

Nour v Haeyoung Kang
2022 NY Slip Op 30627(U)
February 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 524392/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of February 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
ALI NOUR,

Plaintiff,

-against-

HAEYOUNG KANG,

Defendant.
-----X

Index No.: 524392/2019

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed 13-19,

Opposing Affidavits (Affirmations)..... 22-23,

Reply Affidavits (Affirmations) 25

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KINGS COUNTY CLERK
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After a review of the papers and oral argument on the motion the Court finds as follows:

This lawsuit arises out of a motor vehicle accident which allegedly occurred on November 13, 2018. Plaintiff, Ali Nour (hereinafter the "Plaintiff") alleges in his Complaint that he suffered personal injuries while riding his bicycle when the vehicle owned and operated by Defendant Haeyoung Kang (hereinafter the "Defendant") collided with him while moving out of the parking lane. The collision occurred on Prospect Park Southwest at or near its intersection with Seeley Street, in the County of Kings, City and State of New York.

The Plaintiff now moves (Motion Sequence #2) for an order pursuant to CPLR 3212 granting partial summary judgment against the Defendants on the issue of liability. The Plaintiff contends that the

collision occurred when the Defendants' vehicle suddenly began to move out of the parking lane without due care. The Plaintiff also asserts that the Defendant stated that he did not see the Plaintiff prior to the collision. In opposition, the Defendant contends that there is at least an issue of fact regarding whether the Plaintiff was negligent and a proximate cause of the accident. Defendant contends that she did utilize her turning signal prior to exiting from the parking lane. The Defendant also argued that the Plaintiff was the proximate cause of the collision since the Plaintiff failed to properly take notice of the Defendant's vehicle. The Defendant points to the fact that the collision took place after the Defendant Driver had already partially entered the travel lane. The Defendant also contends that the Plaintiff's motion is premature.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202

AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. It is true that “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case...” they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2nd Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

The Plaintiff made a *prima facie* showing that the Defendant was negligent and a proximate cause of the accident. However, the Defendant’s affidavit states that “[p]rior to this accident, my vehicle was parked in the parking lane of Prospect Park Southwest with Seeley St. to its left.” The Defendant then stated that “I looked around to see if there were any vehicles, bicyclists, and/or pedestrians in my vicinity.” She also stated that “I did not see any vehicles, bicyclists, and/or pedestrians traveling in my vicinity, so I turned on my left turn signal and proceeded to turn my wheel to merge onto the travel lane of Prospect Park South.” She additionally stated that “[w]hile the front third of my vehicle was in the travel lane of Prospect Park Southwest and the rear portion of my vehicle was in the parking lane of Prospect Park Southwest, I heard a noise from the rear quarter panel of my vehicle.” In so far as the Defendant contends a five second partial presence in the driving lane and a point of contact in the rear quarter panel of her vehicle, the Defendant, although negligent and a proximate cause of the accident (proceeding in violation of the right of way of the Plaintiff), has raised an issue of fact as to the Plaintiff’s comparative negligence in that he failed to act based upon his failure to see what there was to be seen. “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 N.Y.S.3d 390, 391 [2d Dept 2019], quoting *Palma v. Sherman*, 55 AD3d 891, 891, 867 N.Y.S.2d 111, 112 [2d Dept 2008]. Accordingly, the Plaintiff’s motion is granted solely to the extent that Defendant was negligent and a proximate cause of the accident, subject to a determination of whether Plaintiff was

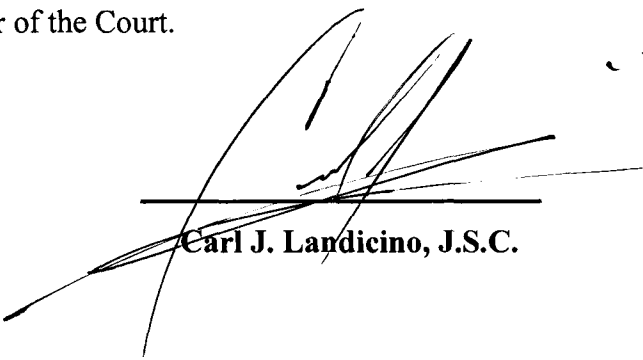
comparatively negligent at trial. *See Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiffs' motion (motion sequence #2) for partial summary judgment is granted, subject to a determination at trial with regard to whether the Plaintiff was comparatively negligent.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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