SHORT FORM ORDER

INDEX No. 618775/2019
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION SUBMIT DATE: 03/09/21
MOT. SEQ. # 001 - MD
MOT. SEQ. # 002 - XMD

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JAMES J. HARMON,

Plaintiffs,

- against -

AIG PROPERTY CASUALTY COMPANY.

Defendant.

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Upon the following papers e-filed and read on this motion for summary judgment: Notice of Motion and supporting papers by plaintiff, dated May 7, 2020 ; Notice of Cross Motion and supporting papers by defendant, dated July 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated July 29, 2020 ; Replying Affidavits and supporting papers by defendant, dated September 22, 2020 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion (#001) for summary judgment and defendant's cross motion (#002) for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that plaintiff's motion for an order granting him summary judgment on the issue of liability and dismissing defendant's defense of comparative negligence is denied; and it is further

ORDERED that defendant's cross motion for an order granting it summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that, if applicable, plaintiff is directed to promptly serve upon the Suffolk County Clerk, notice pursuant to CPLR §8019 [c] together with a copy of this Order and payment of any required fees; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when he was struck by a vehicle operated by Glenn Schnabel while riding a bicycle through a parking lot in the Village of Southampton on August 9, 2018. The accident allegedly happened when Schnabel's vehicle crossed over Hampton Road from Elm Street into the parking lot of 116 Hampton Road striking plaintiff while riding his bicycle.

The insurance carrier for Glenn Schnabel, USAA, tendered its policy limit of $100,000.00 to plaintiff, and this action was commenced to recover supplementary underinsurance by defendant AIG. Plaintiff now moves for an order granting him partial summary judgment on the issue of liability and dismissing defendant's affirmative defense of comparative negligence arguing that Schnabel was the sole proximate cause of the accident and plaintiff's injuries. In support of the motion, plaintiff submits a certified police accident report, his own affidavit, the transcripts of plaintiff's deposition testimony and nonparty Glenn Schnabel, among other things.

At his deposition, plaintiff testified that on the morning of the incident he was riding his bicycle on Hampton Road between 6:00 a.m. and 6:30 a.m. and that it was a clear sunny day. He testified that Hampton Road has one lane of travel for each direction divided by two yellow lines, and that he was travelling westbound riding near the curb through marked parking stalls on the southside of Hampton Road. He testified that he was riding near the entrance to a parking lot area when the front of his bicycle collided with the front of a vehicle driven by Glenn Schnabel. He testified that the only thing he remembers was getting off the ground and standing up, and that the impact occurred somewhere within the entranceway of the parking lot. Plaintiff testified that he was riding at a rate of speed of approximately 13 miles per hour when the accident occurred.

In his affidavit, plaintiff states that the incident occurred at approximately 6:20 a.m. while he was crossing the entrance to the Southampton Town Hall parking lot located at 116 Hampton Road, Southampton, New York. Plaintiff states that he viewed video surveillance footage captured by a camera mounted on the Southampton Elementary School and refers to still images from the footage which he states fairly and accurately depict the events leading up to the collision. The Court is not in possession of the video, but copies of images from the footage are submitted. The images are blurry and do not reveal how the accident occurred; they merely show a vehicle traveling straight on a roadway.

A certified police accident report is submitted, and it contains a statement made by Schnabel. He told the officer at the scene that he was "crossing over Hampton Road from Elm Street into the parking lot of 116 Hampton Road and did not see the bicyclist subsequently striking same."

Glenn Schnabel testified that on the morning of the incident he was going to work at the Southampton Town Hall and drove southbound on Elm Street. He testified that he stopped his vehicle at a stop sign at the intersection of Elm Street and Hampton Road and then turned left on to Hampton Road in an Eastbound direction. He testified that while he was stopped at the stop sign, he looked to his right and looked to his left and that he did not observe any vehicles or bicycles traveling towards him in a westbound direction nor did he observe any vehicles or bicycles heading eastbound. He testified that there was no traffic and that he drove approximately 100 feet before making a right turn into the entranceway. He testified that he had a clear line of vision with no obstructions and that he was traveling

at a rate of speed of 10 mph when he turned into the entranceway, and that he did not activate the turn signal before turning into the parking lot. Schnabel testified that he first observed plaintiff immediately before the impact and he depressed the brake of his vehicle but did not press his horn and that the bicycle hit his vehicle at the passenger side view mirror, and plaintiff was thrown off of the bicycle and thrown onto the windshield.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Pursuant to Vehicle and Traffic Law Section § 1231, a bicyclist is subject to the duties applicable to the driver of a vehicle. Plaintiff, who was riding his bicycle in the roadway, "is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle subject to all of the duties applicable to the driver of a motor vehicle" (Vehicle and Traffic Law § 1231; ***Palma v Sherman***, 55 AD3d 891, 867 NYS2d 111 [2d Dept 2008]; ***Redcross v State of New York***, 241 AD2d 787, 660 NYS2d 211 [3d Dept], *lv denied* 91 NY2d 801, 666 NYS2d 563 [1997]). "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" (***Flores v Rubenstein***, 175 AD3d 1490, 1491, 109 NYS2d 390 [2d Dept 2019], quoting (***Palma v Sherman***, 55 AD3d 891, 867 NYS2d 111).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Barbieri v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Coogan v Torrisi***, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]; ***Dalal v City of New York***, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]). Vehicle and Traffic Law § 1146 (a) provides, as relevant here "every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary."

Additionally, every driver has a common law duty to keep a proper lookout and to see that which should be seen through the proper use of his or her senses (*see* ***Palmeri v Erricola***, 122 AD3d 697, 996 NYS2d 193[2d Dept 2014]; ***Calderon-Scotti v Rosenstein***, 119 AD3d 722, 989 NYS 2d 514 [2d Dept 2014]; ***Laino v Lucchese***, 35 AD3d 672, 672, 827 NYS 2d 249 [2d Dept 2006]). A driver, or cyclist, who has the right-of-way is entitled to anticipate that other motorists will obey traffic laws which require them to yield the right-of-way (***Todd v Godek***, 71 AD3d 872, 872,895 NYS2d 861 [2d Dept 2010]). Notwithstanding, the driver, or cyclist, still retains a duty to exercise reasonable care to avoid a collision

with another vehicle (*see* ***Bullock v Calabretta***, 119 AD3d 884, 885, 989 NYS 2d 862 [2d Dept 2014]; ***Demant v Rochevet***, 43 AD3d 981, 842 NYS2d 74 [2d Dept 2007]).

Here, plaintiff established prima facie that defendant violated VTL § 1146(a) through defendant's own testimony wherein he testified that he did not sound his horn immediately before the impact and did not observe plaintiff until seconds before the accident. However, plaintiff has failed to establish that defendant was the sole proximate cause of his injuries and that he was free from comparative fault (*see* ***Tsang v New York City Tr. Auth.***, 125 AD3d 648, 3 NYS3d 370 [2d Dept 2015]; ***Gorenkoff v Nagar***, 120 AD3d 470, 990 NYS2d 604 [2d Dept 2014]; ***Sirlin v Schreib***, 117 AD3d 819, 985 NYS2d 688 [2d Dept 2014]; ***Lanigan v Timmes***, 111 AD3d 797, 975 NYS2d 148 [2d Dept 2013]). While a plaintiff is no longer required to demonstrate the absence of his own comparative negligence to be entitled to partial summary judgment on the issue of liability (***Carlos Rodriguez, Appellant, v City of NY, Respondent.***, 31 NY3d 312, 76 NYS3d 898 [2018]), whereas here, plaintiff specifically argues that he is free from fault and moves to dismiss defendant's affirmative defense of comparative negligence, plaintiff must establish that he was free from fault to establish his prima facie entitlement to summary judgment (*see* ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff has failed to establish his prima facie entitlement to judgment as a matter of law, as the deposition testimony of both parties fails to eliminate triable issues of fact as to which party had the right of way (*see* ***Ramirez v Wangdu***, 195 AD3d 646, 144 NYS3d 630 [2d Dept 2021]). While generally, it is for the trier of fact to determine the issue of proximate cause, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (*see* ***Howard v Poseidon Pools***, 72 NY2d 972, 534 NYS2d 360 [1988]; ***Velez v Mandato***, 129 AD3d 945, 12 NYS3d 172 [2d Dept 2015]; ***Scala v Scala***, 31 AD3d 423 818 NYS2d 151 [2d Dept 2006]). Here, this Court is unable to draw one conclusion as to the proximate cause of the accident in view of the limited facts offered on this motion as to how the accident occurred. Accordingly, plaintiff's motion for partial summary judgment on the issue of liability and for an order dismissing defendant's affirmative defense of comparative fault is denied.

For the same reasoning, defendant's cross motion for summary judgment dismissing the complaint against it on the grounds that plaintiff was the sole proximate cause of the accident is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.

LINDA KEVINS, JSC

Dated: 12/1/21

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION