

McManus v Agoro
2023 NY Slip Op 35136(U)
January 9, 2023
Supreme Court, Bronx County
Docket Number: Index No. 20044/2020E
Judge: Veronica G. Hummel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

-----X
JOHN MCMANUS,

Plaintiff,

Index No.20044/2020E
DECISION/ORDER

-against -

Motion Seqs 1,2

AKONDO AGORO and CHRISTIAN CAB CORP.,
Defendants.

-----X
HON. VERONICA G. HUMMEL, A.J.S.C.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all of the papers filed by the parties in NYSCEF regarding the motion of plaintiff JOHN MCMANUS [Mot. Seq. 1] for an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability as against defendants AKONDO AGORO and CHRISTIAN CAB CORP.; and the motion of defendants [Mot. Seq. 2], seeking an order striking the Note of Issue, compelling plaintiff to submit to a dental examination or be precluded, and compelling plaintiff to furnish authorizations.

Plaintiff commenced this action to recover for personal injuries allegedly arising out of a pedestrian knockdown accident which occurred on February 7, 2017, at or near the intersection of 5th Avenue and West 37th Street.

The proponent for a summary judgment motion 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 Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851,853 (1985). A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Once a showing of *prima facie* entitlement to summary judgment has been made, the burden shifts to the party opposing the motion for summary judgment to

produce “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Motion 1-Partial Summary Judgment

In support of the motion, plaintiff provides an attorney affirmation, a statement of material facts, the pleadings, a memorandum of law, an uncertified copy of the police report, and a plaintiff’s deposition transcript. Plaintiff does not submit a reply.

Plaintiff testified that, at the time of the accident, plaintiff was a pedestrian, walking towards the relevant intersection. When he got to the crosswalk, he made a right to go on the crosswalk towards 37th Street. When he turned right he was able to see the "walk/don't walk" sign and the sign read "walk". The "walk/don't walk" sign was directly in front of him as he began to walk across west 37th Street. West 37th Street was a one-way street for moving traffic with traffic coming from his left to his right. Defendants’ car made a right turn off of 5th Avenue. Plaintiff did not hear the sound of brakes before he was knocked down by Defendants’ vehicle. Plaintiff did not hear the sound of anybody yelling. When he got to the crosswalk, he turned right and walked in the crosswalk as he walked across 37th Street, and was in the middle of the street when Defendants’ vehicle, making the right from 5th Avenue, collided with plaintiff’s left side.

A pedestrian walking in a crosswalk has the right of way, and any motorist is required to yield, so long as any traffic-control or pedestrian control signal is in the pedestrian's favor. see Vehicle and Traffic Law §§ 1111 [a], 1112 [a], 1151[a]; Rules of the City of New York, 34 RCNY §§ 4-03[a], [c], 4-04 [b]. Although a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians. see Vehicle and Traffic Law § 1111[a][1]. A driver has a statutory duty to yield the right of way to plaintiff and to use due care to avoid colliding with a pedestrian on the roadway. see Vehicle and Traffic Law §§ 1111(a)(3), 1112[a], 1146 and 1152[a];]; Rules of the City of New York, 34 RCNY §§ 4-03[a], [c], 4-04 [b]. A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence *per se*. see *Rodriguez v. Budget Rent A-Car Sys., Inc.*, 44 A.D.3d 216, 223-224 (1st Dep’t 2007); *Barbiero v. Vokoun*, 72 A.D.3d 853 (2d Dep’t 2010); *Coogan v. Torrisi*, 47 A.D.3d 669, 670 (2d Dep’t 2008).

Plaintiff’s moving papers set forth *prima facie* entitlement to partial summary judgment as a matter of law on the issue of liability. It is undisputed that plaintiff was legally within the crosswalk, crossing the street with the walk light in plaintiff’s favor, when plaintiff was struck. Under the circumstances, the defendant driver

failed to satisfy his statutory duty to yield the right of way to plaintiff and to use due care to avoid colliding with a pedestrian on the roadway. *see* Vehicle and Traffic Law §§ 1111(a)(3), 1112[a], 1146 and 1152[a];]; Rules of the City of New York, 34 RCNY §§ 4-03[a], [c], 4-04 [b]. The violation of these provisions is negligence *per se*. As such, plaintiff establishes *prima facie* entitlement to judgment as a matter of law on the issue of liability by demonstrating that Defendants' vehicle, in violation of Vehicle and Traffic Law and New York City Traffic Rules, failed to yield the right-of-way to plaintiff. In light of this *prima facie* showing, the burden shifted to defendants to demonstrate an issue of fact¹.

Defendants' opposition fails to generate an issue of fact. Defendants submit an attorney affirmation, a counter-statement of material facts and an uncertified copy of the MV 104 report. The attorney affirmation submitted in opposition to the motion has no evidentiary value (*see Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (1st Dep't 2011) ("It is well established . . . that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value")), and is thus insufficient to defeat the motion. Furthermore, the argument by defendants that plaintiff's motion for summary judgment is premature also lacks merit as the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion. *Downey v. Mazzioli*, 137 A.D.3d 498, 499 (1st Dep't 2016); *Mirza v. Tribeca Auto Inc.*, 189 A.D.448 (1st Dep't 2020). To the extent that defendants rely on the uncertified MV-104 form, the reliance is misplaced as the document is incompetent evidence and contains inadmissible hearsay. *Rue v Strokes*, 191 A.D.2d 245 (1st Dep't 1993); *see Mona Leasing, Inc. v Travelers Indemnity Co.*, 148 Misc. 2d 877 (Dist. Ct. 1990).

Motion Seq 2- Strike the Note of Issue

Th motion of defendants [Mot. Seq. 2], seeking an order striking the Note of Issue, compelling plaintiff to submit to a dental examination or be precluded and directing plaintiff to furnish authorizations is granted to the extent that the Note of Issue is stricken. Pursuant to 22 NYCRR 202.21 (e), a Note of Issue shall be vacated if it appears that a material fact in the certificate of readiness is incorrect. A Preliminary Conference Order, dated March 12, 2020, states that the date to file the Note of Issue shall be determined at the final compliance conference

¹ The court notes that plaintiff does not seek (and the court has not considered) dismissal of defendants' affirmative defense regarding plaintiff's comparable negligence. *see* CPLR 2214[a]; *Castillo v Slupecki*, 63 Misc. 3d 325 (Sup. Ct. Bronx County 2019). Requiring a plaintiff to specifically request summary judgment dismissing a comparative-fault affirmative defense recognizes that a plaintiff's alleged comparative fault relates to damages, not a defendant's liability and is consistent with the principle that a court is generally prohibited from granting relief that a movant has not expressly requested. *Castillo v Slupecki*, *supra*; *Tirado v Miller*, 75 A.D.3d 153, 158 (2d Dep't 2010); *see* CPLR 2214 [a].

or by stipulation, neither of which criteria was satisfied in this matter. **More importantly, the order and the Court Rules require that, unless court approval is granted to the contrary, a stipulation signed by all parties stating that discovery is completed must be uploaded to NYSCEF before a Note of Issue can be filed.** The order and the Court Rules also provide that a Note of Issue filed without such a court order may be stricken *sua sponte*. None such stipulation was uploaded prior to plaintiff's filing of the Note of Issue and the Note of Issue is therefore appropriately stricken.

The attorneys are reminded that they have a professional responsibility and a mandate from the Chief Justice of the Court of Appeals that require that attorneys make good faith efforts to resolve all discovery disputes without court intervention.

Of import, the amended Uniform Rule Trial Court Rule 202.20-f sets forth the strict requirements of a showing of good faith efforts to resolve a discovery issue. Failure to satisfy the requirements of the provision will result **in the denial of any future discovery motion**. Under the rule, any motion for discovery must include an affirmation of good faith that outlines, in detail, the dates and times of the multiple efforts made to resolve the issue. Good faith efforts must include multiple attempts to reach the parties' attorneys via telephone and email.

The parties are directed to confer and promptly set forth a schedule for the completion of all outstanding discovery.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief sought by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

ORDERED that the motion of plaintiff JOHN MCMANUS [Mot. Seq. 1] for an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability as against defendants AKONDO AGORO and CHRISTIAN CAB CORP. is granted; and it is further

ORDERED that the motion of defendants [Mot. Seq. 2], seeking an order striking the Note of Issue, compelling plaintiff to submit to a dental examination or be precluded and directing plaintiff to furnish

authorizations, is granted to the extent that the Note of Issue is stricken; and it is further

ORDERED that the Clerk shall vacate the Note of Issue and Certificate of Readiness and strike the action from the trial calendar and record said action in all court records; and it is further

ORDERED that the Clerk shall mark motion sequences 1 and 2 decided in all court records.

This constitutes the decision and order of the Court.

Dated: January 9, 2023

Hon. 
HON. VERONICA G. HUMMEL, A.J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION 1 is.....	☒ GRANTED	☐ DENIED
MOTION 2 is.....	☐ GRANTED	☐ DENIED
	☒ GRANTED IN PART	☐ OTHER
	☐ GRANTED	☒ GRANTED IN PART
	☐ OTHER	
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER
	☐ SCHEDULE APPEARANCE	
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT
	☒ STRIKE THE NOTE OF ISSUE	