

Quiles v Kaba
2023 NY Slip Op 35206(U)
March 14, 2023
Supreme Court, Bronx County
Docket Number: Index No. 801889/2021E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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JOSEAMID QUILES,

Index No. 801889/2021E

Plaintiff,

-against-

Hon. BIANKA PEREZ

IBRAHIMA KABA and DTG ENTERPRISE, INC.,

Justice Supreme Court

Defendants.

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The following were read on this motion (**Mot. Seq. No. 2**) for **SUMMARY JUDGMENT LIABILITY** submitted on **December 28, 2022**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF No(s). 35-46
Answering Affidavit and Exhibits	NYSCEF No(s). 49
Reply Affidavit and Exhibits	N/A.

Upon the foregoing papers, plaintiff moves this Court for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability, striking defendant's answer for failure to appear at depositions and setting this matter down for an inquest. Defendants oppose.

This personal injury matter arises out of a motor vehicle accident which occurred on December 4, 2020. The accident occurred at or near the intersection of Third Avenue and East 149th Street, Bronx, New York. Plaintiff states he was driving his bicycle in the marked bicycle lane when defendant failed to yield the right of way striking plaintiff's bicycle with his vehicle (Exh. E). Plaintiff further states that he did not cause the accident. The police report annexed is inadmissible as the officer's accident description is hearsay, (see *Augustine v. Village of Interlaken*, 68 AD2d 705 [4th Dept 1979; *Montalvo v. Morales*, 18 AD2d 20 [2nd Dept 1963]).

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 N.Y.2d 851, [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers, (*id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LL.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant

meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

It is well settled that once a party moving for summary judgement has made a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish a material issue of fact which require a trial of the action. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1st Dept 1985]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue of fact. On a motion for summary judgement, the court must determine whether the factual issue is genuine or unsubstantiated and if the issue claimed to exist is not genuine, and there is in truth nothing to be tried summary judgement must be granted. (*Southern Associates, Inc., v United Brands Co.*, 67 AD2s 199 [1st Dept 1979]).

Vehicle and Traffic Law § 1146(a) provides that, “[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist ... upon any roadway and shall give warning by sounding the horn when necessary.” “In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists” (*Palma*, 55 A.D.3d at 891, 867 N.Y.S.2d 111). A driver has a “statutory duty to use due care to avoid colliding with a bicyclist on the roadway, as well as a common-law duty to see that which he should have seen through the proper use of his senses” (*Barbieri v. Vokoun*, 72 A.D.3d 853, 856, 900 N.Y.S.2d 315; *Brenner v. Dixon*, 98 A.D.3d 1246 [4th Dept 2012]).

Vehicle and Traffic Law §388, states, in pertinent part, that [e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. (VTL § 388; see *Elrac v. Ward*, 96 NY2d 58 [2003]). Under the doctrine respondeat

superior, a trucking company is vicariously liable for the negligent acts of its operator within the scope of his employment. (*GUSEK v. Compass Transportation*, 266 A.D.2d 923, 697 N.Y.S.2d 886 [4th Dept. 1999]).

Here, plaintiff made a prima facie showing of entitlement to summary judgment by submitting his deposition transcript. In response to the motion, defendant only submits an attorney affirmation. A mere “attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance,” and is thus incapable of raising a triable issue of fact (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). Contrary to Defendant’s assertion, the motion is not premature, as Defendant presumably had personal knowledge of relevant facts, but failed to lay bare their proof as they did not submit an affidavit of someone with personal knowledge of the facts in opposition to the motion (*Avant v. Cepin Livery Corp.*, 74 A.D.3d 533 [1st Dept 2010]). Accordingly, plaintiff’s motion as to the issue of defendants’ liability is hereby granted.

As to plaintiff’s branch of the motion pursuant to CPLR 3126 striking defendants’ answer for failure to appear for an examination before trial is hereby denied as the parties have failed to comply with Court Part Rules and Uniform Civil Rules Section 202.20-f before resorting to motion practice.

If necessary, a discovery conference may be requested upon written application demonstrating that all good faith efforts have been exhausted to resolve the issue(s) without court intervention. The application shall identify the good faith efforts undertaken and highlight specific point(s) of contention that require judicial resolution, as set forth in Part 14’s Court Rules. Please email the Bronx Supreme Civil Part 14 at BxSupCiv-IA14@NYCOURTS.GOV to request a discovery conference.

As to plaintiff’s branch of the motion setting this matter down for an inquest in favor of the plaintiff is denied as discovery is incomplete, and the Note of Issue has not been filed.

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion for summary judgment on the issue of liability is granted, it is further

ORDERED, that all other branches of plaintiff’s motion are hereby denied, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendants as to the issue of liability.

This constitutes the decision and order of the Court.

Dated: March 14, 2023

Hon. *Bianka Perez*
BIANKA PEREZ, J.S.C.

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT