

Zawar v Moreno

2023 NY Slip Op 34791(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 521188/2018

Judge: Carl J. Landicino

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.

0

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 24th day of April, 2023.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
ALI AL ZAWAR,

Index No.: 521188/2018

Plaintiff,

-against-

DECISION AND ORDER

GUSTAVO MORENO and COMPASS GROUP USA, INC.

Motions Sequence #2

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	48-58,
Opposing Affidavits (Affirmations).....	61,
Reply Affidavits (Affirmations)	63

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

The instant action concerns a claim for personal injuries allegedly arising from a motor vehicle collision that occurred on August 23, 2018. Plaintiff Ali Al Zawar (hereinafter the “Plaintiff”) alleges that he was injured when his vehicle was struck in the rear by a vehicle operated by Defendant Gustavo Moreno (“Moreno”) and owned by Defendant Compass Group USA, Inc. (“Compass”) (collectively the “Defendants”). The incident allegedly occurred as the Plaintiff was completing a left hand turn from West Street onto Murray Street in New York County, New York. The Plaintiff alleges that he was rear ended as he slowed his vehicle to avoid colliding with the bicycle.

The Plaintiff now moves (motion sequence #2) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and dismissing the Defendants' first, second, third, fourth, fifth, sixth, tenth, twelfth, fourteenth, fifteenth and sixteenth affirmative defenses. The Plaintiff contends that summary judgment should be granted because the Defendant's vehicle was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that Plaintiff's vehicle was hit in the rear by the Defendants' vehicle. In support of his application, the Plaintiff relies on the depositions of the Plaintiff and Defendant Moreno. The Defendants oppose the motion and contend that Plaintiff's application for summary judgment should be denied as there are issues of fact regarding how the accident occurred and whether the Plaintiff suddenly and abruptly decelerated in front of the Defendants' 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, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [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, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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 AD3d 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, 538 N.Y.S.2d 837 [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 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

The Plaintiff sat for a deposition on January 30, 2020 (NYSCEF Doc. 55). He indicated that he started his left-hand turn after having been stopped at a traffic light. (Page 39). When asked where he was looking when the collision occurred, the Plaintiff stated, “[f]orward, looking forward.” (Page 43) When asked if he was wearing his seatbelt, the Plaintiff stated “[y]es.” When asked at what speed he was traveling when he began to make the left turn, the Plaintiff stated “[a]pproximately 10 to 15 miles per hour.” When asked what his speed was right before the collision, the Plaintiff stated that it was 5 miles per hour. When asked why he decelerated, the Plaintiff stated, “[b]icycle lane slowed me.” (Page 45). When asked how much time had passed between him seeing the bicyclist and the impact, the Plaintiff stated, “[c]ould be five seconds or

so.” (Page 46). He stated that when he first saw the bicyclist, the bicyclist was “10 to 15 feet away.” When asked whether the bicyclist was in front of him, the Plaintiff stated “[y]eah, and he came speeding very fast.” (Page 47). Plaintiff indicated that he slowed down when he first saw the bicycle, “I slightly dabbed the brakes.” (Page 50). When asked how much time passed from when he tapped his breaks to when he felt an impact, the Plaintiff stated “[t]hree to five seconds.” (Page 51).

Defendant Moreno sat for deposition on November 4, 2020 (NYSCEF Doc. 56). When asked whether at the time of the accident he was operating a vehicle owned by Defendant Compass, Defendant Moreno stated, “[y]es.” (Page 12). When asked if the truck he was driving is the type of truck commonly known as a box truck, the Defendant Moreno stated, “[y]es.” (Page 13). When asked if he was in the process of making a turn when the accident took place, the Defendant stated, “[e]xactly.” (Page 30). When asked if the Plaintiff’s vehicle was directly in front of his vehicle, Defendant Moreno stated, “[y]es.” (Page 31). When asked the distance between his vehicle and the Plaintiff’s vehicle, Defendant Moreno stated, “[w]hen I was turning, there was a separation of approximately 10 -- 10 feet, and that was the separation when he speeded up a little bit and I also did the same.” (Page 33). When asked whether the front part of his vehicle struck the rear part of the Plaintiff’s vehicle, Defendant Moreno stated, “[y]es.” (Page 34). When asked how long before the impact took place did he put his foot on his break, Defendant Moreno stated, “[l]et's say like two seconds when he put the brake.” (Page 35). When asked how fast he was traveling before he applied his brake, he agreed that it was 10 miles per hour. When asked whether Plaintiff stopped at the time of the impact, Defendant Moreno stated, “[h]e [the Plaintiff] was in the process of stopping.” (Page 36). When asked whether he observed why the Plaintiff was breaking, Defendant Moreno stated, “[y]es, because a bike crossed there.” He stated that he saw the bicycle after the

impact, not before. (Pages 37-38). When asked what he told to his employer about the collision, Defendant Moreno stated, “[t]here was another car that put pressure on his brakes in a strong manner and that it was hard for me to stop. And I said because of the weight I could not stop, so I hit the Uber car, and the Uber car put the brakes very strongly because there was a bike and I didn’t have time.” (Page 43).

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiffs to establish, *prima facie*, that the Defendant’s vehicle hit the Plaintiffs’ vehicle in the rear. These statements are sufficient for the Plaintiffs to establish a *prima facie* showing on the issue of liability. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because “[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007]. Further, “[w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his [or her] vehicle, and to exercise reasonable care to avoid colliding with the other vehicle.” *Gaeta v. Carter*, 6 AD3d 576, 576, 775 N.Y.S.2d 86 [2d Dept. 2004]; *see* Vehicle and Traffic Law § 1129 [a]; *Williams v. Spencer–Hall*, 113 AD3d 759, 759-760, 979 N.Y.S.2d 157 [2d Dept 2014]; *Taing v. Drewery*, 100 AD3d 740, 741, 954 N.Y.S.2d 175 [2d Dept 2012].

In opposition, the Defendants have failed to raise a material issue of fact or show that this was an emergency situation. The vehicles were driving at a slow rate of speed with both navigating a turn across lanes, including a bike lane. The slowing of the Plaintiff’s vehicle was foreseeable under the circumstances and the slowing did not constitute a short stop for purposes of the

Plaintiff’s comparative negligence. “Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, ‘must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead.’” *Grier-Key v. Lyons*, 195 AD3d 798, 145 N.Y.S.3d 819 [2d Dept 2021], quoting *Arslan v. Costello*, 164 AD3d 1408, 1409, 84 N.Y.S.3d 229, 230 [2d Dept 2018]. See also *Waide v. ARI Fleet, LT*, 143 AD3d 975, 39 N.Y.S.3d 512, 2016 N.Y. Slip Op. 07019 [2d Dept 2016].

Insofar as the Defendants have not raised an issue of fact as to Plaintiff’s comparative negligence, the Defendants’ first, second, third, fourth, fifth, sixth, tenth, twelfth, fourteenth, fifteenth and sixteenth affirmative defenses are dismissed. See *Quintanilla v. Mark*, 210 AD3d 713, 177 N.Y.S.3d 687, 2022 N.Y. Slip Op. 06151 [2d Dept 2022]; *Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021].

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

The Plaintiff’s motion (motion sequence #2) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and the proximate cause of the accident, and the Defendants’ first, second, third, fourth, fifth, sixth, tenth, twelfth, fourteenth, fifteenth and sixteenth affirmative defenses are dismissed. The matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

2023 APR 26 AM 9:57
 FILED
 KINGS COUNTY CLERK