

Palumbo v De Souza
2021 NY Slip Op 33448(U)
September 30, 2021
Supreme Court, Westchester County
Docket Number: Index No. 50253/2019
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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NICHOLAS PALUMBO,

Plaintiff,

-against-

DECISION & ORDER

Index No. 50253/2019

Seq# 1

MICHELE PACIFICO DE SOUZA and JORDAN E.
MCKENZIE,

Defendants.

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The following papers were considered on the motion pursuant to CPLR 3212, seeking summary judgment on the issue of liability:

- Notice of Motion/Affirmation/Affidavit/Exhibits 1-4
- Statement of Material Facts/Certification of signature
- Affirmation in Opposition
- Reply Affirmation

Based on the foregoing submissions the motion for summary judgment is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Nicholas A. Palumbo ("Palumbo") commenced the action on January 4, 2019, by filing a summons and complaint to recover damages for alleged personal injuries he sustained while operating his motorcycle. The plaintiff alleges that on September 16, 2018 at approximately 9:45 a.m., the defendant, Michele Pacifico De Souza ("De Souza") was operating the vehicle owned by the defendant, Jordan E. McKenzie, with his permission and drove the vehicle into the traffic circle at Annsville Circle where it meets with Roa Hook Road and US Highway 6 in Peekskill, Westchester County, New York,

which traffic circle was controlled by a yield or stop sign.

The plaintiff alleges that he was operating his motor cycle at approximately 20 miles per hour in the right lane of the two lane traffic circle and was approximately one car length from the entrance road where De Souza entered the traffic circle when De Souza entered the traffic circle and she stopped, leaving him no room to maneuver or stop and causing him to strike the vehicle that De Souza was operating.

DeSouza denies that she stopped her vehicle after entering the traffic circle and claims that she brought her vehicle to a stop after having traveled a distance in the traffic circle. She further claims that Palumbo was operating his motorcycle in the left lane of the two lanes of the traffic circle when she entered the traffic circle.

Palumbo now files the instant motion seeking summary judgment on the issue of liability, arguing that he is entitled to summary judgment as a matter of law because he was not negligent in the operation of his motor cycle and the evidence demonstrates that De Souza was negligent in her failure obey the traffic control devices, her failure to yield to the right of way of Palumbo, and to yield the right of way to a vehicle already traveling on a traffic circle, in violation of Vehicle and Traffic Law §§ 1110, 1142, 1143, 1172, and 1145 and such failure was the sole proximate cause of the accident. The defendants oppose the motion arguing that there are issues of fact, in that, there are different versions or conflicting testimony of how the accident occurred and there is an issue of fact as to whether a collision even occurred with De Souza's vehicle.

In support of his motion, Palumbo submits his deposition transcript, De Souza's deposition transcript, an affidavit from witness Mario Dias ("Dias"), an attorney's affirmation, the statement of facts and copies of the pleadings. In his affidavit, Dias avers

that he was riding his motorcycle with Antonio Rodrigues ("Rodrigues") and Palumbo, the three of them exited a gas station with Palumbo in the lead. Palumbo entered the outermost or right lane of the circle, while he and Rodrigues drove in the innermost or left lane of the circle. He states that Palumbo was approximately four to five car lengths ahead of Rodrigues and himself, operating in the outermost lane, while he and Rodrigues were close to each other as they proceeded through the circle.

Dias avers that as Palumbo approached the intersection of Annsvill Circle and US Highway 6, a/k/a Roa Hook Road, a Nissan Sedan entered the roadway on an angle and stopped with its driver side blocking the outermost lane of the circle where Palumbo was traveling. At that moment, Palumbo's motorcycle was approximately one car length from where the car entered and Palumbo had no room to maneuver or stop and his motorcycle struck the Nissan.

DISCUSSION

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

In order to establish a prima facie entitlement to judgment as a matter of law, it is incumbent upon the movant to come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact on the issue of liability (*see Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619 [2d Dept 2005], *citing, Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 708 [2d Dept 1998]).

The evidence demonstrates the plaintiff's prima facie entitlement to judgment as a matter of law by establishing that the defendants' vehicle proceeded into the traffic circle controlled by a stop or yield sign without yielding the right of way to the vehicle already traveling on the circle (see Vehicle and Traffic Law § 1145), thereby shifting the burden to the defendants to demonstrate the existence of a factual issue requiring a trial (see *Goemans v County of Suffolk*, 57 AD3d 478, 479 [2d Dept 2008] ["the County established its prima facie entitlement to judgment as a matter of law by evidence that De Souza failed to yield the right-of-way upon entering the subject intersection in violation of Vehicle and Traffic Law § 1142(a) and thus was negligent as a matter of law."]; *Thompson v Schmitt*, 902 NYS.2d 606, 607 [2d Dept 2010] [Plaintiff established prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating "that the defendant driver, who was faced with a stop sign at the intersection ...negligently entered the intersection without yielding the right of way to his approaching vehicle and that this was the sole proximate cause of the accident"])

Furthermore, the defendant was obligated to see that which by the proper use of her senses she should have seen, and Palumbo, as the driver with the right-of-way, was entitled to anticipate that the defendant would obey traffic laws which required her to yield (see *Moussouros v Liter*, 22 AD3d 469, 470 [2d Dept 2005]).

In opposition, De Souza testified that she only saw two motorcycles in the circle in the left lane traveling toward her going at fifteen to twenty miles per hour, so she entered the circle and proceeded in the circle. She stopped her vehicle after she heard a noise and saw that one motorcycle was down. She testified that she did not feel any contact or impact to her vehicle, that the downed motorcycle was approximately twenty to twenty-five feet

away from her vehicle in the right lane, but was the same motorcycle she had seen in the left lane when she entered the circle. De Souza also testified that there were only two motorcycles in total in the circle. Palumbo did not provide an affidavit from Rodrigues and a motion for summary judgment is not meant to determine issues of veracity. The Court finds that there are issues of fact as to how the accident occurred, if Palumbo was traveling in the left lane or the right lane when De Souza entered the circle and if Palumbo's motorcycle actually came into contact with De Souza's vehicle. The testimony provided by the parties presents a conflicting or different versions of the accident and creates an issue of fact as to the proximate cause of the accident.

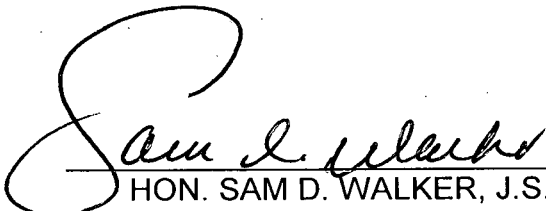
Accordingly, based on the foregoing, it is

ORDERED that Palumbo's motion for summary judgment is denied.

The parties are directed to appear before the Settlement Conference Part on a date to be determined.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2021


HON. SAM D. WALKER, J.S.C.