

Voker v Cannon

2023 NY Slip Op 35096(U)

August 16, 2023

Supreme Court, Queens County

Docket Number: Index No. 708593/2022

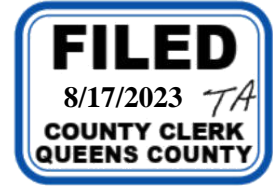
Judge: Maurice E. Muir

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.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

MOSES VOKER

Plaintiff,

-against-

MICHAEL P. CANNON and KEREN MCENEANE,

Defendants.

IAS Part - 42

Index No.: 708593/2022

Motion Date: 12/8/22

Motion Cal. No. 38

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Moses Voker (“Mr. Voker” or “plaintiff”) for an order: (a) granting the Plaintiff Moses Voker summary judgment against the Defendants Michael P. Cannon and Keren McEneaney on the issue of liability; (b) dismissing the Defendants' First Affirmative Defense alleging culpable conduct, comparative negligence and assumption of risk on the part of the plaintiff; (c) setting this action down for a trial on the assessment of damages; and (d) awarding such other and further relief as this Court deems just, proper and equitable.

| | |
|---|-----------------|
| | Papers |
| | <u>Numbered</u> |
| Notice of Motion-Affirmation in Support-Exhibits-Service..... | EF 09 - 16 |
| Affirmation in Opposition-Exhibits..... | EF 19 - 21 |
| Affirmation in Reply-Exhibits -Service..... | EF 22 - 26 |

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. Voker allegedly sustained in motor vehicle collision. The plaintiff alleged that on December 11, 2020, his motor vehicle made contact with a motor vehicle operated by Michael P. Cannon (“Mr. Cannon”) and owned by Keren McEneaney (“Ms. Keren McEneaney”) at the intersection of Rockaway Beach Boulevard and Beach 62nd Street in the county of Queens, city and state of New York. As a

result, on April 20, 2022, he commenced the instant action; and on May 27, 2022, issue was joined, wherein the defendants interposed an answer.

Now, the plaintiff seeks the above-described relief. In support of the instant motion, the plaintiff avers that on December 11, 2020, at approximately 8:00 p.m. he was driving on Rockaway Beach Boulevard, which was controlled by a three (3) phase traffic light. The plaintiff also avers that upon reaching Beach 62nd Street the light turned red. As a result, he brought his vehicle to a gradual stop; and he observed a vehicle on the opposite (or westbound side) of Rockaway Beach Boulevard also stopped for the red traffic light with no turn signal on. Moreover, the plaintiff contends that the traffic light controlling vehicles on the opposite side (or westbound side) of Rockaway Beach Boulevard did not have a left turning arrow. Thereafter, the light turned green; and he began to accelerate towards the intersection at about ten (10) to fifteen (15) miles per hour; and he almost reached the middle of the intersection when the vehicle which was on the opposite side of Rockaway Beach Boulevard suddenly made a very fast left turn directly in front of him on Beach 62nd Street. As a result, his vehicle struck the passenger side of the other vehicle. In further support of the plaintiff's motion, he provided a certified copy of the police report, which states, in relevant part, the following:

DRIVER OF VEHICLE 1 STATES HE WAS DRIVING E/B ON ROCKAWAY BEACH BOULEVARD. VEHICLE 2 WAS TRAVELING W/B ON ROCKAWAY BEACH BOULEVARD AND FAILED TO YIELD WHEN MAKING A LEFT TURN TO TRAVEL S/B ON BEACH 62 STREET CAUSING VEHICLE 1 TO T-BONE VEHICLE 2. DRIVER OF VEHICLE 2 STATES HE WAS TRAVELING W/B ON ROCKAWAY BEACH BOULEVARD AND MADE A LEFT TURN ONTO BEACH 62 STREET. VEHICLE 1 THEN HIT VEHICLE 2 ON PASSENGER SIDE CAUSING DAMAGE TO BOTH VEHICLES. SUPERVISOR NOTIFIED.

In opposition, Mr. Cannon avers that on the day of the subject accident, he was driving westbound on Rockaway Beach Boulevard. As he approached the subject intersection, his planned to turn left onto the southbound direction of Beach 62nd Street, which is controlled by traffic lights. Moreover, Mr. Cannon avers that while at the intersection, the traffic light facing his direction presented a left green arrow, indicating that he had the right of way to make a left turn. As a result, he attempted to make a left turn onto Beach 62nd Street. However, while attempting to make his left turn, plaintiff's vehicle suddenly entered the subject intersection and impacted the front passenger side of his vehicle.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the

defendant's negligence was a proximate cause of the alleged injuries” (*Marazita v. City of New York*, 202 AD3d 951, 952 [2d Dept 2022][internal quotation marks omitted]; *see Shah v. MTA Bus Co.*, 201 AD3d 833 [2d Dept 2022]; *Ortiz v. Zurita*, 195 AD3d 734, 735 [2d Dept 2021]). On a motion for summary judgment on the issue of a defendant's liability, a plaintiff is no longer required to show freedom from comparative fault to establish his or her prima facie entitlement to judgment as a matter of law (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Xin Fang Xia v. Saft*, 177 AD3d 823, 825 [2d Dept 2019]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]). However, even though a plaintiff is not 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 the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence (*see Kwok King Ng v. West*, 195 AD3d 1006, 1008 [2d Dept 2021]; *Sapienza v. Harrison*, 191 AD3d 1028 [2d Dept 2020]).

Furthermore, pursuant to Vehicle and Traffic Law § 1141, it provides that “[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.” “The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law” (*Bunch v. Gwood*, 202 AD3d 1036, 1038 [2d Dept 2022] [internal quotation marks omitted]). A violation of Vehicle and Traffic Law § 1141 constitutes *negligence per se* (*see Jackson v. Klein*, 203 AD3d 1147 [2d Dept 2022]; *Atkins v. City of New York*, 196 AD3d 622, 624 [2d Dept 2021]). “Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . 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” (*Rohn v. Aly*, 167 AD3d 1054, 1056 [2d Dept 2018][internal quotation marks omitted]; *see Elusma v. Jackson*, 186 AD3d 1326, 1327 [2d Dept 2020]; *Jeong Sook Lee-Son v. Doe*, 170 AD3d 973 [2d Dept 2019]; *Shashaty v. Gavitt*, 158 AD3d 830 [2d Dept 2018]).

Here, the plaintiff failed to establish his prima facie burden of demonstrating entitlement to judgment as a matter of law on the issue of liability. In support of his motion, the plaintiff submitted his affidavit and a certified copy of the police report. It is well settled law that facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule” (*Memenza v. Cole*, 131 AD3d 1020 [2d Dept 2015] [internal quotation marks

omitted]; *see also Yassin v. Blackman*, 188 AD3d 62 [2d Dept 2020]). "Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties" (*id.* at 1021 [citations omitted]). Where information in a police accident report is not based on the personal observations of a police officer, "it may nevertheless be admissible as a business record if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]," or if the statement qualifies under another hearsay exception, such as an admission (*id.* at 1022, quoting *Stevens v. Kirby*, 86 AD2d 391, 395 [4th Dept 1982]). [E]ach participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" (*Memenza v. Cole*, 131 AD3d at 1022, quoting *Murray v. Donlan*, 77 AD2d 337, 346 [2d Dept 1980]). Here the information in the police report was not derived from the personal observations of the police officer, who did not observe the accident. (*Country-Wide Ins. Company v. Lobello*, 2020 WL 5223505 [2d Dept 2020]). As such, the certified copy of the police report is inadmissible.

Lastly, the court finds that there is an issue of fact as to whether Mr. Cannot had a left turn signal. It is well settled that a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Walker v. Ryder Truck Rental & Leasing*, 206 AD3d 1036 [2d Dept 2022] citing *Ruiz v. Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks omitted]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Charlery v. Allied Tr. Corp.*, 163 AD3d 914, 915 [2d Dept 2018] [internal quotation marks omitted]; *see Chimbo v. Bolivar*, 142 AD3d 944, 945 [2d Dept 2016]). Here, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In fact, issues of fact and credibility are presented which cannot be resolved on a motion for summary judgment. Accordingly, the Court must deny the plaintiff's motion for summary judgment. (*Colletti v. City of New York*, 208 AD3d 749 [2d Dept 2022]; *Gall v. Schwed*, 119 AD3d 804, 808 [2d Dept 2018]; *Poon v. Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]; *see also Han v. Gladyshev*, 153 AD3d 762 [2d Dept 2017]; *Jones v. American Commerce Ins. Co.*, 92 AD3d 844 [2d Dept 2012]; *Gardner v. Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]).

Lastly, that branch of the plaintiff's motion to strike the defendant's first affirmative defense, based upon plaintiff's alleged culpable conduct, is denied. "CPLR § 3211(b) provides that '[a] party may 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 has not established sufficient grounds to strike the defendants' affirmative defense.

Accordingly, it is hereby

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

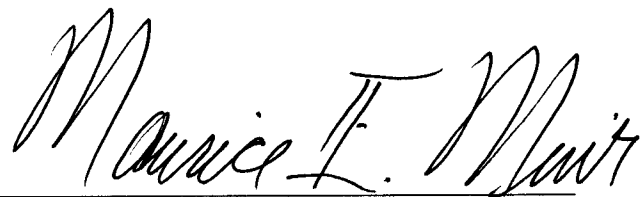
ORDERED that branch of plaintiff's motion to strike the defendant's first affirmative defenses, pursuant to CPLR § 3211(b), is denied; and it is further,

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 defendant shall serve a copy of this decision and order with notice of entry upon the plaintiff, via certified mail and NYSCEF, on or before September 5, 2023. The foregoing constitutes the Decision and Order of the court.

The foregoing constitutes the Decision and Order of the court.

Dated: August 16, 2023
Long Island City, NY



MAURICE E. MUIR, J.S.C.

