

**De La Luz Alfaro v Access-A-Ride**

2022 NY Slip Op 32901(U)

August 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 517463/2017

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 18<sup>th</sup> of August 2022.

P R E S E N T:  
HON. CARL J. LANDICINO,

Justice.

-----X  
ARTURO DE LA LUZ ALFARO,

Index No.: 517463/2017

*Plaintiff,*

-against-

ACCESS-A-RIDE, EMPIRE PARATRANSIT  
CORP., KYUN KIM and THE NEW YORK CITY  
TRANSIT AUTHORITY,

DECISION AND ORDER

Motion Sequence #10

*Defendants.*

-----X  
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 .....	192-208,
Opposing Affidavits (Affirmations).....	209-214,
Reply Affirmation or Affidavit .....	216-217,
Memorandum of Law.....	215

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns an alleged accident that occurred on April 24, 2017. Plaintiff, Arturo De La Luz Alfaro (hereinafter the "Plaintiff") was allegedly injured while riding his electric bicycle, when the driver door of a vehicle owned by Defendant New York City Transit Authority (hereinafter the "Defendant NYCTA"), leased by Defendant Empire Paratransit Corp. (hereinafter the "Defendant Empire"), and operated by Defendant Kyun Kim (hereinafter the "Defendant Kim") opened into or in front of him. Plaintiff also alleges that Defendant Kim was acting within

the scope of his employment with Defendant Empire at the time of the accident. The door allegedly made contact with the Plaintiff. The accident allegedly occurred on Prospect Park West, at or near its intersection with Prospect Avenue in Brooklyn, New York.

The Plaintiff now moves (motion sequence #10) for summary judgment on the issue of liability and dismissal of Defendants' first, second, fourth and seventh affirmative defenses. The Plaintiff contends that Defendant Kim was negligent and the proximate cause of the accident for allegedly opening a motor vehicle door in violation of VTL §§ 388, 1214 and 1146, and 34 RCNY § 4-12(c). The Defendants oppose the motion and argue that there are issues of material fact as to Defendant Driver Kim's negligence and that Plaintiff had a duty and opportunity to avoid the collision. Specifically, the Defendants argue that Plaintiff had sufficient time to take evasive action in order to avoid the collision and there is a question as to whether Plaintiff failed to have proper lighting on both his e-bike and his person.

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, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [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, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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, 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].

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, 538 N.Y.S.2d 837 [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, 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 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

The Defendant owner and operator is liable for any use or operation that results in death or injuries to a person resulting from negligence, pursuant to VTL § 388. The opening of a door is considered “use and operation” as intended by the statute, VTL § 388. See *Cohn v. Nationwide Mut. Ins. Co.*, 286 AD2d 699, 730 N.Y.S.2d 152 [2d Dept 2001]; *Kohl v. American Transit Ins. Co.*, 59 AD3d 681, 874 N.Y.S.2d 213 [2d Dept 2009]. The relevant provisions of the aforementioned statutes and regulation, provide as follows:

VTL §1214 - Opening and Closing Vehicle Doors. No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving

traffic for a period of time longer than necessary to load or unload passengers.

VTL § 1146 - Drivers to exercise due care (a) Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.

34 RCNY §4-12(c) - Miscellaneous - Getting out of vehicle. No person shall get out of any vehicle from the side facing on the traveled part of the street in such manner as to interfere with the right of the operator of an approaching vehicle or bicycle.

In support of his application, the Plaintiff relies primarily on Plaintiff's deposition testimony and affidavit and Defendant Kim's testimony and statement. In his affidavit, the Plaintiff states that the "accident occurred on Prospect Park West near the intersection of Prospect Avenue in Brooklyn, New York. At the intersection where my accident occurred, there were streetlights on both sides of Prospect Park West which illuminated the street." (See Plaintiff's Affidavit, NYSCEF Document 205, Paragraphs 3-4). Plaintiff, during his testimony, stated that he "was coming [home] from work." (See NYSCEF Document 198, Pg. 55). He further confirmed that he was travelling "[i]n the same direction the cars were travelling." (Id. Pg. 58). Plaintiff stated that he saw Defendants' vehicle "[f]ive minutes, three minutes" before the accident and that when he first saw the vehicle it was stopped with its lights on. (Id. Pg. 59). However, later in his testimony he clarified that he saw the vehicle "thirty seconds" before the accident. (Id. Pg. 68). He further confirmed that the vehicle was parked "[i]n the parking lane." (Id. Pg. 60). Plaintiff confirmed that he was accelerating his e-bike at the time of the accident and did not have time to apply his brakes. (Id. Pg. 64-65). When asked if he took any evasive maneuvers to avoid impact, the Plaintiff stated "[n]o, because I did not have time." (Id. Pg. 66). He further confirmed that he only had "two seconds" from the time the door opened to when he made contact with Defendants' door. (Id. Pg. 70). He confirmed that the e-bike did have lights installed in the front "[w]here the tire is, there is

like a fender. That's where it was located." (Id. Pg. 43). He also confirmed that the front light was "[l]it, on" at the time of the accident. (Id. Pg. 44). He confirmed that he also had a flashing light on the back of his bicycle at the time of the accident. (Id. Pg. 45).

Defendant Kim, during his deposition testimony, confirmed that the accident occurred on Prospect Park West "approximately at 8:00 p.m." (See NYSCEF Document 211, Pgs. 28, 30). He stated that he was parked "[f]or quite some time. 20 to 30 minutes." (Id. Pg. 31). Prior to opening his door, "[he] checked the mirrors and other things before." (Id. Pg. 44). He confirmed that he checked his mirrors for "[m]aybe three seconds" and did not see anything approaching. (Id. Pg. 46-48). When asked how long it was from the time he began to open the door to the time of impact, Defendant Kim confirmed "[m]aybe three seconds. Wasn't long." (Id. Pg. 51). He further stated that he had to use two arms to open the door because "[t]he bus door is usually heavier to operate with one arm. So technically like unlatch the door with the left arm but then you have to push open with your right arm." (Id. Pg. 47). When asked if he saw the door make contact with the e-bike, Defendant Kim confirmed "I did not see it." (Id. Pg. 50). He confirmed he heard the impact and that was when he heard the sound, and he "think[s] [he] was looking ahead." (Id. Pg. 50). After the impact occurred, Defendant Kim confirmed that he did not see Plaintiff wearing a headlight or a light on the e-bike. (Id. Pg. 86). He further confirmed that after the accident he did not see whether the e-bike had a headlight attached to it. (Id.). In Defendant Kim's written statement, he stated that "I did not inspect the moped. I don't know if it had a headlight or brakes." (NYSCEF Document 212).

The Plaintiff has established a *prima facie* showing that Defendant Kim was negligent opening the driver's door into moving traffic, when it was not reasonably safe to do so and that Defendant Kim also failed to see what, by the reasonable use of his senses, he should have seen. *Montesinos v. Cote*, 46 AD3d 774, 848 N.Y.S.2d 329 [2d Dept 2007].

“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, 109 N.Y.S.3d 390 [2d Dept 2019], quoting *Palma v. Sherman*, 55 AD3d 891, 867 N.Y.S.2d 111 [2d Dept 2008]. “While a driver is required to see that which through proper use of [his or her] senses [he or she] should have seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield. Moreover, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision.” *Barbato v. Maloney*, 94 AD3d 1028, 943 N.Y.S.2d 204 [2d Dept 2012] [citations and internal quotation marks omitted].

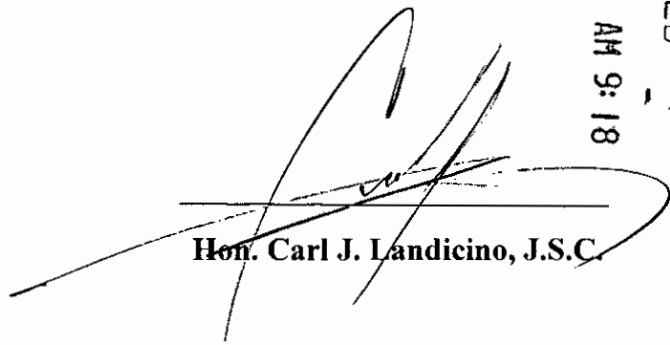
The Defendants allege that Defendants’ parking lights were on, and that Defendant Kim looked before opening his door. Defendants also allege that the door was open for a sufficient length of time to give the Plaintiff the ability to avoid the collision. Additionally, Defendant Kim contends that he did not see the Plaintiff as Plaintiff did not have any lights on his bicycle. As such, the Defendants have argued that there are issues of fact as to whether Plaintiff had proper lights on and should have otherwise anticipated the door opening and taken evasive action. See *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]; see *Membreno v. Roche*, 128 AD3d 782, 10 N.Y.S.3d 253 [2d Dept 2015]. However, the Plaintiff, by Defendant’s own admission, only had a few seconds to react to the door being opened. Further, Defendant Kim did not actually state that Plaintiff’s e-bike did not have lights on it or that, although it had lights, they were not illuminated. Accordingly, Plaintiff’s motion for summary judgment on the issue of liability is granted and the Defendants’ first, second, fourth, and seventh affirmative defenses are dismissed. See *Poon v. Nisanov*, 162 AD3d 804, 79 N.Y.S.3d 227 [2d Dept 2018]. Defendant Kim was negligent and the sole proximate cause of the accident.

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

Plaintiff's motion (motion sequence #10) for summary judgment on the issue of liability is granted and Plaintiff's application seeking dismissal of the Defendants' first, second, fourth, and seventh affirmative defenses is granted. Defendant Kim was negligent and the proximate cause of the accident. The matter shall proceed on the issue of damages only.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Hon. Carl J. Landicino, J.S.C.

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