direction on a one-way road when he was stopped at a stop sign,

he had no time to sound his horn or turn his wheel to avoid defendant's vehicle. In that regard, plaintiff avers that he is not responsible for the happening of the alleged accident.

In opposition, defendant argues that the motion should be denied because plaintiff failed to annex a statement of material facts to his motion papers pursuant to 22 NYCRR 202.8-g[a]. Defendant also argues that there are material issues of fact as to the happening of the alleged accident and plaintiff's comparative fault, including, *inter alia*, issues as to whether plaintiff was traveling at an excessive rate of speed or was otherwise negligent in failing to take sufficient action to avoid contact with his vehicle. Defendant further asserts that there are questions of fact as to whether plaintiff acted reasonably under the circumstances and failed to see that which he should have seen.

In reply, plaintiff asserts that defendant admitted to the police that his vehicle struck plaintiff's vehicle. Plaintiff also argues that contrary to defendant's position, the police accident report submitted in support of his motion is admissible.

Summary judgment pursuant to CPLR 3212 provides a mechanism for the prompt disposition, prior to trial, of civil actions which can be decided as a matter of law (see generally, Brill v City of New York, 2 NY3d 648, 650 [2004]). On a motion for summary judgment, the moving party must make out a *prima facie* case by submitting evidence in admissible form which establishes its entitlement to judgment as a matter of law (see, Marshall v Arias, 12 AD3d 423, 424 [2d Dept 2004]). Upon such a showing, the burden shifts to the non-moving party to present admissible evidence which demonstrates the necessity of a trial as to an issue of fact (see, Zolin v Roslyn Synagogue, 154 AD2d 369, 369 [2d Dept 1989]). The non-moving party must be afforded every favorable inference that can be drawn from the evidentiary facts established (see, McArdle v M & M Farms, 90 AD2d 538 [2d Dept 1982]). However, conclusory, unsupported allegations or general denials are insufficient to defeat a motion for summary judgment (see, William Iselin & Co., Inc. v Landau, 71 NY2d 420, 427 [1988]).

Procedurally, plaintiff's failure to annex a statement of material facts to his motion papers pursuant to 22 NYCRR 202.8-g[a] warrants denial of the motion. Pursuant to 22 NYCRR 202.8-g[a], "[u]pon any motion for summary judgment . . . there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Indeed, it has been held that this rule is not "discretionary," but rather, "a summary judgment movant who fails to set forth a material statement of facts as required by the rule has failed to properly put those facts before the court in the first instance" (see, Amos Fin. LLC v Crapanzano, 73 Misc 3d 448 [NY Sup Ct Rockland County 2021]; Payano v Robinson, 2021 WL 5044285, at *1 [NY Sup Ct Bronx County Sep 13, 2021]; Guerrero v Carnegie Valet Cleaning Corp., 2021 WL 5044283, at *1 [NY Sup Ct Bronx County Sep 21, 2021]). Here, as plaintiff has failed to comply with the directives of 22 NYCRR 202.8-g[a], his motion is hereby denied (see, id.).

Assuming *arguendo* that plaintiff had properly complied with the procedures of 22 NYCRR 202.8-g[a], plaintiff's motion nonetheless warrants denial on substantive grounds

as there are triable issues of fact sufficient to preclude summary judgment on the issue of liability. Specifically, while plaintiff establishes his *prima facie* showing by submitting an affidavit in which he attests that he was "stopped at a stop sign in an eastbound direction on 99th Avenue" when "[s]uddenly and without any warning, [his] motor vehicle was struck head-on" by the vehicle owned and operated by defendant, "who made a left turn onto 99th Avenue and was heading westbound the wrong and opposite way on 99th Avenue," defendant submits his own affidavit refuting plaintiff's version of the events leading up to the alleged accident (see, Pl. Aff. p. 2; Def. Exh. A; Kwang Jin Kim v Ramos, 181 AD3d 914, 914 [2d Dept 2020]; Gray v Air Excel Serv. Corp., 171 AD3d 1026, 1028 [2d Dept 2019]; Galano v ILC Holdings, Inc., 164 AD3d 1315, 1317 [2d Dept 2018]; Ciraldo v Cty. of Westchester, 147 AD3d 813, 814 [2d Dept 2017]; Snemyr v Morales-Aparicio, 47 AD3d 702, 703 [2d Dept 2008]; Eichenwald v Chaudhry, 17 AD3d 403, 404 [2d Dept 2005]; see also, Pyptiuk v Kramer, 295 AD2d 768, 770 [3d Dept 2002]).[1] Indeed, contrary to plaintiff's assertion that he "had the right of way and was stopped in the proper eastbound direction of the roadway" when defendant "made a left turn onto the wrong and opposite side of this one-way eastbound roadway," it is defendant's position that there are questions of fact as to whether plaintiff's vehicle was stopped at the time of the alleged accident and whether plaintiff caused or contributed to the happening of the alleged accident (see, id.).

For example, according to defendant, he was "traveling W/B on Hempstead Avenue" and when he made a left turn, he "realized that 99th Ave was a one-way street and immediately stopped [his] vehicle which was facing in the opposite direction" (see, Def. Exh. A). Defendant states that "[w]hen [he] brought [his] vehicle to a stop[,] there were no vehicles on 99th Ave approaching Hempstead Ave" and that he "looked in [his] rearview mirror to determine whether [he] could safely reverse onto E/B Hempstead Ave [and] then . . . looked forward again at 99th Ave while remaining in the stopped position" (see, id.). Defendant further attests that when he "looked forward again after looking in [his] rearview mirror," he first saw plaintiff's vehicle approximately "5 feet in front of [his] vehicle" and at that time, plaintiff's vehicle "was behind the stop line and was moving at approx. 20mph" (see, id.). It is further defendant's position that when he first saw plaintiff's vehicle, his vehicle "had been stopped for approx. 3 seconds" and that the front bumper of [plaintiff's vehicle] came into contact with the front bumper of [his] vehicle" at the crosswalk of 99th Avenue approaching Hempstead Avenue (see, id.). In that regard, contrary to plaintiff's argument that he was stopped at a stop sign on 99th Avenue when defendant's vehicle struck his vehicle head-on, defendant's assertion that plaintiff's vehicle "did not stop at the stop line" but "was moving" "at the moment of impact" whereas his vehicle had been stopped "at the moment of impact" sufficiently raises a question of fact for a jury to resolve (see, Pl. Aff. p. 2; Def. Exh. A; see, e.g., Gray, 171 AD3d at 1028, supra; Pyptiuk, 295 AD2d at 770, supra). Accordingly, as defendant has raised triable issues of fact as to the happening of the alleged accident and whether plaintiff caused or contributed to the same, the branch of plaintiff's motion seeking summary judgment on the issue of liability is denied.

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[1] To the extent that plaintiff relies on Harrinarain v Sisters of St. Joseph, 173 AD3d 983 [2d Dept 2019] for the proposition that the uncertified police accident report submitted in support of his motion is admissible since it contains defendant's admission, such argument is unavailing as this case has been abrogated by Yassin v Blackman, 188 AD3d 62, 67 [2d Dept 2020].

Furthermore, as there are triable issues of fact as to whether plaintiff caused or contributed to the alleged accident (see, supra), plaintiff's application to strike defendant's first affirmative defense regarding his alleged culpable conduct is denied (see, Rodriguez v City of New York, 31 NY3d 312, 324 [2018]).

In sum, plaintiff's motion for summary judgment on liability and to strike defendant's first affirmative defense regarding his alleged culpable conduct and/or comparative negligence is denied.

This constitutes the Decision and Order of the Court.

Dated: December 13, 2021

Donna-Marie E. Golia, JSC

FILED
12/13/2021
COUNTY CLERK
QUEENS COUNTY