

**Cortez v Roy**

2024 NY Slip Op 30957(U)

March 20, 2024

Supreme Court, New York County

Docket Number: Index No. 159388/2022

Judge: James G. Clynes

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JAMES G. CLYNES PART **22M**

*Justice*

-----X

MIGUEL CORTEZ,	INDEX NO. <u>159388/2022</u>
Plaintiff,	MOTION DATE <u>12/28/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

DONALD ROY, NEW YORK CITY HOUSING AUTHORITY

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for

JUDGMENT - SUMMARY

Pursuant to CPLR 3212, plaintiff moves for summary judgment against defendants on the issue of liability, and moves under CPLR 3211(b) to strike all of defendants' affirmative defenses related to liability. Defendants oppose and reply.

Defendants, Donald Roy ("Roy") and the New York City Housing Authority ("NYCHA" or "owner"), cross-move for summary judgment to dismiss plaintiff's complaint or grant them summary judgment finding plaintiff negligent for his injuries. Plaintiff opposes and replies.<sup>1</sup>

For the reasons below, plaintiff's motion for summary judgment on defendants' liability is granted and dismissal of defendants' affirmative defenses is partially granted but only as to the fifth and sixth affirmative defenses on liability. Defendants' cross-motion for summary judgment is denied with leave to refile on the issue of serious injury following the close of discovery.

<sup>1</sup> The court does not consider defendants' reply in support of their cross-motion, as a cross-movant is not entitled to a reply and defendants have not sought or been granted leave to file a reply.

## **BACKGROUND**

On November 2, 2022, plaintiff commenced this action by filing a summons and complaint against Roy and NYCHA (NYSCEF Doc. No. (Doc.) 1, complaint). The complaint alleges, *inter alia*, that plaintiff operated a bicycle at all times, Roy is an authorized driver and was driving the vehicle owned by NYCHA, and on March 9, 2022, at the intersection of West 94<sup>th</sup> Street and Amsterdam Avenue, plaintiff sustained injuries when the defendants' vehicle came into contact with plaintiff while he was seated on the bicycle (*id.*). The complaint also alleges that plaintiff's injuries were due to defendants' negligent control of the vehicle, that he sustained serious injury under Section 5102 (d) of the Insurance Law, and sustained economic loss greater than basic economic loss under Section 5102 of the Insurance Law (*id.*).

Defendants filed their answer on November 21, 2022, and their amended answer on February 1, 2023 (Doc. 5, answer; Doc. 18, amended answer). The amended answer, *inter alia*, denies most of the complaint's allegations but admits that NYCHA owns the vehicle and that Roy operated the vehicle with the knowledge, permission, and consent of NYCHA (Doc. 18). Additionally, defendants assert seven affirmative defenses (*id.*).

At the General Municipal Law 50-H examination, plaintiff testified that he was in the crosswalk with the crosswalk light in his favor when he saw defendants' vehicle waiting on the corner for the signal light to change to make a right turn from Amsterdam Avenue onto West 94<sup>th</sup> Street (Doc. 25, 50-H exam tr, defendants' exhibit 5 at 28; Doc. 35, 50-H exam tr, defendants' cross-mot exhibit 4 at 28). Plaintiff also testified that he rode his bicycle against the traffic, rode on the sidewalk on Amsterdam Avenue before reaching West 94<sup>th</sup> Street, and that he did not stop before entering the crosswalk (*id.* at 24, 25-26, 28). Plaintiff testified that he was in the crosswalk when defendants' vehicle collided with him (*id.* at 27, 28).

Plaintiff's Motion For Summary Judgment

Plaintiff contends, *inter alia*, that defendants' negligent conduct violated Vehicle and Traffic Law ("VTL") 1146, causing plaintiff's injuries (Doc. 7, aff of plaintiff's counsel at 3). VTL 1146 requires, among other things, that every vehicle driver exercise care to avoid colliding with any bicyclist or pedestrian on a roadway and give warning by sounding the horn when necessary. Plaintiff asserts that he was standing with his bicycle at the intersection of West 94<sup>th</sup> Street and Amsterdam Avenue intending to cross the intersection and was straddling his bicycle when he entered the crosswalk (Doc. 10, plaintiff's aff, plaintiff's exhibit C). Plaintiff argues that before entering the crosswalk, he saw no traffic approaching while he straddled his bicycle and then entered the crosswalk (Doc. 7 at 2). Plaintiff asserts that while in the crosswalk, he saw Roy operating the vehicle at the corner of West 94<sup>th</sup> Street and Amsterdam Avenue waiting for the light to change (*id.*). Plaintiff asserts he was suddenly struck by the vehicle driven by Roy when plaintiff was almost to the other side of the street but still in the crosswalk (*id.*).

Defendants' opposition argues, *inter alia*, that plaintiff failed to meet his *prima facie* burden since plaintiff's conduct was the sole proximate cause of his injuries and that plaintiff's motion is procedurally defective (Doc. 19, aff of defendants' counsel at 5). Defendants argue that plaintiff created triable issues of fact because plaintiff's affidavit, 50-II testimony, and other pleadings contain contradictions as to whether plaintiff was straddling his bicycle in the intersection or rode into the crosswalk without stopping (Doc. 20, defendants' mem of law in opp to summary judgment at 8). Roy asserts that he did not see anyone in the crosswalk, did not see plaintiff before the collision, and did not have an opportunity to avoid the collision with plaintiff (Doc. 26, Roy's aff, defendants' exhibit 6). Defendants also assert that plaintiff's motion is procedurally defective since it neither contains the Notice of Claim nor a statement of material

facts pursuant to Uniform Civil Rule 202.8-g (Doc. 19 at 2). Defendants argue that plaintiff's motion is premature because they have not received plaintiff's medical records, which are necessary to establish whether plaintiff sustained a serious injury within the meaning of Insurance Law 5104 (*id.* at 6).

Defendants' Cross-Motion For Summary Judgment

Defendants cross-move to dismiss plaintiff's complaint on the issue of defendants' liability, arguing, *inter alia*, that plaintiff violated VTL provisions and his conduct was the sole proximate cause of his injuries (Doc. 28, aff of defendants' counsel at 3). Defendants argue that plaintiff violated several provisions of the VTL, such as VTL 1127, 1231, 1234, and that an unexcused VTL violation is negligence *per se* (Doc. 30, defendants' mem of law in support of cross-mot for summary judgment at 6, 7). VTL 1127, among other things, requires vehicles to follow the designated direction signpost of one-way roadways. VTL 1231, among other things, states that bicyclists have all the same rights and duties applicable to drivers. VTL 1234, among other things, states that bicyclists riding over a curb must come to a full stop before entering a roadway. Defendants assert that plaintiff is negligent as a matter of law because he admitted that he rode his bicycle against the traffic before entering the roadway without stopping and into the crosswalk when the collision happened (*id.* at 6-7). Defendants argue that plaintiff was not lawfully in the intersection at the time of the collision because he was required to obey traffic signals, pursuant to VTL 1111, and failed to do so (*id.* at 7-8). Roy asserts that he did not see anyone in the crosswalk, did not see plaintiff before the collision, and did not have an opportunity to avoid the collision with plaintiff (Doc. 38, Roy's aff, defendants' cross-mot exhibit 7). Additionally, defendants contend that plaintiff did not sustain serious injuries under Insurance Law

5102(d), and that they have not received plaintiff's medical records and an independent medical examination has not been conducted (Doc. 28 at 12).

Plaintiff's opposition reasserts many of the same arguments made in his motion for summary judgment. Plaintiff argues, *inter alia*, that defendants' conduct violated VTI. 1146, which caused plaintiff's injuries (Doc. 44, plaintiff's counsel reply aff and opp to cross-mot at 1-2). Plaintiff also argues that defendants failed to provide any information that the vehicle was stopped prior to turning onto West 94<sup>th</sup> Street or that Roy indicated that the vehicle was going to turn by using the turn signal, and that Roy failed to exercise care to avoid the collision (*id.* at 3, 4). Plaintiff claims that even if his own conduct was negligent, it is not sufficient by itself to defeat his motion for summary judgment as to liability (*id.* at 2). Lastly, plaintiff asserts that a statement of material facts is not required for summary judgment under Uniform Civil Rule 202.8-g (*id.* at 3).

### **DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Without a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party has a heavy burden as the facts must be viewed in a light most favorable to the non-moving party (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). If the moving party meets their burden, the opposing party must produce evidentiary proof in admissible form that is sufficient to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Additionally, summary judgment is not premature because the

record may lack testimony or documentation that may illuminate issues raised by the parties in the hopes that further evidence to defeat summary judgment may be uncovered during discovery (*Flores v City of New York*, 66 AD3d 599, 600 [1<sup>st</sup> Dept 2009]).

“To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff” (*Han Hao Huang v “John Doe”*, 169 AD3d 1014, 1015 [2d Dept 2019]). A plaintiff does not have to establish that a defendant’s negligence is the sole proximate cause of the plaintiff’s injuries in order to establish a *prima facie* case but rather show that the defendant’s negligence is a substantial cause of the events that produced the injury (*Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [1<sup>st</sup> Dept 2010] [citations and emphasis omitted]).

The plaintiff does not have a burden to show absence of their comparative negligence for defendant’s liability on summary judgment (*Rodriguez v City of New York*, 31 NY3d 312, 318 [2018]). “[U]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection” (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1<sup>st</sup> Dept 2008] [internal quotation marks and citation omitted]). Factual issues concerning a plaintiff’s comparative negligence speaks to damages and is not a defense to a plaintiff’s *prima facie* case (*Bokum v Sera Sec. Servs., LLC*, 165 AD3d 535 [1<sup>st</sup> Dept 2018]). Thus, a bicyclist may prevail on the issue of liability by showing a driver failed to see the bicyclist through the ordinary use of their senses and took no action to avoid the collision (*Verna v Little Richie Bus Serv. Inc.*, 2024 NY Slip Op 00176 [1<sup>st</sup> Dept 2024]).

Uniform Civil Rule 202.8-g states that for summary judgment motions under CPLR 3212, the court may direct a statement of material facts from the moving party asserting there is no disputed genuine issues of material fact (*see* 22 NYCRR 202.8-g).

CPLR 3211(b) states 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.” The plaintiff bears the burden of showing that affirmative defenses are without merit as a matter of law when moving to dismiss them pursuant to CPLR 3211(b) (*534 E. 11<sup>th</sup> St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1<sup>st</sup> Dept 2011]). When deciding a motion to dismiss a defense, “the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*id.* at 542 [citation omitted]). Further, “[a] defense should not be stricken where there are questions of fact requiring trial” (*id.* [citation omitted]).

In cases involving a plaintiff’s comparative negligence, a defendant motorist needs to provide a non-negligent explanation for the collision (*Shin v Ljulja*, 219 AD3d 1238, 1238-39 [1<sup>st</sup> Dept 2023], *see also Romero v Valdez*, 198 AD3d 496 [1<sup>st</sup> Dept 2021]). Conflicting evidence that contradicts a plaintiff’s testimony may raise a triable issue of fact that would preclude dismissal of an affirmative defense (*Lopez v 1675 Realty*, 209 AD3d 407, 408-09 [1<sup>st</sup> Dept 2022] [plaintiff testified that the area where the accident happened was dark whereas the defendant’s affidavit said the area was illuminated by the building and streetlight]). However, a motorist failing to see a bicyclist prior to the collision or not having an opportunity to avoid the collision is insufficient as a triable issue of fact for liability because it goes to comparative negligence (*Fernandez v Ortiz*, 183 AD3d 443, 444 [1<sup>st</sup> Dept 2020]).

Plaintiff's Motion For Summary Judgment

Plaintiff met his *prima facie* burden on defendants' liability. Plaintiff demonstrated that defendants' conduct was a substantial cause of his injuries when the vehicle collided with him. Plaintiff and Roy's affidavits demonstrate that the collision occurred while plaintiff was in the crosswalk. Plaintiff saw Roy and the vehicle while in the crosswalk, while Roy admits that he only saw plaintiff after the collision occurred. Thus, Roy failed to see plaintiff through the normal use of his senses and failed to take reasonable care to avoid the collision. The fact that Roy did not see plaintiff prior to the collision and did not have an opportunity to avoid the collision is not a triable issue of fact. Additionally, plaintiff showed that defendants' affirmative defenses regarding liability – fifth and sixth affirmative defenses – should be stricken because defendants' arguments have only addressed plaintiff's comparative negligence. Since plaintiff has met his *prima facie* burden on defendants' liability, the burden shifts to defendants to show there are triable issues of fact to preclude summary judgment.

Defendants fail to meet their burden to show there are triable issues of fact on their liability. Defendants' evidence does not provide a non-negligent explanation or conflicting evidence for colliding with plaintiff. It is undisputed that plaintiff was in the crosswalk, with the light in his favor, when the collision happened. The fact that Roy did not see plaintiff and therefore had no opportunity to avoid the collision is not a triable issue of fact on liability. Whether plaintiff offers self-contradictory evidence if plaintiff was straddling or riding through the crosswalk may go towards his comparative negligence, and thus damages, but does not absolve Roy of failing to have seen plaintiff when he was in the crosswalk and to have taken reasonable steps to avoid the collision.

Contrary to defendants' arguments, plaintiff's motion for summary judgment is not procedurally deficient. Plaintiff is not required to submit a statement of material facts unless ordered to by the court because Uniform Civil Rule 202.8-g contains permissive rather than mandatory language. Additionally, defendants' assertion that plaintiff's motion is premature because they have not yet received plaintiff's medical records is misplaced. Defendants admit that the medical records will be used to assess whether plaintiff was seriously injured as defined by Insurance Law 5104.

Defendants' Cross-Motion For Summary Judgment

Defendants fail to meet their *prima facie* burden. Defendants' have not shown that plaintiff was the sole proximate cause of his injuries. Roy's affidavit states that he did not see plaintiff prior to the collision, whereas plaintiff saw Roy while he was in the crosswalk. Thus, Roy failed to see plaintiff through the ordinary use of his senses and did not take action to avoid the collision. While defendants assert that plaintiff rode into the street and did not stop before entering the crosswalk, such a contention speaks to plaintiff's comparative negligence that, by itself, is insufficient to defeat summary judgment on liability. Discovery, as to damages, is to proceed. The court does not address defendants' argument of whether plaintiff has sustained serious injury under Insurance Law § 5102(d) because discovery has not been completed and defendants have not obtained plaintiff's medical records. Since defendants failed to meet their *prima facie* burden, the court does not address plaintiff's arguments.

WHEREFORE, it is hereby:

ORDERED that plaintiff's motion for summary judgment on liability, pursuant to CPLR 3212, and motion to dismiss defendants' fifth and sixth affirmative defenses on liability, pursuant to CPLR 3211(b); is granted; and it is further

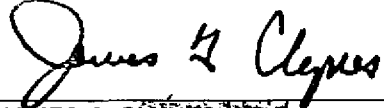
ORDERED that defendants' cross-motion for summary judgment, pursuant to CPLR 3212, is denied, with leave to refile on the issue of serious injury following the close of discovery; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the court.

3/20/2024  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE