

**Santiago v Pardee**

2021 NY Slip Op 33202(U)

October 19, 2021

Supreme Court, Orange County

Docket Number: Index No. EF006959-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
JOHN SANTIAGO,

Plaintiff,

-against-

AGNES L. PARDEE,

Defendant.  
-----X

**DECISION AND ORDER**  
**Index No.:EF006959-2018**

**Motion Date: 9/3/2021**  
**Sequence No. 2**

SCIORTINO, J.

The following papers numbered 1 to 12 were considered in defendant's motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Ferrara)/ Statement of Material Facts/Exhibits A - F	1 - 9
Affirmation in Opposition (Cambareri)/ Counter Statement of Material Facts	10 - 11
Reply Affirmation (Ferrara)	12

This personal injury action arises out of an incident which took place on November 4, 2016 on Broadway, in Newburgh, New York. At the time of the incident, the plaintiff was operating a bicycle to which he had mounted an engine and gas tank. He made contact with the right quarter panel of defendant's vehicle.

The action was commenced by filing a Summons and Complaint on July 5, 2018. Issue was joined on November 8, 2018, with the filing of the defendant's Answer containing seven affirmative defenses.

The Examination before Trial of plaintiff John Santiago was taken on December 30, 2019.

Examination before Trial of defendant, Agnes Pardee, was taken on April 13, 2020. Examination before Trial of non-party Officer Jeffrey Perez was taken on November 19, 2020. Note of Issue was filed on March 29, 2021.

### **Motion for Summary Judgment**

By Notice of Motion filed on May 5, 2021, defendant argues plaintiff was recklessly operating a bicycle illegally modified with a gasoline motor kit. Further, plaintiff was traveling eastbound at high rate of speed in the westbound lane of Broadway. Defendant was lawfully traveling westbound on Broadway, attempting to turn right into a parking space, when plaintiff struck the rear quarter panel of her vehicle.

In support of the motion, defendant appends the Police Accident Report of officer Jeffrey Perez<sup>1</sup>. Perez' report notes plaintiff admitted to traveling in the wrong direction of traffic; plaintiff thought defendant would have cleared the roadway giving him room to pass by and enter the parking spot. Defendant argues the police accident report is properly authenticated, and the statements contained therein are admissible statements against interest.

Defendant argues the parties' deposition testimony and police accident report establish that defendant did not breach any duty to plaintiff, and defendant's actions were not the proximate cause of the plaintiff's injuries. Plaintiff failed to act reasonably and failed to follow the rules of the road.

### **Opposition**

In opposition, plaintiff argues both he and defendant were traveling in the "left two eastbound lanes, closest to the double yellow lines" before the accident (Cambareri Affirmation ¶4). Plaintiff

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<sup>1</sup> While the Police Accident Report is uncertified, the report was authenticated at Jeffrey Perez' deposition.

intended to turn left in order to get a parking area on the other side of Broadway. Plaintiff testified that, while he was behind defendant's vehicle, he did not observe her turn signal. Plaintiff claims that, as he was attempting to make a left turn, defendant made a sudden wide left turn in front of him.

Plaintiff argues the parties' differing testimony regarding the accident raises an issue of fact warranting denial of defendant's motion.

### Reply

In reply, defendant essentially reiterates her arguments. Plaintiff fails to address the plaintiff's admissions contained in the police accident report. Defendant argues conflicting statements contained in a different version of the facts are insufficient to defeat summary judgment.

### Discussion

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept. 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party" (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]). The Court is obliged to draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]).

A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident (*Leak v. Hybrid Cars, Ltd.*, 132 AD3d 958, 959 [2d Dept 2015]). A person riding a bicycle on a

roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle (*Palma v. Sherman*, 55 AD3d 891 [2d Dept 2008]; Vehicle and Traffic Law § 1231). A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position (*id.*). Both bicyclists and operators of motor vehicles are required to obey the statutes governing traffic and are entitled to assume that others will also do so (*Rosenberg v. Kotsek*, 41 AD3d 573 [2d Dept 2007]).

At the location of the accident, Broadway has two lanes of travel in each direction. Defendant testified she was stopped at a red light in the right lane heading westbound on Broadway. Defendant observed the plaintiff approaching her vehicle; plaintiff was traveling eastbound in the westbound lane. Defendant's cell phone rang, and she decided to pull her vehicle into a parking spot to her right. The traffic light turned green, and she turned on her right turn signal and attempted to make a right turn into the parking spot. As she attempted to pull into the spot, the plaintiff's bicycle struck the rear driver's side of her vehicle.

In contradiction to defendant's testimony, plaintiff testified that he and defendant were both in the left lane traveling eastbound before the accident. Plaintiff testified that he was traveling "maybe three feet" behind the defendant's vehicle before the accident. He attempted to cross Broadway from the left eastbound lane to a parking spot on the westbound side of Broadway. Plaintiff testified that he was traveling at approximately 30 miles an hour, and did not attempt to break before the impact. After crossing the double yellow line, plaintiff testified that his bicycle struck the rear driver's side of defendant's vehicle. In contradiction to his earlier testimony, plaintiff also testified that he was traveling eastbound in the westbound lane of traffic for ten to fifteen seconds before the impact. No explanation is provided for this discrepancy.

Here, defendant established her *prima facie* entitlement to summary judgment. Defendant demonstrated that she was traveling at a lawful rate of speed, had the right-of-way, and did not have an opportunity to avoid the accident (*George v. Cerat*, 118 AD3d 1475, 1476 [4th Dept 2014]). Further, defendant tendered evidence demonstrating that the plaintiff was negligent as a matter of law in traveling eastbound down the westbound side of the road and failed to see the automobile which, by proper use of his senses, he should have seen (*Rosenberg*, 41 AD3d 573). Defendant was entitled to anticipate that the plaintiff would obey traffic laws requiring him to yield (*id.*).

In opposition, plaintiff has failed to submit an affidavit or provide any explanation for the discrepancy in his deposition testimony. Plaintiff, having submitted only an attorney affirmation in opposition to the motion, has failed to raise a triable issue of fact precluding summary judgment.


#### Conclusion

On the basis of the foregoing, it is hereby

**ORDERED** that the defendant's motion for summary judgment is granted, and the Complaint is dismissed.

This decision shall constitute the order of the Court.

Dated: October 19, 2021  
Goshen, New York

ENTER  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*