

**Guarcax v Yun Li**

2023 NY Slip Op 34798(U)

January 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 505408/2019

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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 4th day of January 2023

PRESENT:  
HON. CARL J. LANDICINO,  
Justice.

-----X  
WALTER GUARCAX,

Index No.: 505408/2019

*Plaintiff,*

-against-

DECISION AND ORDER

Motion Sequence #2

YUN LI,  
*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 .....	41-48,
Opposing Affidavits (Affirmations).....	52, 53,
Reply Affidavits (Affirmations) .....	54

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

The instant action relates to a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on January 30, 2018. Plaintiff Walter Gaurcax (hereinafter the “Plaintiff”) alleges that he was injured when the bicycle he operated was struck by a vehicle owned and operated by Defendant Yun Li (hereinafter the “Defendant”). The incident allegedly occurred on Washington Avenue, between Saint John’s Place and Sterling Place 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 proceeding to trial on the issue of damages. The Plaintiff argues that summary judgment should be granted as the Defendant failed to safely pull out of his parking spot into the lane of travel without looking properly and failing to

yield to the Plaintiff's right of way. In support of this application, the Plaintiff relies on his own deposition, the deposition of the Defendant and an affidavit from a non-party witness.

The Defendant opposes the motion and contends that there are issues of fact that should prevent this Court from granting the motion. Specifically, the Defendant argues that the Plaintiff hit his vehicle while he was in the moving lane.

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, 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, 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].

Turning to the merits of the instant motion, the Plaintiff relies on his own deposition, the deposition of the Defendant and an affidavit from a non-party witness. During his deposition, when asked how the accident occurred, the Plaintiff stated, “I was riding the bicycle and all of a sudden, by surprise, he hit me.” (See Plaintiff’s Motion, Exhibit D, Page 23). When asked what part of the bicycle was struck, the Plaintiff stated “[o]n the right side.” (See Plaintiff’s Motion, Exhibit D, Page 23). When asked if the bicycle was moving at the time, the Plaintiff stated “[y]es.” (See Plaintiff’s Motion, Exhibit D, Page 24). When asked what happened after the collision, the Plaintiff stated “[w]hen this occurred my face hit the pavement and it broke my teeth.” (See Plaintiff’s Motion, Exhibit D, Page 25). As part of his affidavit, non-party witness Travis Morales stated “[o]n January 30, 2018, at approximately 6:40 p.m., I was walking north on Washington Avenue on the west side of the street after the intersection of St. Johns Place.” Mr. Morales stated that he “saw the vehicle pull out of the spot and hit a man on a bicycle.” Mr. Morales also stated that “[t]he vehicle was still partly in the spot and was at an angle in the process of pulling out of the spot.” (See Plaintiff’s Motion, Exhibit A).

In opposition to the motion, the Defendant relies upon his deposition testimony. During his deposition, the Defendant was asked where he was prior to the accident, he stated “[a] parking

space on the road.” (See Plaintiff’s Motion, Exhibit E, Page 12). When asked what led him to be parked there, the Defendant stated “[w]ell, I dropped off a client at that the location. And then, there was an empty parking spot, so that is why I stopped my vehicle in that parking space.” (See Plaintiff’s Motion, Exhibit E, Page 13). The Defendant stated “I first moved my vehicle into the road, the lane, the moving lane and then while my vehicle was traveling on the moving lane, then a bicycle hit my vehicle on the left side of my vehicle near the front wheel.” “My vehicle was been hit.” When asked about moving into the traffic lane, the Defendant stated that “I have to turn on the signal to signal people that I'm getting out.” (See Plaintiff’s Motion, Exhibit E, Page 22). “Some vehicle already got on the moving lane. And then I drove on the moving lane. Then the bike hit me, not me hitting the bike.” (See Plaintiff’s Motion, Exhibit E, Page 18). This testimony serves to raise a material issue of fact as to how the accident occurred, and raises a non-negligent defense on the part of the Defendant.

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 denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

*[Handwritten Signature]*  
 Carl J. Landicino, J.S.C.  
 2023 JAN 19 AM 9:31  
 KINGS COUNTY CLERK  
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