

Biltucci v Rouamba

2023 NY Slip Op 32275(U)

June 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 514642/2021

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 26th day of June, 2023.

PRESENT: HON. CARL J. LANDICINO, J.S.C.

-----X
LILLI BILTUCCI,

Index No.: 514642/2021

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence #1

PASCAL B. ROUAMBA,

Defendant.
-----X

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.....	13-22,
Opposing Affidavits (Affirmations).....	26-27,
Reply and Sur-Reply Affidavits (Affirmations).....	30.

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

This lawsuit arises out of a motor vehicle accident that allegedly occurred on May 20, 2021. Plaintiff, Lilli Biltucci (hereinafter the "Plaintiff") alleges in her Complaint that she suffered personal injuries while riding her bicycle when the vehicle owned and operated by Defendant Pascal B. Rouamba (hereinafter the "Defendant") collided with her. The collision apparently occurred at or near the intersection of Porter Avenue and Grattan Street in Brooklyn, New York.

The Defendant moves (motion sequence #1) for summary judgment pursuant to CPLR 3212 dismissing the complaint. The Defendant argues that he is not liable for the collision. He contends that he had the right of way and that the Plaintiff rode her bicycle through a stop sign and collided with his vehicle and, as such, Plaintiff was the sole cause of the collision. In support of his motion, the Defendant relies on the depositions of the parties and a video of the incident.

Plaintiff opposes the motion and argues that there are issues of fact regarding the Defendant's comparative negligence.

It has long been established that “[s]ummary 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 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate 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 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

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].

The Defendant sat for deposition on January 11, 2022 (NYSCEF Doc. 21). When asked where the collision occurred the Defendant stated, “[i]n the middle of the intersection”, “[b]etween Porter Avenue and Grattan Street.” (Page 30). When asked whether there were traffic control devices at Grattan Street, Defendant stated “[n]o.” (Page 38). Defendant stated that he was

travelling “twenty-five miles per hour.” (Page 36). Defendant confirmed that he did not see the Plaintiff and her bicycle before the impact occurred.

In addition, Defendant relies on Plaintiff’s deposition testimony in support of his motion. The Plaintiff sat for deposition on January 11, 2022 (NYSCEF Doc. 20). Plaintiff described Grattan Street in the relevant area as “a one-way with a bike lane demarcated on the road.” (Page 17). When asked to describe the traffic control devices at the intersection of Grattan and Porter, Plaintiff stated, “[o]n Grattan, as it is a one-way, coming from that one lane there is a stop sign and a stop line painted on the road.” (Page 25). When asked whether she stopped or slowed down at the stop sign when she approached the intersection, Plaintiff stated, “[a]s I approached the intersection I slowed down and I was in the bike lane.” (Pages 25-26). When asked where she was looking as she approached the intersection, Plaintiff stated that “[she] looked both ways as there is traffic that Porter will come from both directions. [She] looked left and right and then left again and [she] did not see any vehicles.” (Pages 26-27). When asked how far down Porter Avenue she could see as she crossed the stop sign and looked to the left, Plaintiff stated, “[a]pproximately twenty to thirty feet”, “I did not see any vehicles.” (Page 29). When asked whether she saw Defendant’s vehicle at any point prior to the collision, Plaintiff stated, “I saw the vehicle about half a second before impact when I was in the middle of the intersection, and this is following looking left, right and left.” (Page 30). When asked to estimate the speed at which Defendant’s vehicle was traveling prior to the collision, Plaintiff stated, “[a]pproximately forty-five, fifty miles an hour.” (Page 31). The Plaintiff also stated that although she did not own a vehicle, she had driven a car previously, “[e]nough that I couldn’t count, hundreds” of times. (Page 32).

Defendant contends that the instant collision was solely caused by Plaintiff’s failure to stop or otherwise yield in violation of VTL 1142(a). Additionally, Defendant relies on the subject video.

Defendant argues that a viewing of the vehicle clearly contradicts Plaintiff's assertion that Defendant was traveling at fifty miles per hour at the time of accident. Additionally, Defendant argues that the video depicts Plaintiff's violation of the stop sign by entering the intersection without stopping. Defendant also argues that he was not subject to a traffic control device at the subject intersection and therefore had the right of way.

In opposition to Defendant's motion, Plaintiff also relies upon her deposition testimony. When asked whether her view down Porter Avenue was blocked by parked cars when approaching the stop sign, Plaintiff stated, "Partially. However, I could still see other cars moving, you know, behind [parked cars]. There were other signs to kind of use if there is an object in the way, so --", "[a] shadow cast by like a moving vehicle so I did not see any shadow." When asked whether she heard anything, the sound of an engine, any signals, or horns honking as she crossed the stop sign and looked to her left again, Plaintiff stated, "I did not." (Page 29).

Plaintiff also relies upon Defendant's deposition testimony. When asked how many times he had driven in the subject area, Defendant stated, "[m]ore than a thousand times." (Page 19). When asked whether, from all the times he had driven on that road, he knew there was a bicycle lane and had seen bicyclists, Defendant stated, "[y]es, sir." (Pages 52-53). When asked to confirm that he did not apply his brakes between Harrison and Grattan in order to slow his vehicle, Defendant stated, "[y]es, sir". (Page 44). When asked whether he sounded his horn prior to the impact with the Plaintiff, Defendant responded, "[n]o." When asked whether he swerved in any way prior to the collision, Defendant stated, "[n]o". When asked whether he took any evasive maneuvers prior to the collision, Defendant stated, "[n]o, sir." (Page 45). When asked whether he saw the bike lane when driving on Porter Avenue as he was approaching the intersection,

Defendant stated, "I saw it in the beginning of the intersection of Grattan Street and Porter Avenue." (Page 52).

Plaintiff relies upon the video of the collision and contends that she was more than halfway into the intersection at the time of impact. In addition, Plaintiff contends that Defendant failed to slow down while entering the intersection and drove at a high speed rate. In summary, Plaintiff argues that issues of fact remain as to whether Defendant kept a proper lookout, whether Defendant could have avoided the collision with Plaintiff, and whether Defendant was speeding at the time of the accident.

"In general, a person riding a bicycle on a roadway is granted the rights, and is subject to the duties, applicable to a vehicle driver (*see* Vehicle and Traffic Law § 1231)." *Lindner v. Guzman*, 163 AD3d 947, 948, 82 N.Y.S.3d 476, 2018 N.Y. Slip Op. 05460 [2d Dept 2018]. Generally, "[a] driver who has the right of way is entitled to anticipate that other drivers will obey traffic laws which require them to yield (*see* Vehicle and Traffic Law § 1141; *Kann v. Maggies Paratransit Corp.*, 63 A.D.3d 792, 882 N.Y.S.2d 129; *Moreno v. Gomez*, 58 A.D.3d 611, 872 N.Y.S.2d 143)." *Rodriguez v. Klein*, 116 AD3d 939, 939, 983 N.Y.S.2d 851 (Mem), 2014 N.Y. Slip Op. 02761 [2d Dept 2014]. Under these circumstances, it is clear that Plaintiff failed to stop at the designated stop sign on Grattan Street and yield to traffic moving along Porter Avenue. This is evidenced by Plaintiff's deposition testimony and the video of the incident. Additionally, it is apparent that Defendant had the right of way when approaching the intersection.

Plaintiff argues that an issue of fact remains as to whether Defendant kept a proper lookout and could have avoided the collision. "In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle's horn when a reasonably prudent person would do so in order to warn a bicyclist of danger, and to operate the vehicle with reasonable care to

avoid colliding with anyone on the road.” *Palma v. Sherman*, 55 AD3d 891, 891, 867 N.Y.S.2d 111, 112-113, 2008 N.Y. Slip Op. 08307 [2d Dept 2008]. In this instance, Defendant contends that he did not see the Plaintiff on her bicycle before the moment of impact, and did not have the opportunity to avoid the collision.

Further, Plaintiff contends that Defendant was speeding at the moment of impact. “A lay witness will ordinarily be permitted to testify as to the estimated speed of an automobile, based upon the prevalence of automobiles in our society, the frequency with which most people view them at various speeds and an adequate foundation that the witness has estimated the speed of automobiles on prior occasions (*see, Larsen v. Vigliarolo Bros.*, 77 A.D.2d 562, 429 N.Y.S.2d 273; *Pieniewski v. Benbenek*, 56 A.D.2d 710, 392 N.Y.S.2d 732; *Beechey v. De Sorbo*, 53 A.D.2d 727, 383 N.Y.S.2d 925).” *Swoboda v. We Try Harder, Inc.*, 128 AD2d 862, 863, 513 N.Y.S.2d 781, 783 [2d Dept 1987]. *See also Guthrie v. Overmyer*, 19 AD3d 1169, 797 N.Y.S.2d 203, 2005 N.Y. Slip Op. 04930 [4th Dept 2005]. Plaintiff alleges Defendant was speeding at forty-five to fifty miles per hour at the moment of impact. The fact that Plaintiff did not see Defendant’s vehicle until “half a second” before the collision and was able to estimate Defendant’s speed is not necessarily speculative and is more appropriately assessed with a credibility finding. “The trial court did not commit error by permitting the defendant’s lay witness to testify concerning the speed of the plaintiff’s vehicle which he observed **immediately** before the accident.” *Shpritzman v. Strong*, 248 AD2d 524, 525, 670 N.Y.S.2d 50, 1998 N.Y. Slip Op. 02612 [2d Dept 1998] (*emphasis added*).

“Lubeski averred that immediately prior to the collision, she observed the defendants’ motor vehicle pass her motor vehicle on Stewart Avenue at a speed of, at least, 85 miles per hour, and shortly thereafter, heard a loud bang and recognized Schnitzer’s vehicle as one of the two cars involved in the collision. ‘A lay witness is ordinarily permitted to testify as to the estimated speed of an automobile based upon the prevalence of automobiles in our society and the frequency with which

most people view them at various speeds' (*Shpritzman v Strong*, 248 AD2d 524, 525 [1998])."

-*Lynch v. Dobler Chevrolet, Inc.*, 49 AD3d 509, 510, 855 N.Y.S.2d 172, 2008 N.Y. Slip Op. 01925 [2d Dept 2008].

"Based on their submissions, which included, *inter alia*, the transcripts of the parties' depositions and the plaintiff's errata sheet, the City defendants failed to eliminate all triable issues of fact as to whether Sacchetti took reasonable care to avoid the collision (*see Gezelter v Pecora*, 129 AD3d at 1023; *Cox v Nunez*, 23 AD3d 427, 428 [2005]) and was speeding at the time of the collision (*see Lynch v Dobler Chevrolet, Inc.*, 49 AD3d 509, 510 [2008])." *Alatsas v. Sacchetti*, 167 AD3d 556, 556-557, 88 N.Y.S.3d 511, 2018 N.Y. Slip Op. 08270 [2d Dept 2018]. *See also Bravo v. Benish*, 200 AD3d 639, 154 N.Y.S.3d 852 (Mem), 2021 N.Y. Slip Op. 06669 [2d Dept 2021]. Accordingly, Plaintiff raised a material issue of fact with respect to Defendant's comparative fault.

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

Defendant's motion (motion sequence #1) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Hon. Carl J. Landicino, J.S.C.

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