

Bottcher v Lord

2022 NY Slip Op 31352(U)

April 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 525038/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 (MOA) of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 18th day of April, 2022.

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P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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MATTHEW BOTTCHEER,

Index No.: 525038/2019

Plaintiff,

DECISION AND ORDER

-against-

CHRISTINA LORD,

Motion Sequence #1

Defendant.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed 10-21,

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

Reply Affidavits (Affirmations) 24-25

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After a review of the papers and oral argument, the Court finds as follows:

The instant action relates to a claim for alleged personal injuries arising from a motor vehicle collision that occurred on September 2, 2019. Plaintiff Matthew Botcher (hereinafter the "Plaintiff") alleges that he was injured when the vehicle he owned and operated was struck by a vehicle owned and operated by Defendant Christina Lord (hereinafter the "Defendant"). The incident allegedly occurred at the intersection of Pennsylvania Avenue and Liberty Avenue in Brooklyn, New York.

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and proceeding to trial on the issue of damages. The Plaintiff contends that summary judgment should be granted because Defendant's vehicle was negligent and the

sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that the Defendant's vehicle violated New York VTL § 1110(a) and 1111(d)(1) in as much as she failed to stop at a red traffic light causing the Defendant's vehicle to collide into the Plaintiff's vehicle.

The Defendant opposes the motion and contends that there are triable issues of fact that should prevent this Court from granting the motion. Specifically, the Defendant argues that there is an issue of fact as to the color of each driver's traffic light. Defendant also contends that the motion should be denied for failing to include a Statement of Material Facts¹.

Summary 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 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the 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 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

¹ Defendant waived objection to Plaintiff's failure to include a statement of facts during oral argument and by document filed on February 9, 2022. (See NYSCEF Document 31).

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]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if 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 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that the Plaintiff has failed to meet his *prima facie* burden that the Defendant was negligent and a proximate cause of the accident. “A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries.” *Ramirez v. Wangdu*, 195 AD3d 646, 646, 144 N.Y.S.3d 630, 631 [2d Dept 2021]. In support of his application, the Plaintiff relies on his deposition, the certified Police Accident Report, a Google Maps image of the location² and the Defendant’s deposition. As an initial matter, the Police Accident Report, while certified, does not contain any admissible statements. The statements were not attributed to a party and the report indicates that “[o]fficers were not present at the

² As per CPLR 4532-b the Court cannot take judicial notice of this photograph as there is no indication of the date it was created. *See CPLR 4532-b; see also Rodriguez v. The City of New York*, No. 29129/2018E, 2021 WL 6195620, at *1 [Sup. Ct., Bronx County 2021].

time of the incident and did not observe the collision.” As a result, the information contained within the report is inadmissible. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020].

The testimony of the respective parties raises a triable issue of material fact. During his deposition, Plaintiff stated that he was traveling eastbound on Liberty Avenue and that it is a “two-way street”, “one lane in each direction” with parking on both sides. Plaintiff stated that he came to a red light at Liberty Avenue and Pennsylvania Avenue and “stopped behind the pick-up truck” “[f]or, like, 30 seconds.” Plaintiff stated that when “[t]he light turned green”, he proceeded through the intersection at which time Defendant’s vehicle, a “dark colored sedan”, struck the Plaintiff’s “front driver’s side wheel and quarter panel and partially my door.” (See Plaintiff’s Motion, Exhibit B, Pages 21-31).

The Defendant’s deposition testimony serves to contradict the Plaintiff’s version of how the accident occurred. During her deposition, Defendant stated that she “was on Atlantic Avenue, I made a right on Pennsylvania, and I was headed towards Liberty Avenue.” She confirmed she was able to observe the traffic light at Liberty Avenue as green after she turned onto Pennsylvania Avenue. She stated that on Pennsylvania Avenue “[t]here are people parked and there are two lanes that you can drive on.” She confirmed that there are two lanes of moving traffic in each direction and “I was in the left lane.” She further stated that “[t]here was a big box truck in front of me” and that there “were cars in the right lane going in the same direction” with other cars “in front of me and some were behind me.” She then stated that “I changed my lanes, because the truck in front of me was so big it was blocking my view of the traffic light, so that’s why I got out from behind the truck.” When asked if she was able to see the traffic light after changing lanes, she confirmed “[y]es, the light was green” and that she changed lanes “[a]t least two car-lengths behind” the beginning of the intersection. When asked if she saw the Plaintiff’s vehicle at any time before the impact, she confirmed that she did not. (See Plaintiff’s Motion, Exhibit C, Pages 23-43).


The Court finds that as there are contradicting versions of how the collision occurred. The Plaintiff has failed to meet his burden that the Defendant was negligent and a proximate cause of the collision at issue. It is unclear which vehicle had the right of way and whether either vehicle had sufficient time to avoid the accident. A review of this evidence in a light most favorable to the nonmoving party shows that “the plaintiff failed to eliminate triable issues of fact as to whether the defendant was negligent and, if so, whether any such negligence caused or contributed to the accident.” *Flores v. Rubenstein*, 175 AD3d 1490, 1491, 109 N.Y.S.3d 390, 392 [2d Dept 2019]. “Since the plaintiff failed to meet his initial burden as the movant, it is not necessary to review the sufficiency of the defendant's opposition papers.” *Ramirez v. Wangdu*, 195 A.D.3d 646, 647, 144 N.Y.S.3d 630, 631 [2d Dept 2021]. Accordingly, the motion by the Plaintiff is denied.

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

The Plaintiff's motion for summary judgment on the issue of liability (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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