

**McGee v Bartels**

2024 NY Slip Op 31800(U)

May 23, 2024

Supreme Court, New York County

Docket Number: Index No. 157361/2023

Judge: Hasa A. Kingo

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. HASA A. KINGO PART 05M**

*Justice*

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GERARD MCGEE,

Plaintiff,

- v -

STEPHEN R. BARTELS, ANDREA S. SANCHEZ, NEW  
YORK CITY POLICE DEPARTMENT, CITY OF NEW YORK

Defendant.

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INDEX NO. 157361/2023

MOTION DATE 04/03/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Gerard McGee (“Plaintiff”) moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability and, pursuant to CPLR § 3211(b), for an order striking the Defendants’ affirmative defenses relating to Plaintiff’s alleged comparative fault. Defendants, the City of New York (the “City”), the New York City Police Department (“NYPD”), Officer Stephen Bartels (“Officer Bartels”), and Officer Andrea Sanchez (“Officer Sanchez”) (collectively identified as “Defendants”) oppose the motion. For the reasons stated herein, Plaintiff’s motion is granted in part.

**BACKGROUND**

On November 12, 2022, Plaintiff was riding a pedal-assisted electric bicycle northbound on Pitt Street and Delancey in the City and County of New York when he was struck by a car door (NYSCEF Doc No. 14, Statement of material facts ¶ 6). Pitt Street has two northbound lanes and Defendants were double-parked in the east lane when Officer Sanchez opened the front passenger door and collided with Plaintiff (*id.* ¶ 11). Upon contact, Plaintiff flew over the door and sustained personal injuries (*id.* ¶¶ 12, 14). Pitt Street is not outfitted with a separate marked bike lane for cyclists to use on the road, and as such, Plaintiff was riding in the street, on the east most part of the roadway (NYSCEF Doc No. 27, Officer Sanchez affirmation ¶ 3). Body-worn camera footage submitted by Plaintiff depicts the moments before, during, and after the impact, including an admission by Officer Sanchez’ that she did not see the Plaintiff (NYSCEF Doc No. 24, Exhibit 7).<sup>1</sup>

<sup>1</sup> Plaintiff submitted the body-worn camera footage via a link to YouTube.com. As such the video has not been properly authenticated, however neither party raises any issues as to the video’s authenticity, and Defendants rely on said video when making arguments in opposition.

On December 19, 2022, Plaintiff timely served a notice of claim pursuant to General Municipal Law § 50-e (NYSCEF Doc No. 15, Roth affirmation ¶ 11). Plaintiff appeared for a hearing pursuant to General Municipal Law § 50-h on June 13, 2023 (*id.* ¶ 12). On July 24, 2023, Plaintiff commenced this action to recover for the personal injuries he sustained (NYSCEF Doc No. 1, Verified complaint). The City and the NYPD joined issue by service of their answer on August 24, 2023 (NYSCEF Doc No. 6, Verified answer). Thereafter, Officer Bartels and Officer Sanchez interposed their answers on October 23, 2023 (NYSCEF Doc No. 12, Verified amended answer). On April 3, 2024, Plaintiff filed the instant motion (NYSCEF Doc No. 13, Notice of motion).

Plaintiff contends that he is entitled to summary judgment on the issue liability because Defendants were negligent *per se* when Officer Sanchez opened the front passenger door when it was not safe to do so in violation of Vehicle and Traffic Law § 1214 (NYSCEF Doc No. 16, Memorandum of law ¶¶ 21-24). Plaintiff avers there was nothing he could have done to avoid coming into contact with the door (NYSCEF Doc No. 14, Statement of material facts ¶ 13). In support of the motion, Plaintiff proffers uncontroverted evidence consisting of the notice of claim, 50-h hearing transcript, an affidavit by the Plaintiff, and body worn camera footage. In opposition, Defendants contend that because Officer Sanchez opened the door facing a parking lane, she did not open the door to moving traffic, and did not violate Vehicle and Traffic Law § 1214 (NYSCEF Doc No. 26, Bila affirmation ¶ 8).<sup>2</sup> Defendants contend that there are issues of fact regarding the cause of Plaintiff's accident and whether he contributed to it (*id.* ¶ 6).

## DISCUSSION

A motion for summary judgment pursuant to CPLR § 3212(b) “shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party” (CPLR § 3212[b]). “The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To be a “material issue of fact” it “must be genuine, bona fide and substantial to require a trial” (*Leumi Financial Corp. v Richter*, 24 AD2d 855 [1st Dept 1965]). “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” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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<sup>2</sup> On each side of the two driving lanes on Pitt Street there are parking lanes for back in parking only. Thus, to the east of Defendant's vehicle were front facing parked vehicles.

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 (*Fernandez v Ortiz*, 183 AD3d 443, 443-444 [1st Dept 2020]). The Vehicle and Traffic Law ("VTL") imposes certain duties on drivers, which are applicable for the purposes of establishing negligence, and a party's violation of the VTL constitutes negligence *per se* [*Davis v Turner*, 132 AD3d 603 [2015]]. Under VTL § 1231, every person riding a bicycle on a roadway is afforded the same rights and duties applicable to drivers (Vehicle and Traffic Law § 1231).

In support of the motion, Plaintiff has submitted uncontroverted evidence consisting of the notice of claim, 50-h hearing transcript, and an affidavit by the Plaintiff to establish *prima facie* entitlement to judgment as a matter of law. Under the VTL, "[e]very driver of a vehicle shall exercise due care to avoid colliding with a bicyclist" (Vehicle and Traffic Law § 1146). Section 1214 of the VTL regulates the opening and closing of vehicle doors and states that "[n]o person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic" (Vehicle and Traffic Law § 1214). Section 4-12(c) of the Rules of the City of New York Department of Transportation states, "[n]o person shall get out of any vehicle from the side facing on the traveled part of the street in such manner as to interfere with the right of the operator of an approaching bicycle" (Rules of City of NY Dept of Transportation [34 RCNY] § 4-12[c]). The evidence proffered by Plaintiff demonstrates that Officer Sanchez opened her door where the Plaintiff was lawfully riding when it was not reasonably safe to do so in violation of VTL §§ 1214 and 1146 and Section 4-12(c) of the Rules of the City of New York, and that there was nothing Plaintiff could have done to avoid the encounter.

Defendants contend that Officer Sanchez did not open her car door into moving traffic because they were double parked in the east lane of a two-lane street, facing a parking lane, and therefore did not violate VTL § 1214. However, the area directly to the east of the NYPD vehicle was available to moving traffic, specifically cyclists, including Plaintiff. Where there is no separately marked bike-lane, bicyclists are directed to travel "near the right-hand curb or edge of the roadway or upon a usable right-hand shoulder" (VTL § 1234; *see also* VTL § 1284 regarding electric scooters).<sup>3</sup> This is precisely where Plaintiff was riding his bicycle. Although Defendants argue that Plaintiff was comparatively negligent for squeezing in between the NYPD vehicle and front facing parked cars, Plaintiff was riding exactly where he was supposed to under the VTL and Officer Sanchez had a duty to not open the car door until it was reasonably safe to do so (*Garcia v BLS Limousine Serv. of New York, Inc.*, 199 AD3d 612 [1st Dept 2021]; *Tavarez v. Herrasme*, 140 AD3d 453, 454 [1st Dept 2016]).<sup>4</sup> To suggest, as Defendants do, that only the west side of the NYPD vehicle was available to moving traffic because there was an additional lane for vehicles is inapposite to the purpose of the statute governing the safe opening of vehicle doors and would render it obsolete.<sup>5</sup> Moving traffic is not limited to a separate lane for vehicles, and includes

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<sup>3</sup> Notably, Defendants concede that there was no bike lane on Pitt Street where the accident occurred (NYSCEF Doc No. 26, Bila affirmation ¶ 10; NYSCEF Doc No. 27, Officer Sanchez affirmation ¶ 3).

<sup>4</sup> Defendants cannot obstruct the area where Plaintiff is designated to ride and then claim that he was comparatively negligent for riding there.

<sup>5</sup> Further, to expect Plaintiff to go around to the driver's side of the NYPD vehicle, in between two lanes of traffic, would pose an even greater risk to Plaintiff's safety.

bicycles, motorbikes, and streets where there is only one traffic lane (*see Coghlan v. Tanedo*, 2021 WL 3195710, at \*2 [Sup Ct, NY County 2021] [plaintiff was awarded summary judgment on liability where Defendants double parked, obstructed the bike lane, and struck Plaintiff with a vehicle door in violation of VTL § 1214]; *see also Li v. Lutwak*, 2019 NY Slip Op 32915[U] at \*1 [Sup Ct, NY County 2019] [summary judgment was granted to plaintiff when defendants opened the passenger side door of their double-parked vehicle as plaintiff passed on his motorbike]).

Notably, Defendants concede that Officer Sanchez opened the door that collided with Plaintiff and otherwise fail to advance any non-negligent reasons for the accident (*see Garcia v BLS Limousine Serv. of New York, Inc.*, 199 AD3d 612 [1st Dept 2021]). Moreover, Officer Sanchez admitted that she did not see Plaintiff before opening the door. As such, Officer Sanchez failed to see what, by the reasonable use of her senses, she should have seen (*see Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519, 520 [2d Dept 2006] [“[a] driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen”). Accordingly, Defendants’ argument that Plaintiff substantially caused the accident by failing to warn the occupants in the vehicle that he was approaching is unavailing. It was Defendants who had the duty to look and see if it was reasonably safe to exit when they did. Considering Plaintiff’s *prima facie* showing and Defendants’ failure to raise an issue of fact, Plaintiff’s motion for summary judgment as to liability is granted.

In addition to seeking liability, Plaintiff also requests the dismissal of Defendants’ affirmative defense of culpable conduct. Culpable conduct diminishes a personal injury plaintiff’s damages in proportion to the extent that said plaintiff caused the damages (CPLR §§ 1411, 1412). While a plaintiff is not obliged to demonstrate that they were not comparatively negligent to obtain summary judgment on liability, a plaintiff’s comparative negligence might be determined within the framework of summary judgment if the plaintiff moves to dismiss the defendant’s affirmative defense of comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Cui v Hussain*, 207 AD3d 788, 789 [2d Dept 2022]). In this case, Plaintiff seeks dismissal of Defendants’ culpable conduct defense but has not established a *prima facie* case that his speed did not contribute to his damages in any manner. While this does not preclude summary judgment on the liability issue, discovery on the issue of Plaintiff’s comparative fault must be completed prior to a trial on Plaintiff’s damages before this court can conclude, as a matter of law, that Defendants have no viable affirmative defense as to Plaintiff’s culpable conduct. Therefore, Plaintiff’s motion to dismiss Defendants’ affirmative defense of culpable conduct is denied.

Based on the foregoing, it is hereby

ORDERED that Plaintiff’s motion is granted with respect to the issue of liability; and it is further

ORDERED that Plaintiff’s motion is denied with respect to the affirmative defense of culpable conduct, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in Plaintiff’s favor on the issue of liability accordingly; and it is further

ORDERED that the Clerk of the Court is directed to set this matter down for a preliminary conference in the DCM Part on the next available date, to set a discovery schedule on the issues of culpable conduct and damages; and it is further

ORDERED that a settlement conference for this matter shall be held on June 27, 2024 at 2:30 p.m. in the courtroom located in Room 320 at 80 Centre Street, New York, New York; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office; and it is further

ORDERED that such service upon the General Clerk’s Office 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).


This constitutes the decision and order of the court.

5/23/2024  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  SUBMIT ORDER  FIDUCIARY APPOINTMENT  REFERENCE

  
FASA A. KINGO, J.S.C.