

Perez v Giannascolo
2022 NY Slip Op 33925(U)
November 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 508636/2021
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 7th day of November, 2022.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
GEOVANNY PEREZ,

Plaintiff,

-against-

ANNE M. GIANNASCOLO,

Defendant.
-----X

DECISION AND ORDER

Index No.: 508636/2021

Motion Sequence #1

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

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	13-21
Opposing Affidavits (Affirmations).....	22, 23
Reply and Sur-Reply Affidavits (Affirmations).....	24, 25

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

Plaintiff Geovanny Perez (“Plaintiff”) commenced this action seeking damages for alleged injuries sustained as a result of a purported motor vehicle accident he had while riding his bicycle. Plaintiff’s accident was purportedly a collision with Defendant Anne M. Giannascolo (“Defendant”) at the intersection of Central Park West (“CPW”) with West 69th Street (“W69”) in Manhattan, New York on October 27, 2020. Plaintiff contends that Defendant violated VTL 1141 in that while making a left hand turn from CPW onto W69 Defendant impacted the Plaintiff’s bicycle. Plaintiff further contends that he had the right of way and was free from comparative negligence.

Plaintiff now moves (motion sequence #1) for summary judgment on the issue of liability and seeks the dismissal of Defendant's affirmative defenses on the issues of comparative negligence and assumed risk. Defendant opposes the motion. Defendant contends that there are triable issues of fact.

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].

Turning to the merits of the motion, Plaintiff contends that Defendant violated VTL 1141 which states that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Plaintiff relies primarily on the deposition testimony of the parties. During his deposition, Plaintiff testified that while he was traveling on CPW and approaching its intersection with W69 he stopped at the red light for approximately thirty seconds. (See Plaintiff's Deposition Testimony, NYSCEF Document 19, Pages 37-38). He further testified that he was first in line at the intersection and when the light turned green he proceeded to travel through the intersection. (Id. Page 38). While proceeding through the intersection, Plaintiff testified that Defendant's vehicle came into contact with "the rear back of the bike of the tire." (Id. Page 40). Plaintiff further testified that before proceeding into the intersection "[t]here was no car. There was none" that was making a turn. (Id. Page 51).

Defendant testified in her deposition that she was travelling northbound on CPW in the left lane, intending to make a left-hand turn onto W69. (See Defendant's Deposition Testimony, NYSCEF Document 20, Page 18). Defendant further testified that as she was approaching the intersection the light turned red and she came to a stop behind a couple of cars that were ahead of her. (Id. Pages 20-21). She further testified that the light turned green and the vehicles in front of her continued straight through the intersection. She also confirmed that she never saw Plaintiff's bicycle prior to the accident. (Id. Page 22). Defendant stated that while making her left hand turn the front of her vehicle came in contact with the rear of Plaintiff's bicycle as follows:

Q: What portion of your vehicle came into contact with the bicycle?

A: The driver's side -- their left-hand side of the driver's side near the headlamp.

Q: In the front?

A: Yes.

Q: What portion of the person or the vehicle that you came into contact with with [sic] your vehicle did you strike?

A: The back of the bike. The rear end of the bike.

(Id. Page 24).

She further testified that she "only saw [Plaintiff] directly in front of my vehicle when I put on the brakes and in that millisecond, he turned and there was the impact." (Id. Page 33).

Defendant opposes the motion and argues that there are material issues of fact. Specifically, Defendant argues that there is conflicting deposition testimony as to the facts surrounding the accident. The Defendant had a duty to yield the right of way to Plaintiff pursuant to Statute (VTL 1144) and any inconsistencies between Plaintiff's and Defendants' testimony are not material. As such, the Defendant has failed to raise an issue of fact. Accordingly, the Court finds that the Defendant driver was negligent and the proximate cause of the accident.

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

Plaintiff's motion for summary judgment on the issue of liability (motion sequence #1) is granted. The Defendant driver was negligent and the proximate cause of the accident and Defendant's affirmative defenses of culpable conduct and assumption of risk are dismissed. 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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