

Shakir v City of New York
2024 NY Slip Op 35452(U)
May 10, 2024
Supreme Court, Queens County
Docket Number: Index No. 718818/2018
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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JOHN SHAKIR,

Plaintiff,

-against-

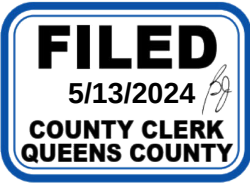
Index No.:718818/2018

Motion Date: 3/11/2024

Motion Cal. No.: 26

Motion Sequence No.: 2

THE CITY OF NEW YORK, THE NEW YORK
CITY POLICE DEPARTMENT and
POLICE OFFICER TIMOTHY HOEHMANN,



Defendants.

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The following e-file papers numbered 40-56, 59-67, 69 submitted and considered on this motion by Defendants The City of New York, The City of New York s/h/a The New York City Police Department (hereinafter referred to as “ NYPD” and collectively as “City”), and Police Officer Timothy Hoehmann (hereinafter referred to as “Hoehmann”) seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment in favor of the City and Hoehmann; for an Order pursuant to CPLR 3211 (a)(7), dismissing the complaint against The City of New York s/h/a The New York City Police Department, as NYPD is a non-suable entity.

<u>Motion Sequence 2</u>	<u>Papers Numbered</u>
Notice of Motion-Affirmation in Support- Affidavits-Exhibits.....	EF 40-56
Affirmation in Opposition-Affidavits-Exhibits.....	EF 59-67
Reply Affirmation-Affidavits-Exhibits.....	EF 69

Relevant Facts and Procedural History

This litigation arises from an incident involving Plaintiff John Shakir (hereinafter “Shakir”) riding a bicycle and coming into contact with a marked NYPD vehicle on September 29, 2017 at the intersection of Shore Front Parkway and Beach 105th Street in the County of Queens, State of New York. According to testimony adduced herein from the parties, Shore Front Parkway is a two-way street for travel eastbound and westbound, and the eastbound and westbound lanes of traffic are separated by a grassy median. Shakir testified in sum and substance that on the date of the accident, he was riding his bicycle home from a Rite-Aid Pharmacy located on Beach 108th Street. He rode down Beach 123rd Street to the boardwalk, and along the boardwalk to Beach 105th Street. At Beach 105th Street he exited the boardwalk and then attempted to cross Shore Front Parkway when the accident occurred.

Shakir testified at his statutory 50-h hearing in sum and substance, that on the date of the accident, September 29, 2017, he was riding his bicycle along the boardwalk and came to the intersection of Beach 105th Street and Shore Front Parkway, exiting the bicycle lane that he had been traveling in along the boardwalk, and that he attempted to cross Shore Front Parkway. He had no recollection of how the accident occurred. His next memory after the accident was waking up in the hospital.

Hoehmann, City’s employee and the operator of the NYPD vehicle, gave sworn testimony and testified that on the date of the accident he was traveling along Shore Front Parkway for approximately five minutes before the collision occurred. He had been operating the vehicle at a speed of 20 to 25 miles per hour. Hoehmann testified that at the time of the accident the traffic light at the intersection was green in his favor. He stated that Shakir came into contact with the NYPD vehicle on the driver’s side front panel as a result of Shakir failing to see what was there to be seen and crossing the street against the green traffic light.

The other occupant of the NYPD vehicle, NYPD Sergeant Schachtel (hereinafter “Schachtel”) also testified, and stated that on the date of the accident, he was occupying the passenger seat of the NYPD vehicle, and he did not observe Shakir prior to the collision. Schachtel stated that Shakir drove his bicycle into the NYPD vehicle and “kept pedaling like the car wasn’t there.” (See Schachtel Dep. Tr. pgs. 32: 19-23; 49:7-9.)

Non-party witness, Michael Deming (hereinafter “Deming”) gave sworn testimony in this matter on February 19, 2020. Deming testified in sum and substance, that on the date of the accident, he was employed as a MTA Bridge and Tunnel Officer, and he witnessed the accident. He testified that the accident occurred on September 29, 2017 and that he had also provided a handwritten statement to the police. He testified that the pedestrian with the bicycle was crossing the street against the traffic signal, and had actually came in front of his car, thereafter striking the NYPD vehicle, and that the bicyclist failed to slow down the bicycle before making contact with the NYPD vehicle. When the light turned green in his favor for travel, the bicyclist entered the roadway, not stopping to look right or left or attempting to apply his brakes.

Regarding the branch of the motion seeking relief under CPLR 3211, City asserts that as an agency of the City, NYPD is not a suable entity per Chapter 17, Section 396 of the New York City Charter, and seeks dismissal of the complaint against NYPD on these grounds pursuant to CPLR 3211.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). “Once a prima facie showing has been made, however, 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” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]).

“A defendant moving for summary judgment in an negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident. The operator of a vehicle with the right-of-way is entitled to assume that others will obey the traffic laws requiring them to yield. While a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident, such a driver who had seconds to react to a vehicle which has failed to yield is not comparatively negligent in failing to avoid the collision.” (See *Hernandez-Martinez v Wang*, 221 AD2d 977 [2d Dept 2023] [internal citations omitted].)

“There can be more than one proximate cause of an accident, and [g]enerally, it is for the trier of fact to determine the issue of proximate cause” (See *Khalil v Garcia-Olea*, 222 AD3d 853 [2d Dept 2023]; see also *Oliinyk v Yusupov*, 218 AD3d 602 [2d Dept 2023]). “With few exceptions... a person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle. A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles and to avoid placing himself or herself into a dangerous position. In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle’s horn when a reasonably prudent person would do so in order to warn a bicyclist of danger, and to operate the vehicle with reasonable care to avoid colliding with anyone on the road” (See *Amancio-Gonzalez v Medina*, 223 AD3d 861 [2d Dept 2024] citing *Palma v Sherman*, 55 AD3d 891 [2d Dept 2008].) “The operator of a vehicle with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident... [n]evertheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision.” (See *Kirby v Lett*, 208 AD3d 1174 [2d Dept 2022].)

Vehicle and Traffic Law (hereinafter “VTL”) §1111 titled “Traffic-control signal indications” states the following in relevant part:

Whenever traffic is controlled by traffic-control signals, other than lane direction control signal indications provided in section eleven hundred sixteen, exhibiting different colored lights, or colored lighted arrows, successively, one at a time or in combination, only the colors green, yellow and red shall be used, and said light shall indicate and apply to drivers of vehicles and to pedestrians as follows:

(a) Green indications:

1. Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited...

3. Unless otherwise directed by a pedestrian-control signal as provided in section eleven hundred twelve, pedestrians facing any steady green signal, except when the sole green signal is a turn arrow, may proceed across the roadway within any marked or unmarked crosswalk....

(d) Red indications:

1. Traffic, except pedestrians, facing a steady circular red signal, unless to make such other movement as is permitted by other indications shown at the same time, shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and shall remain standing until an indication to proceed is shown except as provided in paragraph two of this subdivision.

34 RCNY § 4-03 titled “Traffic Signals” states the following in relevant part:

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(a) Traffic control signals. Whenever traffic is controlled by traffic control signals exhibiting different colored lights successively, the following colors shall indicate and apply to operators of vehicles and to pedestrians, except as superseded by pedestrian control signals, as follows:

(1) Green alone:

(i) Vehicular traffic facing such signals may proceed straight through or turn right or left unless a sign at such place prohibits any such movement. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.

(ii) Pedestrians facing such signal may proceed across the roadway within any crosswalk.

(2) Steady yellow alone, dark period, or red-green combined when shown following the green signal:

(i) Vehicular traffic facing such signal is thereby warned that the red signal will be exhibited immediately thereafter and such vehicular traffic shall not enter the intersection when the red signal is exhibited.

(ii) Pedestrians facing such signal are advised that there may be insufficient time to cross the roadway. Pedestrians already in the roadway must proceed to the nearest safety island or sidewalk in the direction of such signal.

VTL § 1143 entitled “Vehicle entering roadway” states the following:

Vehicle entering roadway. The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

VTL § 1146 titled “Drivers to exercise due care” states the following:

(a) Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary. For the

purposes of this section, the term “domestic animal” shall mean domesticated sheep, cattle, and goats which are under the supervision and control of a pedestrian.

(b) 1. A driver of a motor vehicle who causes physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care in violation of subdivision (a) of this section, shall be guilty of a traffic infraction punishable by a fine of not more than five hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment.

2. If such driver of a motor vehicle causes physical injury while failing to exercise due care in violation of subdivision (a) of this section, then there shall be a rebuttable presumption that, as a result of such failure to exercise due care, such person operated the motor vehicle in a manner that caused such physical injury.

(c) 1. A driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care in violation of subdivision (a) of this section, shall be guilty of a traffic infraction punishable by a fine of not more than seven hundred fifty dollars or by imprisonment for not more than fifteen days or by required participation in a motor vehicle accident prevention course pursuant to paragraph (e-1) of subdivision two of section 65.10 of the penal law or by any combination of such fine, imprisonment or course, and by suspension of a license or registration pursuant to subparagraph (xiv) or (xv) of paragraph b of subdivision two of section five hundred ten of this chapter.

2. If such driver of a motor vehicle causes serious physical injury while failing to exercise due care in violation of subdivision (a) of this section, then there shall be a rebuttable presumption that, as a result of such failure to exercise due care, such person operated the motor vehicle in a manner that caused such serious physical injury.

(d) A violation of subdivision (b) or (c) of this section committed by a person who has previously been convicted of any violation of such subdivisions within the preceding five years, shall constitute a class B misdemeanor punishable by a fine of not more than one thousand dollars in addition to any other penalties provided by law.

(e) Nothing contained in this section shall prevent the court from imposing any other authorized disposition, including a period of community service.

VTL § 1231 titled “Traffic laws apply to persons riding bicycles or skating or gliding on in-line skates” states the following:

Traffic laws apply to persons riding bicycles or skating or gliding on in-line skates. Every person riding a bicycle or skating or gliding on in-line skates upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this title, except as to special regulations in this article and except as to those provisions of this title which by their nature can have no application.

(See also *Sturm v Chaudhary*, 210 AD3d 927 [2d Dept 2022]; *Felix v Polakoff*, 178 AD3d 561 [1st Dept 2019]).

The Court finds that City and Hoehmann have established their prima facie entitlement to judgment as a matter of law. City and Hoehmann demonstrated that Shakir’s failure to comply with the VTL and RCNY was the sole proximate cause of the accident. The testimony of non-party witnesses Deming and Schachtel supports the assertion that Shakir entered the intersection without due caution, and that the City’s vehicle driven by Hoehmann was proceeding through the aforementioned intersection with a green light. Hoehmann also claimed that he did not see Shakir until the collision occurred, and that Shakir ran his bicycle into the City vehicle, not having any reasonable time to avoid the collision. In fact, Shakir’s bicycle crossed in front of non-party witness Deming’s vehicle prior to coming into contact with the City’s vehicle. Shakir could not remember how the accident occurred (see *Isaacs v Gregory*, 113 AD3d 728 [2d Dept 2014]).

In opposition, Shakir submitted documentary evidence including a certified and uncertified police accident report; collision investigation report; photograph; statements of Cathy Lynch and Melanie Reed. Shakir claims that the differences in testimonial evidence require a thorough examination by a jury, particularly concerning the sequence of traffic lights and Hoehmann’s actions. Hoehmann’s and other witnesses’ conflicting testimonies about the traffic light status and their observations suggest that summary judgment is inappropriate. Shakir invokes the legal principles of “falsus in uno, falsus in omnibus,” suggesting that if any part of a witness’s testimony is found false, their entire testimony may be disregarded. Shakir further argues that there was a possibility that Shakir was in a crosswalk and had a pedestrian signal in his favor, which Defendants have not definitively negated, adding another layer of factual complication that should be resolved at trial. Shakir also alleged that the traffic light at the intersection may have malfunctioned. Thus, even if Defendants had the green light in their favor, they were obligated under the traffic laws to see what was there to be seen, which they failed to do so. Shakir did not oppose the portion of the motion by NYPD to be dismissed from the case under CPLR 3211 as it is a non-suable entity.

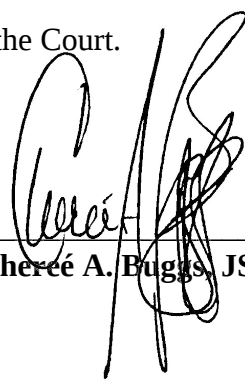
The Court finds that Shakir failed to raise a triable issue of fact. Hoehmann and Deming’s testimony indicate that the police vehicle was already in the intersection at the time of the incident, with the green light, consistent with lawful traffic movement. Witness statements of Kathy Lynch

and Melanie Reed indicate that neither of them actually witnessed the accident. Shakir's assertion regarding the malfunctioning of the traffic light at the intersection was purely speculative and unsupported by any evidentiary basis. Plaintiff has not provided any technical reports, expert testimony, or credible evidence to substantiate claims of a traffic light malfunction, and failed to rebut the evidence that he was solely responsible for the accident. .

Therefore, the motion is granted in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: May 10, 2024



Hon. Chereé A. Buggs, JSC

