Hsin Cheng v Adami
2023 NY Slip Op 34785(U)
May 30, 2023
Supreme Court, Kings County
Docket Number: Index No. 524079/2020
Judge: Carl J. Landicino
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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 30th day of May 2023.

PRESENT: HON. CARL J. LANDICINO,
Justice.

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HSIN CHENG,

Plaintiff,

-against-

MARC VINCENT ADAMI,

Defendants.

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Index No.: 524079/2020

DECISION AND ORDER

Motion Sequence #2

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	28-36,
Opposing Affidavits (Affirmations)	44-46,
Reply Affidavits (Affirmations)	47-48,

After a review of the papers and without opposition, the Court finds as follows:

The instant action concerns a claim for personal injuries allegedly arising from a motor vehicle collision that occurred on June 6, 2019. Plaintiff Hsin Cheng (hereinafter referred as the "Plaintiff") alleges that he was injured when his vehicle was struck by a vehicle owned and operated by Defendant Marc Vincent Adami (hereinafter referred as the "Defendant"). The incident allegedly occurred at the intersection of 12th Avenue and 71st 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 caused the accident by violating VTL 1142(a) in failing to stop at a stop sign and proceeding when it was unsafe to do so.

The Defendant opposes the motion. The Defendant argues that the Plaintiff has failed to meet his *prima facie* burden as the police accident report proffered by the Plaintiff is not admissible and the Plaintiff's affidavit is insufficient to establish a *prima facie* showing. The Defendant also argues that the motion should be denied as premature. Finally, the Defendant argues that there are issues of fact. The Defendant contends that he properly entered the intersection after stopping and the Plaintiff was negligent in as much as the Plaintiff's vehicle collided with Defendant's 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 and a Police Accident Report. As an initial matter, the Police Accident Report is not admissible because it is not certified. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. However, the Plaintiff stated in his affidavit that "[o]n Thursday June 6, 2019, at approximately 1:30 p.m., I was the operator of a 2004 Honda traveling on 12th Avenue at the intersection with 71st Street Street in the County of Kings, City and State of New York." The Plaintiff further stated that "71st Street is a one-way street with a single lane for moving traffic and parking lanes on either side. There is a stop sign for vehicles entering 12th Avenue on 71st Street." The Plaintiff then stated that "[a]t the time of the crash, defendant's 2019 Jeep vehicle ran a stop sign on 71st Street and entered 126 Avenue, striking my vehicle. From the time I saw defendant's vehicle to impact was approximately 1-2 seconds." The Plaintiff states that he was travelling at a speed of fifteen to twenty miles per hour, but also stated she "had no time to stop or maneuver [her] vehicle to avoid the crash." "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].

In opposition, the Defendant has failed to raise a material issue of fact as to his negligence. First, it should be noted that, except in relation to the issue of whether the Plaintiff was wearing a seatbelt at the time of the collision, 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, which is admissible in that it was duly sworn before a notary public. (See Appellate Division, 2nd Department Form Affidavit). Defendant stated that he "was traveling on 71st Street and approached the intersection of 12th Avenue. I brought my vehicle to a full and complete stop, in accordance with the stop sign. Before entering into the intersection, I looked to my right side and to my left side to see if traffic was clear for me to enter." The Defendant then states that "I did not see any vehicles coming from either my left or my right so I continued slowly and entered into the intersection. When my vehicle was in the middle of the intersection, I suddenly observed a 2004 Honda, NJ Plate #H73AHC, traveling southwest on 12th Avenue. The 2004 Honda was approaching my vehicle, and the driver of the 2004 Honda swerved to the left. The two vehicles made moderate contact." "If the operator of the 2004 Honda had entered into the intersection with caution, he would have clearly seen my vehicle which had already crossed half way through the intersection and the accident could have been avoided." Even assuming, *arguendo*, that the Defendant vehicle had stopped at the stop sign before proceeding, he would still have been negligent for proceeding and failing to yield. "A driver who fails to yield the right of way after stopping at a stop sign is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law." *Williams v. Hayes*, 103 A.D.3d 713, 713, 959 N.Y.S.2d 713, 714 [2nd Dept, 2013].

However, although the Defendant has not established a non-negligent defense, the Defendant indicates that he stopped first and looked both ways and upon seeing no vehicles he proceeded.

> " "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2010]). Vehicle and Traffic Law § 1142 (a) provides, in pertinent part, that "[e]xcept when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection."
>
> If one party has established that the other party has committed negligence per se, the burden then falls to the opposing party to submit a nonnegligent explanation for the action (*see Arbizu v REM Transp., Inc.*, 20 AD3d 375, 376 [2005]). A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield (*see Wolf v Cruickshank*, 144 AD3d 1144, 1145 [2016]). "[A] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision [and] to see what there is to be seen through the proper use of his or her senses" (*Ballentine v Perrone*, 179 AD3d 993, 994 [2020]; *see De Castillo v Sormeley*, 140 AD3d 918, 919 [2016])."

-*Orellana v. Mendez*, 208 AD3d 888, 889, 174 N.Y.S.3d 445, 2002 N.Y. Slip Op. 05092 [2d Dept 2022].

The Plaintiff states that he saw the Defendant's vehicle one to two seconds prior to impact and had seen the Defendant failing to stop for the stop sign. The Defendant states that Plaintiff's vehicle hit the Defendant's vehicle when the Defendant's vehicle was halfway across the intersection. It is not clear based upon this testimony whether the Plaintiff was able to take evasive action to attempt to avoid the collision. As such, there remains an issue of the Plaintiff's comparative negligence. See *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]

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

The Plaintiff's motion (motion sequence ~~#1~~ #2) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and a proximate cause of the accident. All other relief is denied and the issue of whether the Plaintiff was comparatively negligent will be addressed at trial.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
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