

Gamez v Yazdani

2023 NY Slip Op 35095(U)

September 27, 2023

Supreme Court, Queens County

Docket Number: Index No. 707380/2023

Judge: Mojgan C. Lancman

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20



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FILIBERTO HERNANDEZ GAMEZ,

Index No.: 707380/2023

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 7.19.2023

GHULAM YAZDANI,

Motion Cal. No.: 19

Defendant.
-----X

The papers bearing NYSCEF Doc. Nos. 11-18 and 21-24 were read on the motion made by the plaintiff, Filiberto Hernandez Gamez (the “Plaintiff”), for an Order, *inter alia*, granting partial summary judgment on the issue of liability against the defendant, Ghulam Yazdani (the “Defendant”).

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on September 30, 2022 (the “Accident”). Presently before the Court is the Plaintiff’s motion for an Order: (1) granting partial summary judgment on the issue of liability; (2) dismissing all affirmative defenses as to liability; (3) “severing the liability portion from the main action”; and (4) setting this cause down for a trial on the issue of damages. For the following reasons, the motion is granted in part and denied in part.

I. Factual Background and Procedural History

The Accident occurred at the intersection of Queens Boulevard and 58th Street, Queens, New York. The Accident involved the Plaintiff, a pedestrian, and a motor vehicle, which was owned and operated by the Defendant.

A. The Plaintiff’s Affidavit in Support

In his affidavit in support, the Plaintiff avers, in relevant part, the following:

On September 30, 2022, I was a pedestrian hit by a motor vehicle that I later learned was being driven and owned by the Defendant...

At the time of the impact, I was crossing Queens Boulevard within the crosswalk at its intersection with the roadway at 58th Street, in Queens County, New York.

There is a marked crosswalk for pedestrians at this location.

At all times I was crossing, including at the impact, I was within the crosswalk.

The intersection is controlled by traffic lights and there is a traffic signal for pedestrians as well as a crosswalk for pedestrian.

The traffic signal indicating that pedestrians could cross was turned on in my favor.

Before I entered the crosswalk, I looked both ways for oncoming traffic and there were no vehicles that were within the intersection or any vehicles indicating an intention to turn.

I then entered the crosswalk.

While I was fully within the marked pedestrian crosswalk, I saw the vehicle driven and owned by the Defendant ... when it struck me on my right-hand side.

The Defendant does not submit an affidavit in opposition. The opposition consists of his attorney's affirmation.

II. Discussion

The familiar principles applicable to summary judgment motions are set forth below.

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden then shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

Vehicle and Traffic Law § 1146 [a] provides, in relevant part, as follows:

Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.

The Plaintiff establishes *prima facie* entitlement to summary disposition on the issue of liability through his affidavit, which demonstrates that he was walking within a crosswalk with a pedestrian signal in his favor when the Defendant's vehicle failed to yield the right of way and struck him (*Festagallo v Mandelbaum*, 213 AD3d 741 [2d Dept 2023]; *Gooden v EAN Holdings, LLC*, 189 AD3d 1552 [2d Dept 2020]; *Maliakel v Morio*, 185 AD3d 1018 [2d Dept 2020]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Gaston v Vertsberger*, 176 AD3d 919 [2d Dept 2019]).

The Defendant fails to raise a triable issue of fact because he submits only an affirmation from counsel, which "has no probative value in opposition to a summary judgment motion" (*Commissioners of the State Ins. Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]).

The Defendant's legal arguments in opposition are without merit.

The contention that this motion is premature because of outstanding discovery is unavailing. In *Quintanilla v Mark*, 210 AD3d 713, 714-715 [2d Dept 2022], the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant ... to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion [internal quotation marks, brackets and citations omitted].

Here, the Defendant is aware of the relevant facts because he was operating the vehicle involved in the Accident (*see id.*).

Second, and in any event, “[t]o defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (*Rodriguez v Gutierrez*, 138 AD3d 964, 968 [2d Dept 2016] [citations omitted]). The Defendant makes no such evidentiary showing.

Third, “[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiff’s motion” (*Festagallo v Mandelbaum*, 213 AD3d 741, 742 [internal quotation marks and citations omitted]).

The Defendant’s opposition argument that the Plaintiff fails to establish *prima facie* entitlement to summary disposition is baseless because the Plaintiff’s affidavit establishes that he was walking within a crosswalk with a pedestrian signal in his favor when the Defendant’s vehicle failed to yield the right of way and struck him (*see Festagallo v Mandelbaum*, 213 AD3d 741; *Gooden v EAN Holdings, LLC*, 189 AD3d 1552; *Maliakel v Morio*, 185 AD3d 1018; *Hai Ying Xiao v Martinez*, 185 AD3d 1014; *Gaston v Vertsberger*, 176 AD3d 919).

The next issue is whether the Plaintiff should be granted summary judgment dismissing the Defendant’s affirmative defense with respect to legal liability. This defense, the second in the answer, alleges that the any damages were caused by the Plaintiff’s culpable conduct, including contributory negligence and assumption of risk. This issue is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant’s affirmative defense of comparative negligence” (*see Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted].

The Plaintiff bears the burden of establishing *prima facie* that he is free from culpable conduct or comparative fault (*see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788 [2d Dept 2019]); *Wray v Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Paget v PCVST-DIL, LLC*, 186 AD3d 1162 [1st Dept 2020]). As explained, the Plaintiff establishes that he bears no legal responsibility for the Accident. A triable issue of fact is not raised in opposition. The affirmative defense of culpable conduct is therefore dismissed.

The defense of assumption of risk, which is embedded in the second affirmative defense, is dismissed on the additional and independent ground that: “[t]he doctrine of primary assumption of the risk, which encompasses activities such as athletic competition, does not apply, nor does implied assumption of the risk apply [to this cause]. Motorists traveling through public streets, as

a general rule, do not assume the risk of other motorists negligently striking their vehicle” (*Webb v Scharf*, 191 AD3d 1353, 1355 [4th Dept 2021] [citations omitted]).

The branch of the motion to “sever[] the liability portion from the main action” is denied. This Order resolves the issue of liability, and this cause shall therefore proceed with respect to the issue of damages. There is thus no valid basis for severance.

Lastly, the Plaintiff seeks to have this cause set down for a trial on the issue of damages. Although the Court grants the Plaintiff summary judgment on the issue of liability, the Defendant is entitled to discovery with respect to damages (*see Barr v Raffo*, 96 AD2d 800 [1st Dept 1983]). Thus, the Plaintiff is granted leave to file a note of issue for the purpose of a trial relative to damages upon the completion of discovery on the subject issue.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff’s motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted summary judgment against the Defendant on the issue of liability; and it is further,

ORDERED, that the Defendant’s second affirmative defense, which asserts culpable conduct, including contributory negligence or assumption of risk, is dismissed; and it is further,

ORDERED, that the trial in this cause shall be held on the issue of damages only; and it is further,

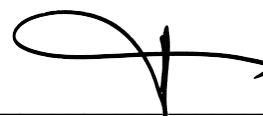
ORDERED, the Plaintiff is granted leave to file a note of issue for the purpose of a trial with respect to damages after discovery relating to damages is completed; and it is further,

ORDERED, that the Plaintiff’s motion is otherwise denied; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendant via NYSCEF by November 27, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 27, 2023



MOJGAN C. LANCMAN, J.S.C.

