

Comsa v Herman

2023 NY Slip Op 31756(U)

May 22, 2023

Supreme Court, New York County

Docket Number: Index No. 155071/2021

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

-----X

TUDOR COMSA

Plaintiff,

- v -

STACEY HERMAN,

Defendant.

-----X

INDEX NO. 155071/2021
MOTION DATE 01/20/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and after oral argument, which took place on March 7, 2023, where Monica Trombley, Esq. appeared for the Plaintiff Tudor Comsa (“Plaintiff”) and Brian Stapleton, Esq. appeared for Defendant Stacey Herman (“Defendant”), Defendant’s motion for summary judgment dismissing Plaintiff’s Complaint is denied.

I. Background

This case arises from a bicycle collision in Central Park on March 12, 2021 (NYSCEF Doc. 1). Plaintiff commenced this action on May 25, 2021 (*id.*). The thirteen-paragraph complaint alleges that Defendant was riding her bicycle in a negligent manner which caused Plaintiff and Defendant to crash (*id.*). Defendant filed her Answer with affirmative defenses on June 15, 2021 (NYSCEF Doc. 3). The note of issue was filed on August 3, 2022 (NYSCEF Doc. 16).

Defendant filed this motion for summary judgment on December 1, 2022 (NYSCEF Doc. 17). Defendant asserts that the undisputed facts show that Plaintiff rode his bicycle through a red light and collided into the rear of Defendant’s bicycle (NYSCEF Doc. 18 at ¶ 3). Defendant asserts that just prior to the impact, she signaled her intent to cross the East 72nd Street transverse and

checked for oncoming traffic (*id.*). Defendant states that she is a cancer patient, who was riding her bike at a leisurely pace of five miles per hour when Plaintiff struck her (*id.*). Defendant asserts that Plaintiff was riding at a fast speed and admitted he did not notice Defendant until just one or two seconds before he crashed into her. Defendant claims there were multiple eyewitnesses who placed the blame for the crash on Plaintiff, who was riding too fast, ignored a red light, and failed to avoid the slower cyclist in front of him. Therefore, Defendant argues that liability rests solely with Plaintiff and the case should be dismissed.

Defendant submitted the affidavit of Daniel Savage (“Savage”) in support of her motion for summary judgment (NYSCEF Doc. 24). Savage was an eyewitness to the incident. Savage swore, under penalty of perjury, that on the date of the incident, he was riding his bike at approximately 18-20 miles per hour (*id.* at ¶ 7). Savage claims that he noticed Plaintiff pass by, and that Plaintiff was riding much faster than Savage (*id.* at ¶ 8). Savage claimed he was following Plaintiff for approximately a half-mile, approximately 20-30 yards behind Plaintiff (*id.* at ¶ 11). Savage testifies that he saw Plaintiff ride directly into Defendant (*id.* at ¶ 14). Savage testified that Defendant was clearly visible, was riding at a slower speed than Plaintiff, that Plaintiff was riding too fast for the intersection where the collision occurred, and that Plaintiff failed to avoid Defendant (*id.* at ¶ 21). Therefore, Savage attributes the accident entirely to Plaintiff (*id.*).

The depositions of both the Plaintiff and Defendant were provided (NYSCEF Docs. 21-22). Plaintiff admits that he collided into the bicycle in front of him (NYSCEF Doc. 21, 15:23-24). Plaintiff states that Defendant took a sharp left turn in front of him and that he did not have enough time to brake (*id.* 20:2-4). Plaintiff claims Defendant did not signal and did not ensure there was nobody coming from behind (*id.*, 20:4-5). Plaintiff testified that he was riding between 10 and 13 miles an hour (*id.*, 21:10-12).

At Defendant's deposition, she testified that she signaled with her arm that she was going to cross (NYSCEF Doc. 22, 13:8-12). Defendant testified that after signaling, she looked to see if there was anybody behind her but did not see any other bicyclists (*id.*, 15: 7-20). Defendant also testified that she looked at the traffic light just prior to crossing, and the light was green, giving her the right of way (*id.* 20:13-24).

On December 19, 2022, Plaintiff submitted opposition to this motion for summary judgment. Plaintiff submitted an affidavit (NYSCEF Doc. 26). Plaintiff reiterated that Defendant did not signal and did not ensure that there was someone coming from behind (*id.* at ¶ 4). Further, Plaintiff claims that there was no traffic light at the location of the accident, and therefore there could not have had a green light as she testified (*id.* at ¶ 6).

Plaintiff argues summary judgment is inappropriate because there are issues of fact which require a jury to determine whether Defendant was negligent. Plaintiff argues there is an issue of fact regarding whether Plaintiff was speeding. Plaintiff testified in his deposition, he was travelling at 10-13 miles per hour, while Savage provided an affidavit stating Plaintiff was travelling at approximately 18-20 miles per hour. There is no definitive evidence which indicates the speed at which Plaintiff was travelling. Moreover, as indicated by the photographs submitted by Plaintiff in opposition to this motion for summary judgment, Plaintiff argues that there is an issue of fact as to whether Plaintiff ran a red light. Further, Plaintiff points out that the affidavit of Savage is silent as to whether Plaintiff ran a red light, and therefore Defendant's testimony regarding whether she had a green light to cross is unsubstantiated. Finally, Plaintiff argues that even if Plaintiff was speeding and ran a red light, there are issues of fact as to whether Defendant was negligent in failing to see Plaintiff riding his bike prior to making the sharp left turn. Plaintiff asserts that viewing the facts in the light most favorable to the non-movant, summary judgment should be

denied. Defendant submitted a memorandum of law in reply on February 2, 2023 (NYSCEF Doc. 29). Defendant basically reiterates her prior arguments that Plaintiff was speeding, and ignored a red light, and therefore liability rests on Plaintiff alone.

II. Discussion

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). To prevail on a motion for summary judgment on the issue of liability in a negligence action, a movant must establish, *prima facie*, not only that the opposing party was negligent, but also that the movant was free from comparative fault (*Harth v Reyes*, 151 AD3d 1031 [2d Dept 2017]).

Viewing the facts in the light most favorable to the non-moving party, the Court finds that there are issues of fact which warrant denying Defendant's motion for summary judgment. First, there is conflicting testimony as to whether Plaintiff was travelling at an unreasonably high speed. While Plaintiff claims he was travelling at 10-13 miles per hour, non-party Savage estimated that Plaintiff was travelling at 18-20 miles per hour. It is not for this Court to determine the credibility

of the witnesses, and therefore any negligence attributed to Plaintiff based on this conflicting testimony is for a jury to decide (*Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507 [1st Dept 2017]).

Likewise, Plaintiff swears there was no traffic light, while Defendant repeatedly claims that Plaintiff ran a red light. Nor did the non-party witness Savage corroborate Defendant's testimony that Plaintiff ran a red light. On reply, rather than addressing these arguments, Defendant merely reiterated her assertion that Plaintiff ran a red light. Thus, it is for the trier of fact to determine whether there was a red light which Plaintiff ran through, and if he did, whether his negligence in running the red light was what caused the accident. Moreover, since the Plaintiff's testimony contradicts Savage's testimony, the mere fact that Savage testified that the accident was solely Plaintiff's fault does not mandate an award of summary judgment in favor of Defendant. There is also conflicting testimony regarding whether Defendant signaled before turning into the lane in which Plaintiff was travelling. These all constitute material issues of fact which warrant denying summary judgment. While Defendant's arguments may go to comparative fault, they are insufficient to grant summary judgment dismissing Plaintiff's Complaint (*see, e.g. Gonzalez v Gonzales*, 212 AD3d 716 [2d Dept 2023] [material issues of fact as to whether motorist failed to see what was there to be seen through the proper use of his senses or failed to exercise due care to avoid collision precluded grant of summary judgment to motorist on negligence claim]).

Accordingly, it is hereby,

ORDERED that Defendant Stacey Herman's motion for summary judgment dismissing Plaintiff Tudor Comsa's Complaint is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve this Decision and Order, with notice of entry, on Defendant; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/22/2023

DATE

Mary V Rosado JSC

HON. MARY V. ROSADO, 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