McCutchen v Garcia
2023 NY Slip Op 35050(U)
June 23, 2023
Supreme Court, Queens County
Docket Number: Index No. 702199/2019
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

WARDELL MCCUTCHEN,

Plaintiff,

-against-

MARITZA GARCIA, CARLOS GARCIA and GLENN WILLIAMS,

Defendants.

MARITZA GARCIA and CARLOS GARCIA,

Third-Party Plaintiffs,

-against-

GLENN WILLIAMS,

Third-Party Defendant.

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Index No.: 702199/2019

Motion Date: 6/8/23

Motion Cal. No. 32

Motion Seq. No. 3

The following electronically filed ("EF") documents read on this motion by Wardell McCutchen ("Mr. McCutchen" or "plaintiff") for an order: (a) granting plaintiff partial summary judgment on the issue of liability on his claims against defendants Mariotza Garcia ("Ms. Mariotza") and Carlos Garcia ("Mr. Garcia") ("collectively, the "defendants"), as no factual issue exist warranting a liability trial in this matter; (b) dismissing defendants' affirmative defense of comparative negligence; and (c) granting such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits...	EF 50 - 63

Affirmation in Opposition-Exhibits.. EF 67 - 71
Affirmation in Reply.. EF 72

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Mr. McCutchen allegedly sustained in a multiple motor vehicle collision on February 7, 2018 at approximately 10:00 p.m.. As a result, on February 7, 2019, he commenced the instant action; and on about April 17, 2019, issue was joined, wherein the defendants interposed an answer, which included three (3) affirmative defenses (i.e., comparative fault, seat-belt law, collateral source rule). Thereafter, on May 4, 2021, the defendants commenced a third-party action against Glenn Williams ("Mr. Williams'), which has been discontinued. Now, the plaintiff seeks the above-described relief. In support of the instant summary judgment motion, the plaintiff argues that his motor vehicle was stationary -- in the intersection of Skillman Avenue and Thomson Avenue ("Thompkins Avenue"), in the county of Queens -- when the defendant struck him and another motor vehicle. Moreover, the plaintiff argues Mr. Garcia testified that he did not see the plaintiff's vehicle before the collision; and he admitted that at the time of the accident he was unaware if th stop light was red or green. In opposition, Mr. Garcia argues that "[p]laintiff McCutchen falsely claims Defendant Garcia was not aware what color the stop light was when the accident occurred. Defendant Garcia repeatedly testified his light was green as he entered the intersection." Furthermore, Mr. McCutchen testified that he does not remember where the traffic lights were located at Thompkins and its intersection with Skillman Avenue in Queens County.

It is well settled that "[a] driver who enters an intersection against a red traffic light in violation of Vehicle and Traffic Law § 1110 (a) is negligent as a matter of law" (*Wynter v. City of New York,* 173 AD3d 1122, 1122 [2d Dept 2019]; *Kirby v. Lett*, 208 AD3d 1174 [2d Dept 2022]). "The operator of a vehicle with the right-of-way is entitled to assume that others will obey the traffic laws requiring them to yield" (*Pei Ru Guo v. Efkarpidis*, 185 AD3d 949, 951 [2d Dept 2020]; *see Mu-Jin Chen v. Cardenia*, 138 AD3d 1126, 1127 [2d Dept 2016], but " 'a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident' " (*Shuofang Yang v. Sanacore*, 202 AD3d 1120, 1122 [2d Dept 2022], quoting *Arias v. Tiao*, 123 AD3d 857, 858 [2d Dept 2014]; *see Fergile v. Payne*, 202 AD3d 928, 930 [2d Dept 2022]). Nevertheless, " 'a driver

with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' " (*Elusma v Jackson*, 186 AD3d at 1327, quoting *Foley v. Santucci*, 135 AD3d 813, 814 [2d Dept 2016]).

Here, the court finds that Mr. McCutchen failed to establish his *prima facie* entitlement to judgment as a matter of law on the issue of liability. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986].) The parties' sharply conflicting accounts of the accident, submitted in support of the plaintiff's motion, raised triable issues of fact as to the manner in which the collision occurred and as to the proximate cause or causes of the accident. (*Sperling v. Akesson*, 104 AD3d 840 [2d Dept 2013]; *Tornabene v. Seickel*, 186 AD3d 645 [2d Dept 2020]; *Bonaventura v. Galpin*, 119 AD3d 625 [2d Dept 2014]; *Lorentz v. Ruiz*, 129 AD3d 795 [2d Dept 2015]). It must be remembered that 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" (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the court on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist (*see Guadalupe v. New York City Tr. Auth.,* 91 AD3d 716 [2d Dept 2012]; *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005]). Moreover, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Pearson v. Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Furthermore, the court finds that Mr. McCutchen submitted, *inter alia*, the deposition testimony of the parties, which raised triable issues of fact as to whether Mr. Garcia failed to see what was there to be seen and failed to take evasive actions to avoid the collision with the plaintiff's vehicle. (*Mark v. New York City Transit Authority*, 150 AD3d 980 [2d Dept 2017]; *Lorentz v. Ruiz*, 129 AD3d 795 [2d Dept 2015]; *Blair v. Coleman*, 146 AD3d 743 [2d Dept 2017]). It is well settled law that summary judgment should not be granted where, as here, the facts are in dispute, where conflicting inference may be drawn from the evidence, or where there are issues of credibility. (*Collado v. Jiacono*, 126 AD3d 927 [2d Dept 2014] citing *Scott v. Long Island Power Authority*, 294 AD2d 348 [2d Dept 2002]; *see also Fobbs v. Shore*, 171 AD3d 874 [2d Dept 2019]).

Lastly, that branch of plaintiff's motion to strike the defendants' affirmative defense based upon comparative negligence is denied. "CPLR § 3211(b) provides that '[a] party may

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move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]; *see also Lewis v. U.S. Bank National Association*, 186 AD3d 694 [2d Dept 2020]). Additionally, on a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed." (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Here, the court finds that the plaintiff failed to establish that the defendants' affirmative defense, based upon comparative negligence, lacks merit.

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion for partial summary judgment in his favor and against the defendants, on the issue of liability, pursuant to CPLR § 3212, is denied; and it is further,

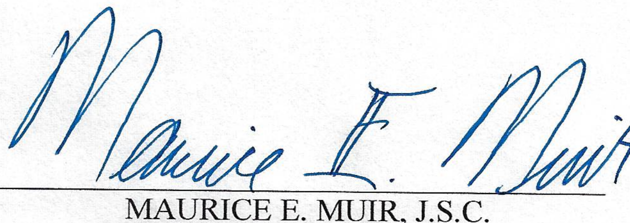
ORDERED that branch of plaintiff's motion to strike the defendants' first affirmative defense, based upon comparative negligence, pursuant to CPLR § 3211(b), is denied; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

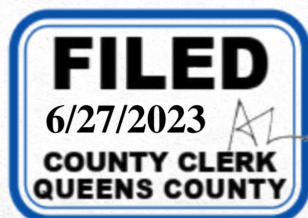
ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants, via certified mail and NYSCEF, on or before July 31, 2023.

The foregoing constitutes the decision and order of the court.

Dated: June 23, 2023
Long Island City, New York



MAURICE E. MUIR, J.S.C.



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