

Cordero v Gulmi

2021 NY Slip Op 34152(U)

June 21, 2021

Supreme Court, Queens County

Docket Number: Index No. 700357/18

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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ADOLFO JUAREZ CORDERO,

Plaintiff(s),

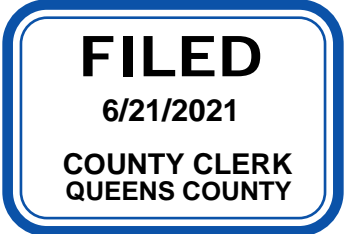
- against -

FREDERICK A. GULMI,

Defendant(s).

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Index No.: 700357/18
Motion Date: 7/28/20
Motion Cal. No.: 40
Motion Seq. No.: 02



The following papers numbered 1 - 9 read on this motion by defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

PAPERS
NUMBERED

| | |
|--|-------|
| Notice of Motion-Affirmation-Exhibits-Service..... | 1 - 4 |
| Affirmation in Opposition-Exhibits-Service..... | 5 - 7 |
| Reply Affirmation-Service..... | 8 - 9 |

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from a September 27, 2017 collision between plaintiff-bicyclist and defendant's automobile, which occurred at approximately 5:30 a.m., directly in front of the exit/entrance to a parking garage located on First Avenue, between East 32nd and East 33rd Streets, in the County, City, and State of New York. The following facts are apparently undisputed: both parties were traveling north on First Avenue, with defendant's car in the leftmost vehicular traffic lane, and plaintiff in the parallel bicycle lane directly abutting the sidewalk; a parking lane runs parallel and in between these lanes; the sidewalk features a curb cut ramp for the parking garage exit/entrance onto First Avenue, for which the path leading to the vehicular traffic lanes crosses the bicycle and parking lanes; and a sidewalk traffic sign on the approach to the exit/entrance advises bicyclists to "watch for turning vehicles." The collision occurred when defendant turned left into the entrance, thereby crossing the bicycle lane and blocking plaintiff's path.

By order dated August 7, 2020, and entered August 10, 2020, this court denied defendant's motion for summary judgment as moot because the court's database listed this action as discontinued pursuant to a settlement conference. As that database notation was incorrect, the dismissal order was recalled and vacated by order dated June 8, 2021, and entered June 10, 2021. The court now addresses defendant's motion on the merits. In support of summary judgment, defendant submits, *inter alia*, certified copies of the police accident report and transcripts of the parties' depositions, as well as certain photographs used during said depositions.

Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (see *id.*). Courts must view the evidence in the light most favorable to the non-movant (see *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (see *Haymon v Pettit*, 9 NY3d 324, 327, n * [2007]).

Defendant argues that he is entitled to summary judgment because plaintiff negligently rode his bicycle into the rear driver's side of defendant's stopped car, and this was the sole proximate cause of the accident. Bicyclists are generally subject to the same duties under the traffic laws as are drivers of motor vehicles (see VTL § 1231). The following general propositions of law govern the issues raised in this motion:

[i]n general, a motorist is required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle's horn when a reasonably prudent person would do so in order to warn a bicyclist of danger, and to operate the vehicle with reasonable care to avoid colliding with anyone on the road. 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. Each is required to obey the statutes governing traffic and is entitled to assume that the other also will do so (*Palma v Sherman*, 55 AD3d 891, 891-892 [2d Dept 2008] [citations omitted], citing, *inter alia*, VTL §§ 1146 and 1231).

It is well-settled that "[a] violation of the Vehicle and Traffic

Law constitutes negligence as a matter of law" (*Abtey v Trivigno*, 188 AD3d 629, 632 [2d Dept 2020]). In addition, both motorists and bicyclists are obligated to see that "which by proper use of his [or her] senses he [or she] should have seen" (*Rosenberg v Kotsek*, 41 AD3d 573, 574 [2d Dept 2007]), and the failure to do so constitutes negligence (see *Merola v Beaird*, 185 AD3d 679, 680 [2d Dept 2020]).

At his deposition, defendant testified that he did not see plaintiff before the accident because he had already finished his turn into the garage exit/entrance and come to a complete stop, such that most of his car was on the sidewalk curb cut, with the rear jutting only about a third of the way into the bicycle lane. Defendant looked before turning, and the path was clear, but he admitted that an improperly parked car in the parking lane, as depicted in the photos he took at the scene, impeded much of his view before he crossed the bicycle lane. After the collision, defendant saw plaintiff on the ground, near the rear of the car, and that the impact had left a dent behind the rear wheel on the driver's side, as shown in the photograph he took later that day.

Plaintiff offered inconsistent testimony as to whether he saw defendant's car before the collision, and as to the car's location at the time of impact. He maintained, however, that defendant's car struck him, and that the impact was to the front driver's side, near the headlights.¹

Defendants have not satisfied their *prima facie* burden to eliminate all issues of fact as to the cause of the accident. It is axiomatic that "[t]here can be more than one proximate cause of an accident" (*Merola*, 185 AD3d at 680). That the sidewalk traffic sign warns bicyclists to watch for turning vehicles is not dispositive as to who had the right of way, and this unresolved issue renders most of the caselaw upon which defendant's motion relies factually distinguishable. In any event, defendant's admission that he did not see plaintiff at all before the accident raises a triable issue of fact as to whether he took adequate care to ascertain whether it was safe to turn, particularly, given the pre-dawn hours and the obstructed view of the bicycle lane due to the improperly parked vehicle (see e.g. *Rojas v Solis*, 154 AD3d 985, 985 [2d Dept 2017] [holding that despite the bicyclist's negligence, the motorist's own testimony raised a triable issue of fact as to whether he failed to see that which was there to be seen]). Moreover, plaintiff's testimony that the impact occurred to the front of defendant's car, rather than the rear, and that the car was still moving, raises additional questions regarding who had the right-of-way, and whether defendant kept a "reasonably vigilant lookout" (*Palma*, 55 AD3d at 891) before he made his turn.

¹Plaintiff testified that he did not recognize the vehicle in the photograph purporting to depict damage to the rear of defendant's car.

Since the transcripts raising these triable factual issues were submitted with the moving papers-in-chief, the motion necessarily did not eliminate all such issues. In light of defendant's failure to make his *prima facie* showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (Alvarez, 68 NY2d at 324).

Accordingly, the above-referenced motion by defendant for summary judgment dismissing the complaint is **DENIED** in its entirety.

The foregoing shall constitute the decision and order of this court.

Dated: June 21, 2021



JANICE A. TAYLOR, J.S.C.

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