

Foster v Bombardier Recreational Prods., Inc.
2023 NY Slip Op 34630(U)
June 23, 2023
Supreme Court, Erie County
Docket Number: Index No. 809576/2021
Judge: Lynn W. Keane
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At a term of the Supreme Court of State of New York, held in and for the County of Erie, 92 Franklin Street, Buffalo, NY held on the 23rd day of June 2023.

PRESENT: HON. LYNN W. KEANE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Maurice Foster, and Diana Foster, Individually, and as the Wife of Maurice Foster,

Plaintiffs,

DECISION AND ORDER

INDEX NO. 809576/2021

-vs-

Bombardier Recreational Products, Inc, Ken's Service and Sales, Inc., and Christina Kubacki,

Defendants.

In this action to recover damages for personal injuries, the defendants have moved for summary judgment under CPLR §3212.

Plaintiff Maurice Foster (“plaintiff”) commenced this action for injuries sustained after the front left wheel of his three wheeled motorcycle, described as a Can-Am Ryker, began to bounce, allegedly causing the plaintiff to veer to the left, strike a median, be thrown over his handlebars, and strike a vehicle, operated by Christina Kubacki (“Kubacki”). The plaintiff has alleged that the motorcycle was manufactured by Bombardier Recreational Products, Inc. (“Bombardier”) and sold by Ken’s Service and Sales, Inc. (Ken’s).

Summary Judgment

“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 and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.” Vega v Restani Const. Corp. 18 N.Y.3d 499, 503 (2012); see Alvarez v Prospect Hosp., 68 N.Y. 2d 320 (1986).

It is well settled that the proponent of a motion for summary judgment must make the prima facie showing of their entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986); Zuckerman v City of New York, 49 N.Y.2d 557 (1980). To obtain summary judgment, the moving party must establish its claim by tendering sufficient evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. See Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 N.Y. 2d 1065 (1979). Such proof may include deposition transcripts, as well as other admissible documentary proof annexed to an attorney’s affirmation. See CPLR §3212 (b); Olan v Farrell Lines Inc., 64 N.Y.2d 1092 (1985).

Once such a showing has been established, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez, 68 N.Y.2d at 324 citing Zuckerman v City of New York, 49 N.Y.2d 557 (1980). “[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” Zuckerman at 562.

Kubacki’s Motion for Summary Judgment

Kubacki seeks an order granting summary judgment on multiple grounds.

First, she alleges that plaintiff was negligent *per se* by violating Vehicle and Traffic Law §1160(a), as he attempted to make a right turn from Southwestern Boulevard, into the north bound lane of McKinley Parkway. When turning right, the plaintiff reportedly struck the curb, crossed over the northbound lane, and struck Kubacki’s vehicle, which was in the southbound lane of McKinley Parkway,

intending to make a right turn on to Southwestern Boulevard.

Next, Kubacki denies that there was a “second impact” between her vehicle and the plaintiff. She claims further that, even if there was a second impact, that a material question of fact does not exist because she had no duty to see a person or vehicle behind and below her line of sight in an area that was not reasonably visible to the driver. PJI 2:77.

ANALYSIS

VTL 1160(a)

The plaintiff does not allege that Kubacki was liable for the initial impact. Rather, plaintiff contends that Kubacki was negligent for causing the second impact when she pulled forward after being struck and it was then that she ran over the plaintiff.

In the affidavit submitted in support of her motion, (NYSCEF #27), Kubacki states that she was moving at impact. She states that she was about four (4) car lengths away from the intersection, when she felt something strike the driver’s side passenger door of her vehicle, causing it to jolt. She avers that she was “traveling well under the 45 mile per hour speed limit at the time.” She had no warning that her vehicle was going to be struck and pulled over to the right curb and stopped the vehicle to call 911.

At her deposition, Kubacki testified that, as she was approaching the intersection, intending to make her turn, her foot was not on the brake. She felt a “hard impact” to the driver’s side of her vehicle; and the impact sounded like a “loud bang”. She recalls “slightly being jolted” inside her vehicle. After the initial impact, Kubacki was “stopped for one second, didn’t know what occurred..., pulled [her] car over to the right slightly.”. (NYSCEF # 56, page28.)

The statements of the plaintiff are in marked contrast to the statements of others who witnessed the collision and described the Kubacki vehicle as being stopped at impact.

In his affidavit (NYSCEF #33, paragraph 9), the plaintiff admits to proceeding across McKinley Parkway where he “collided with the driver’s side of a vehicle that was stopped at a redlight facing North.” In his affidavit (NYSCEF #34, paragraph 9) Charles Gidney, Jr., who was riding with the plaintiff, recalls seeing plaintiff “collide with the driver side of a Chevy Tahoe that was at a complete stop at the intersection of McKinley Parkway and Route 20.

In his affidavit (NYSCEF #35, paragraph 6) John Kelly, another rider accompanying the plaintiff, recalls seeing plaintiff's motorcycle push the plaintiff "into the driver's side of a Chevy Tahoe that was stopped at a red light on McKinley Parkway."

Mark Unger, who was not acquainted with any party to this lawsuit, and who was stopped at the intersection in question at the time of the collision, also submitted an affidavit (NYSCEF #28, paragraph 5). He recalled seeing a motorcycle striking a vehicle that was "coming to a stop" in the right turn lane on McKinley Parkway.

Whether Kubacki was moving at impact is a material issue of fact that remains very much in dispute. In her motion papers, Kubacki relies upon her affidavit to bolster her defense that she was moving at impact. Her moving papers describe this collision as nothing more than "an emergency cross over case." However, several witnesses have stated emphatically that Kubacki was stopped when her car was struck by plaintiff's motorcycle. Unlike an emergency cross over case, an issue presented here is whether it was reasonable for a driver to move the vehicle involved in a crash, even if the initial crash was not the fault of the driver.

Even Kubacki's own statements are inconsistent. In her affidavit, she makes no mention of ever stopping; presenting a set of facts which, if true, would negate the possibility of a second collision. However, during her deposition, Kubacki testified that she "stopped for one second" before pulling her car over to the right, which is consistent with Kubacki driving over the injured plaintiff.

The cases cited by Kubacki do not address a situation where, as here, the plaintiff alleges he was injured in a second impact, after the initial, unexpected impact took place.

After reviewing the record, the court finds that Kubacki has failed to establish her claim by tendering sufficient evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, to direct judgment in her favor. See Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 N.Y. 2d 1065 (1979).

PJI 2:77

Having found a material issue of fact remains regarding whether Kubacki was moving at impact, the court finds that an additional issue of fact exists whether it was reasonable for Kubacki to continue moving forward, after hearing a loud bang and feeling a hard impact to the driver's side of her vehicle causing her to be slightly jolted.

Kubacki has not provided, and the court could not locate, any case law to support her position that a driver has no duty to see and avoid a person or vehicle behind and below her line of sight.

Here, a material issue of fact remains whether Kubacki failed "... to keep a proper lookout under the existing circumstances; to see and be aware of what is in her view; and to use reasonable care to avoid an accident." PJI 2:77

Kubacki has not tendered sufficient evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, to direct judgment in her favor.

Motions for Summary Judgment of Bombardier and Ken's

Bombardier and Ken's join Kubacki in seeking summary judgment, on the grounds that plaintiff is the sole proximate cause of the accident and that plaintiff was negligent per se for his violation of VTL §1160(a) which requires "[b]oth the approach for a right turn and a right turn shall be made as close as practical to the right hand curb or edge of the roadway or, where travel on the shoulder or slope has been authorized, from the shoulder or slope."

The plaintiff has asserted claims against Bombardier and Ken's in addition to the claims brought against Kubacki.

The plaintiff has alleged strict products liability and negligence in the design and manufacture of the motorcycle, and a failure to warn, against Bombardier.

The plaintiff has alleged Ken's was negligent for failing to sell vehicles that were fit to drive and failing to review various safety features on the motorcycle.

Neither Bombardier nor Ken's has produced a representative for deposition. Until such time that additional discovery is completed, these defendants have failed to carry their burden by providing sufficient evidence to demonstrate the absence of material issues of fact. See Alvarez v Prospect Hosp., 68 N.Y. 2d 320 (1986).

WHEREFORE, it is,

ORDERED, that Kubacki's motion seeking an order granting summary judgment, and dismissing plaintiff's complaint, is DENIED, and it is,

ORDERED, that Bombardier's motion seeking an order granting summary judgment, and dismissing plaintiff's complaint, is DENIED, and it is,

ORDERED, Ken's motion seeking an order granting summary judgment, and dismissing plaintiff's complaint, is DENIED.

DATED: June 23, 2023



HON. LYNN W. KEANE, J.S.C.