

**Wilson v Tillman**

2023 NY Slip Op 32137(U)

June 27, 2023

Supreme Court, New York County

Docket Number: Index No. 161442/2019

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X

INDEX NO. 161442/2019

LAWRENCE L. WILSON,

MOTION SEQ. NO. 002

Plaintiff

- v -

DECISION AND ORDER ON MOTION

ROLAND K. TILLMAN, MTA BUS COMPANY

Defendants

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 97

were read on this motion to/for

JUDGMENT - SUMMARY

For the reasons that follow, Plaintiff's motion seeking summary judgment and dismissal of Defendant's affirmative defenses is denied.

Background

This personal injury matter arises out of an alleged accident between two motor vehicles on October 19, 2018. In the complaint, Plaintiff alleges that on October 19, 2018, while employed for a bus company, he was stopped at a designated bus stop and while letting off passengers, Defendant's public bus operated by Defendant-bus driver, Roland K. Tillman ("Tillman") struck Plaintiff's vehicle.

Plaintiff, now pre-note of issue, and prior to conducting party depositions, moves for summary judgment on the issue of liability, alleging that Defendant's negligent driving was the sole proximate cause of the accident.<sup>1</sup> Defendants oppose.

1 As per the Court's Order dated November 9, 2022, (NYSCEF Doc. 76) Motion Seq. 2 was incorrectly deemed withdrawn, when the Court intended the Order to apply to Motion Seq. 1. An Amended Order, dated April 10, 2023, (NYSCEF Doc. 97) was subsequently issued recalling and amending the November 9, 2022 Order. Accordingly, Motion Seq. 2 will be addressed on its merits.

*Discussion*

When a plaintiff moves for summary judgment, that plaintiff has the high burden of establishing entitlement to judgment as a matter of law by demonstrating that there is no defense to the cause of action (see CPLR 3212 [b]). In a negligence action, this burden is met with evidence in admissible form dispelling any material questions of fact for a trial including issues regarding plaintiff's own negligence and shared culpability for the accident (*Calcagno v. Rodriguez*, 91 AD 468 [1<sup>st</sup> Dept 2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v. Pomeroy*, 35 NY2d 361[1974]). Only when this this burden is met will opposing papers be considered (see *Alvarez*, 68 NY2d 320).

Here, upon review, Plaintiff's evidence does not establish entitlement to judgment as a matter of law.

Plaintiff primarily relies on a police report to argue that Defendant admitted guilt by telling the police officer that he side-swiped Plaintiff's vehicle. Yet, the writings of a police officer who did not witness the accident will not be considered evidence of the cause of the accident (*Garcia v. BLS Limousine Serv. of New York, Inc.*, 199 AD3d 612, [1<sup>st</sup> Dept 2021]; *Coleman v. Maclas*, 61 AD3d 569 [1<sup>st</sup> Dept 2009]). Furthermore, even if the police report was certified, it does not establish negligence as a description of a collision is not an admission of fault (see e.g. *Cordero v. Escobar*, 186 AD3d 1315 [2d Dept 2020]; see also *Concepcion v. City of New York*, 202 AD3d 403 [1<sup>st</sup> Dept 2022]).

Plaintiff also submits affidavits and transcript testimony. During the 50-h hearing on June 28, 2019, notably, Plaintiff testified that the bus he was operating had a camera, yet he did not know what the camera recorded, nor submits any recording (NYSCEF Doc. #68). Plaintiff also testified that the accident occurred while the bus was in park in a designated bus stop at the intersection of Woodhull and White Street. He also identified the location as Woodhull and State Street. Plaintiff further testified that he was letting passengers out and was waiting for the traffic light to turn from

red to green. Plaintiff described the intersection as having one lane continuing to the right and one lane going to the left. He did not know how long he had been sitting at the light prior to the accident, but states that had not moved his bus from the time he let passengers off until the collision occurred. Plaintiff also testified that he did not see from what direction the Defendants' bus was coming prior to the collision.

In an affidavit dated January 11, 2022, Plaintiff states that he was pulled over and parked in a designated bus stop in the rightmost westbound lane "at or around" 8 State Street in Manhattan. Yet, contrary to his 50-h testimony, Plaintiff was now able to determine the movements of the Defendants' bus, asserting that the Defendants' bus made contact with his parked bus as the Defendants' bus was moving from the left lane to the right lane while it passed the Plaintiff's bus.

In addition, Plaintiff submits a Google image of the area where the accident occurred, as well as three photographs allegedly depicting the accident (NYSCEF Doc. #30). Yet the Google image provided (purporting to be from June 2018) contrary to Plaintiff's 50-hearing testimony, shows that not one, but two lanes of traffic turn to the right at the subject intersection (NYSCEF Doc. #30, 31). In addition, Plaintiff's papers do not allege that Plaintiff was operating a public bus nor a bus with permission to stop at a bus stop. Plaintiff only alleges that he was operating the bus in an employment capacity.

Upon Defendants' filing opposing papers, Plaintiff submitted another affidavit, dated April 5, 2022 (NYSCEF Doc. #67). In this affidavit, Plaintiff alleges that he dropped off the passengers and was waiting for the traffic light to turn green at the time of the collision. While it appears that this second affidavit is submitted as a reply, and thus not appropriate, even if this Court considered such affidavit, it would only show more contradictions as to how the accident happened and raise further questions of facts about the witness' credibility (*see e.g. Migdol v. City of New York*, 291 AD2d 201 [1<sup>st</sup> Dept 2002]).

Plaintiff also relies on Supreme Court decisions, *Guerrero v. Milla*, 135 AD3d 635 [1st Dept 2016], *Steigelman v. Transervice Lease Corp.*, 145 AD3d 439 [1st Dept 2016] and *Sanchez v. Oxcin*, 157 AD3d 561 [1st Dept 2018]. Yet, in *Guerrero*, *Steigelman*, and *Sanchez*, unlike here, plaintiffs supported their summary judgment motions with evidence establishing their prima facie burden. As the Plaintiff has not met his prima facie burden, the sufficiency of the Defendants' opposition will not be considered.

*Affirmative Defenses*

In light of Plaintiff's contradicting evidence and the lack of evidence as to the type of bus Plaintiff was operating, dismissal of the affirmative defense of Plaintiff's failure to where is a seatbelt is denied at this time.

Accordingly, it is hereby

ORDERED that the Plaintiff's motion for summary judgment as to liability pursuant to CPLR §3212 is denied; it is further

ORDERED that the Plaintiff's motion to dismiss the Defendants' affirmative defense of Plaintiff's contributory negligence is denied; and it is further

ORDERED that the Plaintiff's motion to dismiss the Defendants' affirmative defense of Plaintiff's failure to wear a seatbelt is also denied; and it is further

ORDERED that the Defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office within 20 days from the date of this Order.

6/27/2023

DATE

CHECK ONE:

CASE  
 GRANTED

| DENIED

APPLICATION:

SETTLE  
 INCLUDES

CHECK IF

**HON. DENISE M. DOMINGUEZ**  
**J.S.C.**

NON-FINAL  
 GRANTED IN  OTHER  
 SUBMIT ORDER  
 FIDUCIARY  REFERENCE