Koleosho v Ciporen

2023 NY Slip Op 31129(U)

March 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 518788/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of March 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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THOMAS A. KOLEOSHO, Index No.: 518788/2020

Plaintiff,

-against- DECISION AND ORDER

WILLIAM CIPOREN, Motions Sequence #2

Defendants.

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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	29-36,
Opposing Affidavits (Affirmations)	39-43,
Reply Affidavits (Affirmations)	49

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

The instant action concerns a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on September 12, 2020. At the time of the occurrence, Plaintiff Thomas A. Koelosho (hereinafter referred to collectively as the "Plaintiff") was operating his vehicle and was purportedly struck by a vehicle owned and operated by Defendant William Ciporen (hereinafter referred to the "Defendant"). The Plaintiff alleges that the Defendant, faced with a stop sign, entered the intersection without yielding the right of way to Plaintiff's vehicle, thereby causing the collision. Plaintiff was not facing a traffic control sign/device at the intersection. The accident occurred at the intersection of Avenue J and East 49th Street in Brooklyn, New York.

The Plaintiff now moves (motions sequence #2) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability, and pursuant to CPLR 3211(b) striking the Defendant's affirmative defenses of comparative negligence, assumption of risk and failure to wear a seatbelt. The Plaintiff contends that summary judgment on the issue of liability should be granted in his favor in that the Defendant violated VTL 1142(a).

The Defendant opposes the motion. The Defendant argues that the initial motion by the Plaintiff (motion sequence #1) was denied and that the Plaintiff has not satisfied the requirements of CPLR 2221 to renew or reargue. The Defendant also argues that the motion should be denied as premature. Finally, the Defendant argues that there are issues of fact and the Defendant contends that he properly entered the intersection after stopping and that the Plaintiff was negligent in as much as the Plaintiff's vehicle collided with his vehicle.

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 A.D.3d 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 [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].

In support of the Plaintiff's motion, the Plaintiff relies on his own affidavit. In his affidavit, the Plaintiff stated that "[a]s I was proceeding straight on Avenue J and approaching the intersection of East 49"' Street, with no stop sign in my direction of travel, at a safe and steady rate of speed of between twenty (20) and twenty-five (25) miles per hour, I saw a motor vehicle stop at the stop sign on East 49th Street where it intersects Avenue J." The Plaintiff further stated that "[a]fter my vehicle had entered the intersection, with no stop sign and the right of way, the other motor vehicle proceeded into the intersection while my vehicle was already within the intersection, when it was not safe to do so, and struck the passenger side of my vehicle, causing my vehicle to flip onto its diver's side."

"The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws which require him or her to yield." *Adobea v. Junel*, 114 A.D.3d 818, 819, 980 N.Y.S.2d 564, 566 [2d Dept 2014], *quoting Williams v. Hayes*, 103 A.D.3d 713, 714, 959 N.Y.S.2d 713, 714 [2d Dept 2013]; *Bullock v. Calabretta*, 119 A.D.3d 884, 884, 989 N.Y.S.2d 862 [2d Dept 2014]. "A driver who has the right-of-way, however, also has a duty to keep a proper lookout to avoid colliding with other vehicles." *Bonilla v. Calabria*, 80 A.D.3d 720, 720, 915 N.Y.S.2d 615, 616 [2d Dept 2011].

First, it should be noted that the "motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. The Defendant relies on his own affidavit and a certified Police Accident Report. Although the Police Accident Report is certified, it does not otherwise include a party admission that would constitute an exception to the hearsay rule. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. Additionally, the renewal is proper in that the underlying decision was denied for a Court rule violation, which was not material to the merits of the action. Plaintiff was granted leave to renew. Moreover, the Court (Part 81) does not require a statement of facts pursuant to Uniform Rule 202.8-g(a).

The Defendant, in his affidavit, states, "[p]rior to the accident, I came to a complete stop at the stop sign on East 49th Street at the subject intersection for approximately one minute." The Defendant also states that "I did not see any vehicles on Avenue J after I came to a complete stop, so I proceeded into the intersection with the intention of continuing straight on East 49th Street." The Defendant further states that "[a]s I was entering the intersection, my vehicle was impacted

by a vehicle that I later learned was operated by plaintiff THOMAS A. KOLEOSHO." (See Affirmation in Opposition, Exhibit "B"). As such, the Plaintiff's motion is granted to the extent that the Defendant is negligent and a proximate cause of the accident, subject to a comparative negligence analysis of Plaintiff's fault, if any, at the time of trial.

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

Plaintiff's motion (motion sequence #1) for summary judgment on the issue of liability is granted, subject to a comparative negligence analysis of Plaintiff's fault, if any, at the time of trial.

The foregoing constitutes the Decision and Order of the Court.

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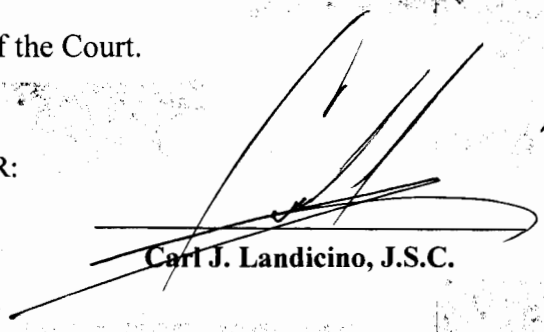

Carl J. Landicino, J.S.C.

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