

**Jie Fan v Harper**

2023 NY Slip Op 31093(U)

April 6, 2023

Supreme Court, New York County

Docket Number: Index No. 155101/2019

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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JIE FAN,

Plaintiff,

- v -

MARVIS HARPER, THE CITY OF NEW YORK, NEW YORK
CITY DEPARTMENT OF BUILDINGS

Defendants.

-----X

INDEX NO. 155101/2019

MOTION DATE 11/15/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 100, 101, 103

were read on this motion for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff's motion for summary judgment is granted in part, as set forth below.

In this negligence action, plaintiff alleges that on January 28, 2019, he was driving north on West Street in New York, New York, when a vehicle owned by defendant the City of New York (the "City") and operated by defendant Marvis Harper, a New York City Department of Buildings employee, entered plaintiff's lane of travel, leading to a collision with plaintiff's car that injured plaintiff. The City interposed an Answer, asserting affirmative defenses sounding in: (1) contributory negligence; (2) assumption of risk; (3) governmental function immunity; (4) CPLR §1601; and (5) VTL §1103 and 1004<sup>1</sup> (NYSCEF Doc. No. 85 [Amended Answer at ¶¶8-12]).

<sup>1</sup> Defendants concede, in their opposition to the instant motion, that their third and fifth affirmative defenses—based upon governmental function immunity and VTL §§ 1103 and 1104, respectively—are inapplicable here.

Plaintiff now moves, pursuant to CPLR §3212, for an order: (1) granting him partial summary judgment on the issue of defendants' liability; and (2) striking defendants' first, second, third, and fifth affirmative defenses. In support of this motion, plaintiff submits the transcript of Harper's deposition, in which he testified that immediately prior to the collision he was attempting to merge into the right lane of traffic (NYSCEF Doc. No. 89 [Harper EBT at pp. 23-26]). Harper testified that when he initially checked his rear view mirror he noticed plaintiff's car about twenty to thirty feet behind him and believed he could change lanes safely (Id. at pp. 28-30). He further testified that, prior to changing lanes, he checked the rearview mirror and signaled his movement into the right lane (Id.). Plaintiff also submits a video from the dashboard camera of his car which recorded the moments leading up to and including the collision (NYSCEF Doc. No. 95). This video, the accuracy of which defendants do not dispute, shows that Harper signaled his lane change and then started to switch lanes when the front of plaintiff's car was approximately parallel to the midpoint of Harper's car.

Defendants oppose the motion. Defendants note that plaintiff's video shows that Harper signaled before his lane change and argue that, as this lane change "was not made without warning ... [a] finder of fact can (and should) determine that plaintiff was the cause of this accident for not observing what was to be seen in front of him" (NYSCEF Doc. No. 100 [Staines Affirm. in Opp. at ¶4]). Defendants also observe that "the video ... reveals that brake lights are engaged by surrounding vehicles and the vehicles in the vicinity are slowing down, [except] for the plaintiff" and argues that this creates a question of fact as to "whether plaintiff failed to observe the roadway conditions and if he was traveling at a reasonable speed for those conditions" (Id. at ¶5). In light of these triable issues of fact, defendants conclude, "plaintiff cannot demonstrate as a matter of law that he was free from contributory negligence for the happening of this accident" (Id. at ¶26).

## DISCUSSION

That branch of plaintiff's motion seeking partial summary judgment as to defendants' liability is granted. "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" (Tsyganash v Auto Mall Fleet Mgt., Inc., 163 AD3d 1033, 1033-1034 [2d Dept 2018]; see also Rodriguez v City of New York, 31 NY3d 312 [2018]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (See Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id.)

Plaintiff has established defendants' negligence through unrebutted proof that Harper violated Vehicle and Traffic Law §1128(a). This statute provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (VTL §1128[a]). A violation of VTL §1128 establishes prima facie liability on the part of the driver of the offending vehicle (See Flores v City of New York, 66 AD3d 599 [1st Dept 2009]). Here, Harper's testimony and plaintiff's dashcam video establish that Harper attempted to shift lanes into moving traffic when it was not safe to do so, in violation of VTL §1128 (See e.g., Castro v Hatim, 174 AD3d 464 [1st Dept 2019] [photographic evidence that plaintiff's SUV struck rear of defendants' tractor-trailer while attempting to merge into defendants' truck's lane of traffic established violation of VTL §1128]; Carthen v Sherman, 169 AD3d 416 [1st Dept 2019] [deposition testimony and police report showed that defendant merged into codefendant's lane of traffic established prima facie

showing of negligence through violation of VTL §1128]; Silverio v Ford Motor Co., 168 AD3d 608 [1st Dept 2019]; Flores v City of New York, 66 AD3d 599 [1st Dept 2009]). While the City maintains that Harper's testimony establishes that he changed lanes when he believed it was safe for him to do so "it is clear from the fact that the collision occurred that it was not actually safe" to change lanes at that time (Batista v Akram, 2021 NY Slip Op 31763[U] [Sup Ct, NY County 2021]).

Although the Court agrees with the City that issues of fact remain as to whether plaintiff was negligent and whether this negligence played any role in the collision, this is irrelevant to plaintiff's motion for partial summary judgment as to defendants' liability. "[T]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (Rodriguez v City of New York, 31 NY3d 312, 324-25 [2018]).

These outstanding issues of fact are relevant, however, to that branch of plaintiff's motion seeking to strike defendants' first and second affirmative defenses of contributory negligence and assumption of risk. Since questions of fact remain as to whether defendants' negligence was the sole proximate cause of the accident or whether plaintiff was negligent in the operation of his vehicle or in failing to observe Harper's turn signal and use such care to avoid the collision as an ordinarily prudent person would have used under the circumstances, dismissal of these affirmative defenses is inappropriate (Cf. Flores v City of New York, 66 AD3d 599 [1st Dept 2009] [defendants "failed to raise an issue of fact as to comparative negligence on the part of plaintiff. Indeed, there was no indication that plaintiff was speeding prior to the accident or that he contributed in any way to the accident"]).

Accordingly, it is

**ORDERED** that plaintiff’s motion for partial summary judgment as to liability as against defendants is granted; and it is further

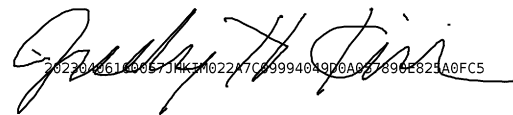
**ORDERED** that plaintiff’s motion for summary judgment dismissing defendants’ affirmative defenses is granted as to plaintiff’s third and fifth affirmative defenses (which have been withdrawn by defendants) and is otherwise denied; and it is further

**ORDERED** that upon completion of discovery, the filing a Note of Issue and Certificate of Readiness, and compliance with all the rules of the Court, this action shall be placed on the trial calendar for a trial on the issues of contributory negligence, serious injury, damages, and causation; and it is further

**ORDERED** that plaintiff shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

4/6/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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