

Rosenthal v Rubin

2022 NY Slip Op 32547(U)

July 29, 2022

Supreme Court, New York County

Docket Number: Index No. 151579/2020

Judge: Lisa S. Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 28M

Justice

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LEE ROSENTHAL,

Plaintiff,

- v -

HOWARD RUBIN,

Defendant.

-----X

INDEX NO. 151579/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for JUDGMENT - SUMMARY

Defendant, Howard J. Rubin ("defendant"), moves for an Order, pursuant to CPLR §3212, to grant summary judgment on the issue of liability in favor of the defendant. Plaintiff, Lee M. Rosenthal ("plaintiff"), cross-moves for an Order, also pursuant to CPLR §3212, to grant summary judgment on the issue of liability in favor of the plaintiff.

In February 2020, plaintiff commenced this negligence action as a result of a motor vehicle accident. The plaintiff, a motorcyclist, claims that on September 2, 2019, the defendant, a bicyclist, made an illegal left turn across traffic without signaling or observing traffic conditions, and caused the accident, which resulted in injuries to both parties. The defendant asserts that he was crossing the road on his bicycle within a crosswalk when plaintiff, who was also traveling on that road, failed to yield to the defendant in violation of New York's vehicle and traffic laws. The plaintiff and defendant submitted their deposition testimony to support their motions before the court.

Defendant now moves for summary judgment asserting that plaintiff violated the New York Vehicle and Traffic laws. Specifically, defendant alleges that the plaintiff violated VTL § 1122-a by colliding with the defendant (bicyclist) when the plaintiff, while on a motorcycle, attempted to pass on the left-hand side. The defendant alleges that plaintiff violated VTL § 1146(a) by failing to exercise due care to avoid colliding with bicyclists. The defendant contends that the plaintiff did not sound his horn or slow down when he was passing defendant. See, NYSCEF Doc. No. 8, affirmation of Christine Fontaine in support, ¶ 28. In addition, the defendant contends that he was within the crosswalk, straddling the bicycle and walking it across the street when plaintiff failed to yield and hit him. See, NYSCEF Doc. No. 24, Rubin tr at 131-135, 139-140, 176. The defendant argues that while the parties have two conflicting versions of how the accident occurred, under either version, the plaintiff's negligence was the proximate cause of the accident. The defendant argues that the plaintiff was driving at an unsafe speed, and was attempting to pass without keeping a safe distance, and failed to honk or alert defendant of his approach. Finally, defendant argues that the plaintiff's testimony that defendant abruptly turned into eastbound traffic serves only to raise a triable issue as to defendant's comparative negligence, which may not be considered.

In opposition to defendant's motion, plaintiff argues that there are material questions of fact as to any negligence on his own behalf. Plaintiff contends that the testimony given by the parties and witnesses establishes that, upon seeing defendant move from the shoulder into the travel lane, plaintiff moved as far left in his travel lane as he could, and the plaintiff could not safely pass the defendant because defendant made a negligent and dangerous left turn from the right shoulder into the moving lane of traffic. Moreover, plaintiff argues that the defendant's contention that plaintiff was traveling at an unsafe speed is conclusory, and not founded upon any evidence. Plaintiff argues that defendant's own actions must be considered because the defendant was the proximate cause of the accident.

Plaintiff filed a cross-motion, and argues, *inter alia*, that the defendant violated *VTL* §§ 1231, 1237, 1234(a), 1160(a), and 1128(a) at the time of the accident. Plaintiff alleges that when making a left turn the defendant, as a bicyclist, was required to use his arm to signal; and when making a left hand turn on a two-way roadway, the defendant was also required to approach the turn from near the center line; and when changing lanes of travel the defendant must first ascertain that such movement can be made safely. *See, VTL* §§ 1231, 1237, 1234(a), 1160(a), and 1128(a). Plaintiff contends that the defendant failed to signal; he exited the right shoulder by making a sudden left turn, interfering with the flow of traffic, and cutting off plaintiff; he made a left turn from the right shoulder without ascertaining whether it was safe; and the defendant admitted to not seeing the motorcycle (the plaintiff) prior to the collision. Plaintiff argues that defendant's actions are a violation of the vehicle and traffic laws, and defendant is negligent as a matter of law.

DISCUSSION

Defendant's motion and plaintiff's cross motion are both denied. "To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff. *Han Hao Huang v. "John Doe"*, 169 A.D.3d 1014, 1015 (2d Dep't 2019) [internal quotation marks and citation omitted]; *see, S.G. v Singh*, 189 A.D.3d 786, 787 (2d Dep't 2020). In motor vehicle accident cases, a breach of a duty may be established by proof of violations of the *VTL*. *See, Velasquez v. MTA Bus Co.*, 132 A.D.3d 485, 485 (1st Dep't 2015); *S.G. v. Singh*, 189 A.D.3d at 787; *see also, Carthen v. Sherman*, 169 A.D.3d 416, 417 (1st Dep't 2019) [*prima facie* showing of entitlement to summary judgment based upon other driver's violation of *VTL* § 1128(a) and defendant's lack of negligence]. The movant then must establish, *prima facie*, that such negligence was a proximate cause of the accident. *See, Bunch v. Gwood*, 202 A.D.3d 1036, 1038 (2d Dep't 2022). "There can be more than one proximate cause of an accident, and [g]enerally it is for the trier of fact to determine the issue of proximate cause." *Blake v. Francis*, 205 A.D.3d 671, 672 (2d Dep't 2022) [internal quotation marks and citation omitted]; *see also, Howard v. Poseidon Pools*, 72 N.Y.2d 972, 974 (1988); *Kalland v. Hungry Harbor Assoc., LLC*, 84 A.D.3d 889, 889 (2d Dep't 2011); *Richardson v. Cablevision Sys. Corp.*, 173 A.D.3d 1083, 1084 (2d Dep't 2019). "[A] defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident." *Blake v. Francis, supra* at 673 [internal quotation marks and citation omitted]).

Motorists and bicyclists are required to obey the traffic statutes and are entitled to assume that the other also will do so. *See, VTL* §1231; *Palma v. Sherman*, 55 A.D.3d 891, 891 (2d Dep't 2008) ["a person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle"]. Generally, a motorist is required "to keep a reasonably vigilant lookout for bicyclists." *Id.* at 891. Motorists should also exercise "due care to avoid colliding with any bicyclist," and warn of danger "by sounding the horn when necessary."

See, VTL § 1146(a); see Palma v. Sherman, supra at 891. Not every driver who comes upon a bicyclist, however, must sound a horn; rather, whether it is negligent to not sound a horn must be considered in light of the relevant circumstances. *See, Ryder v. County of Fulton*, 303 A.D.2d 847, 849 (3d Dep't 2003). The failure to sound the horn may not be the proximate cause of the collision with the bicyclist. *See, Doubrovinskaya v. Dembitzer*, 77 A.D.3d 609, 610 (2d Dep't 2010) [a bicyclist's failure to signal her intended movement or to ascertain if she could execute lane change safely was proximate cause of accident].

A motorist is required to pass on the left at a safe distance until safely clear of the bicycle when overtaking a bicycle proceeding on the same side of the roadway. *See, VTL § 1122-a*. Furthermore, a motorist "shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within the crosswalk." *See, VTL § 1151(a)*. A "pedestrian who crosses outside of the crosswalk has a duty to exercise greater care for his or her own safety while crossing the street," including keeping a proper lookout and exercising due care to avoid a collision. *Kane v. U.S.*, 189 F Supp 2d 40, 52 (SD NY 2002), *see also, Sanclemente v. MTA Bus Co.*, 116 A.D.3d 688, 689 (2d Dep't 2014); *Billiny v. Blagrove*, 84 A.D.3d 848 (2d Dep't 2011).

Bicyclists are subject to all the duties applicable to a driver of a vehicle. *See, VTL § 1231*. Bicyclists are also responsible "to keep a reasonably vigilant lookout for vehicles," and avoid putting themselves in a dangerous position. *See, Palma v. Sherman, supra* at 891. In addition, like motorists, bicyclists are required to drive within a single lane and not change lanes until the operator determines that it can be done safely. *VTL § 1128(a)*.

To the extent that either party to a motor vehicle accident violates the VTL, such violation does not preclude recovery unless the conduct was the proximate cause of the accident. *See, Elusma v. Jackson*, 186 A.D.3d 1326, 1328 (2d Dep't 2020); *Gause v. Martinez*, 91 A.D.3d 595, 596 (2d Dep't 2012); *see also, Gray Air v. Air Excel Serv. Corp.*, 171 A.D.3d 1026, 1028 (2d Dep't 2019). Finding a party's culpable conduct does not inevitably result in finding the proximate cause because there can be more than one proximate cause of an accident. *See, Elusma v. Jackson, supra* at 1328; *Boulos v. Lerner-Harrington*, 124 AD3d 709, 709 (2d Dep't 2015).

This Court finds that both the defendant and plaintiff present conflicting testimony. Here, in support of the motion, defendant Rubin argues that the plaintiff is negligent *per se* for failing to pass safely on the left and failing to sound his horn, and submits the plaintiff's testimony, and the defendant's deposition testimony to demonstrate that plaintiff violated *VTL §§ 1122-a* and *1146(a)*. Defendant testified that he stopped his bicycle, was straddling it and walking in the crosswalk when plaintiff collided with him. Plaintiff testified that defendant was riding on the right shoulder, and then came into the lane of traffic, making a left turn, past the crosswalk and even the intersection, without signaling or observing traffic. Neither party can establish their right to summary judgment of liability based on this proof. *See, Prak v. New York City Tr. Auth.*, 205 A.D.3d 489, 490 (1st Dep't 2022) [summary judgment of liability denied where parties providing conflicting versions of the accident]. The sole basis for defendant's claims that plaintiff violated those provisions of the VTL is his own deposition testimony, which was contradicted by plaintiff's testimony, as well as, that of the testimony submitted by plaintiff's daughter and his domestic partner, Ms. Stanley.

Similarly, summary judgment of liability to plaintiff is also unwarranted. In his cross motion, plaintiff relies on his own testimony as well as that of his daughter and his domestic partner, and on the police accident report, to assert that defendant violated *VTL §§ 1128(a)*, *1160(b)*, *1163*, and *1234(a)*. Plaintiff's testimony and supporting evidence directly conflicts with

defendant’s testimony of how the accident occurred. Triable issues of fact exist as to whether defendant was in the crosswalk walking his bicycle, as he contends, or if he rode his bicycle into the lane of traffic and turned left without signaling and without observing plaintiff’s motorcycle, as plaintiff contends, and whose actions were the proximate cause of the collision. Further, triable issues exist as to whether the defendant was in the crosswalk, and plaintiff failed to yield to him; and, whether the defendant was traveling in the road, or if plaintiff failed to safely pass defendant, if plaintiff’s movement to the left of his lane constituted a safe distance from defendant, and if plaintiff failed to exercise due care in avoiding colliding with defendant. These are issues for the trier of fact to ascertain. Therefore, summary judgment also is denied on plaintiff’s cross motion.

Accordingly, it is hereby

ORDERED that the defendant’s motion for summary judgment on the issue of liability is DENIED; and it is further

ORDERED that the plaintiff’s cross-motion for summary judgment on the issue of liability is DENIED; and it is further


ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, the movant-defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

7/29/2022

DATE



LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE