

Andrews v Quality Bldg. Constr. LLC

2021 NY Slip Op 34125(U)

October 13, 2021

Supreme Court, Bronx County

Docket Number: Index No. 30047/2017E

Judge: Bianka Perez

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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MARK ANDREWS,

Index No. 30047/2017E

Plaintiff

-against-

Hon. Bianka Perez

QUALITY BUILDING CONSTRUCTION LLC,
PETER PALICA, FIRST CORPORATE SEDANS,
INC., AND JOSE CHU,

Justice Supreme Court

AMENDED ORDER

Defendants.
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The following **NYSCEF docs** numbered **37-63** were read on this motion (NYSCEF and CASE MANAGEMENT Seq **002**) noticed on **January 6, 2021**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	Nyscef No(s). 37-47
Notice of Cross Motion - Answering Affidavit and Exhibits	Nyscef No(s). 49-60
Reply Affidavit and Exhibits	Nyscef No(s). 61-63

Upon the foregoing papers, plaintiff moves for summary judgment on the issue of liability against defendants Quality Building Construction LLC, Peter Palica and Jose Chu. Defendant Chu opposes and cross moves for summary judgment on the issue of liability. Plaintiff opposes defendant Chu's cross motion. Defendants Quality Building Construction LLC and Peter Palica oppose the motion and cross motion.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on June 21, 2017 on Park Avenue between East 74th and East 75th Street in New York County, New York.

The court's function on motion for summary judgment is issue finding rather than issue determination. *Silurian v Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Thus, when the existence

of an issue of fact is even arguable or debatable, summary judgment should be denied. *Stone v Goodson*, 8 NY2d 8, (1960); *Sillman v Twentieth Century Fox Film Corp.*, *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact.

Plaintiff’s Motion

In support of his motion, plaintiff submits the pleadings, a certified copy of the police accident report, the deposition testimony of the parties, and dashboard camera footage of the accident taken by defendant Chu’s vehicle.

Plaintiff avers that he was riding his bicycle southbound on Park Avenue in the right lane, with “medium to light” traffic conditions, at approximately ten to fifteen miles per hour (Exh. D, Pl. EBT). He testified that he observed an illegally double-parked SUV in the right lane in front of him, and he moved closer to the middle lane to go around the SUV. Plaintiff further testified that defendant Palica’s vehicle, which he observed a few seconds before the accident, was travelling in the middle lane when defendant Palica struck plaintiff. The dashcam footage annexed by plaintiff shows the following: an unrelated vehicle exits a parking spot in front of defendant Chu’s vehicle; plaintiff rides past defendant Chu’s vehicle while remaining within the right lane; defendant Palica merges into the right lane and strikes plaintiff as plaintiff passed defendant Chu (Exh. I). During his deposition, defendant Palica testified that he activated his turn signal, looked into his right passenger side mirror, but did not observe plaintiff at any point prior to the accident (Exh. E).

The certified police report states that defendant Palica reported that he “merged to go around” defendant Chu’s double-parked SUV when plaintiff “came in front of his vehicle and [he] struck [plaintiff] with his passenger side fender” (Exh. G). The report further states that plaintiff reported “he was riding his bicycle . . . when [defendant Palica] struck his left side” (Exh. G).

In opposition, defendants Quality Building Construction LLC and Peter Palica contend that the video footage shows plaintiff abruptly and violently entering into the middle lane, without looking to his left or signaling in violation of VTL § 1146.

Defendant Chu's Cross Motion

In support of his cross motion and in opposition to plaintiff's motion, defendant Chu submits the same evidence as plaintiff. Defendant Chu avers that although he was unlawfully double-parked, he did not proximately cause the accident as plaintiff had enough room to pass his vehicle without changing lanes. In opposition, plaintiff and defendants Quality Building Construction LLC and Peter Palica contend that but for defendant Chu's double-parking, the accident would not have occurred.

Discussion

Plaintiff satisfied his prima facie burden, which was made by his affidavit and the police accident report establishing his entitlement to judgment as a matter of law on the issue of defendant's liability (*see* CPLR 3212[b]). Plaintiff demonstrates that defendant Palica did not exercise due care to avoid colliding with plaintiff's bicycle in violation of VTL § 1146(a), and failed to change lanes safely in violation of VTL § 1128(a) (*Kaur v Demata*, 123 AD3d 772, 773 [2d Dept 2014], quoting VTL § 1128 [a]; *see Merola v Beaird*, 185 AD3d 679 [2d Dept 2020]). In opposition, defendants Quality Building Construction LLC and Peter Palica raised an issue of fact as to whether plaintiff abruptly entered defendants' lane of traffic, as the video only depicts the moment of impact.

With respect to defendant Chu's cross motion, issues of fact also exist with respect to whether defendant Chu's negligence proximately caused the accident, "as a jury could reasonably find that a bicyclist swerving and being hit by a passing vehicle was a reasonably foreseeable consequence of double-parking or obstructing a lane of traffic" (*Dong v. Cruz-Martinez*, 189 A.D.3d 613 [1st Dept 2020]). Accordingly, defendant Chu's cross motion is denied.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is denied in its entirety; it is further

ORDERED, that plaintiff's motion for an Order dismissing the defendants' affirmative defenses of culpable conduct is denied in its entirety; it is further

ORDERED, that defendant Jose Chu's cross motion on the issue of liability is hereby denied in its entirety; it is further

ORDERED, that plaintiff shall serve a copy of this order, together with notice of entry, on the defendants within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: October 13, 2021

Hon.  _____
BIANKA PEREZ, J.S.C.

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE

2. MOTION IS.....

GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE.....

SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE

FIDUCIARY APPOINTMENT REFEREE APPOINTMENT