

Angelo v Youth Shelter Program of Westchester
2024 NY Slip Op 35618(U)
December 16, 2024
Supreme Court, Westchester County
Docket Number: Index No. 63080/2024
Judge: Nancy Quinn Koba
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To commence the statutory time period
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 WESTCHESTER

-----X
LEONEL ANGELO,

Plaintiff,

-against-

DECISION & ORDER

Index No.: 63080/2024

Mot. Seq. No. 1

YOUTH SHELTER PROGRAM OF WESTCHESTER
and DARRELL C. ROBINSON,

Defendants.

-----X
QUINN KOBÄ, J.

By Notice of Motion (the "Motion"), the plaintiff seeks an Order: 1) pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability against the defendants; 2) pursuant to CPLR 3211 (b), dismissing the defendants' first, third, fourth, fifth, seventh and eighth affirmative defenses; 3) scheduling a preliminary conference; 4) directing an immediate trial on the issue of plaintiff's damages, to be held following the conclusion of discovery and the filing of plaintiff's note of issue; and 5) granting such other, further and different relief as to which this Court deems just and proper. Defendants oppose the Motion.

The following papers were considered in determining the Motion:

Papers

NYSCEF DOC. No.

Notice of motion	8-16
affirmation in support	
exhibits 1-5	
statement of material facts	
memorandum of law in support	
Affirmation in opposition	19-22

statement of material facts
exhibit A
acknowledgement of service

Reply affirmation

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Upon the foregoing papers, the Court determines the Motion as follows:

RELEVANT FACTUAL AND PRCEDURAL BACKGROUND

This action arises out of a motor vehicle accident that occurred on April 20, 2024. On May 29, 2024, plaintiff commenced this action by filing a summons and verified complaint with the Westchester County Clerk. Plaintiff seeks money damages for personal injuries he allegedly sustained in the accident due to defendants alleged negligence and violation of certain provisions of the Vehicle and Traffic Law ("VTL") (Ex. 3 [NYSCEF Doc. No. 1]). Issue was joined on June 25, 2024 when defendants served their answer.

Plaintiff now moves for partial summary judgment on the issue of liability as well as dismissal of the defendants' first (culpable conduct), third (no serious injury), fourth (failure to use an available seatbelt), fifth (injuries due to fault of a third party other than defendants), seventh (reserving right to assert additional defenses) and eighth (arbitration/collateral estoppel) affirmative defenses. In support of the Motion, plaintiff submits his affirmation, affirmed on August 21, 2024, a certified copy of the police accident report, his attorney's affirmation, affirmed on the 30th day of August 2024, the pleadings, statement of material facts and memorandum of law.

In his affirmation, plaintiff avers that on Saturday, April 20, 2024, at approximately 2:30 p.m., he was operating his 2011 Suzuki motorcycle north in the left, forward moving lane, of Nepperhan Avenue approaching the intersection of Ashburton Avenue in the City of Yonkers. He intended to go straight through the intersection (Ex. 1, Angelo Aff. at ¶ 2).¹ He states that Nepperhan Avenue has a total of six lanes at that intersection - four south and two north. The south lanes include a left turn only lane, a right turn only lane and two forward moving lanes. The north

¹Angelo Aff. refers to the Affirmation of Leonel Angelo, affirmed on the 21st day of August 2024 (NYSCEF Doc. No. 11).

lanes include two forward moving lanes and one left turn only lane. The intersection is controlled by a traffic light. Visibility was good and the roads were dry (*Id.* at ¶ 3).

Plaintiff contends he had a steady green light as he approached the intersection. He proceeded into the intersection when "suddenly and without any warning, a 2009 Toyota motor vehicle . . . which was traveling south on Nepperhan Avenue, turned left through the intersection and struck my motorcycle head-on. Mr. Robinson did not sound his horn or do anything to alert me to his actions" (*Id.* at ¶ 4). He contends he had no time to take any action to avoid the accident (*Id.* at ¶ 5). He was thrown from his motorcycle and landed on the roadway sustaining serious injuries. He did not speak to Robinson or the police at the scene (*Id.* at ¶¶ 6-7).

According to the certified police accident report, plaintiff related he was traveling northbound on Nepperhan through a steady green light when the other vehicle pulled out into his lane attempting to make a left turn, causing them to collide head on. The other driver, Robinson, left the scene before the police arrived. However, the officer was able to contact Robinson who advised he was traveling southbound on Nepperhan Avenue. He went to make the left onto Ashburton Avenue through the green light when he collided with plaintiff. He further stated that he believed after the accident plaintiff swerved, driving down Nepperhan Avenue, leaving the scene. The officer reviewed a surveillance video, which allegedly showed plaintiff traveling north on Nepperhan Avenue through the steady green light when Robinson failed to yield the right of way before making the left turn, causing plaintiff to strike Robinson's vehicle head on (Ex. 2 [NYSCE Doc. No. 12]).

Plaintiff argues both the video recording and Robinson's statement of events set forth in the police report corroborate plaintiff's recollection and establish there is no dispute that Robinson caused the accident by turning left in front of plaintiff's oncoming vehicle with the right of way when it was unsafe to do so. Moreover, plaintiff contends there is nothing he could have done to avoid the accident (Greenspan Aff. at ¶¶ 6-8; MOL at 1-2).² In turning left and failing to yield the right of

²Greenspan Aff. refers to the Affirmation in Support of Motion for Partial Summary Judgment of Michael E. Greenspan, affirmed on the 30th day of August 2024 (NYSCEF Doc. No. 10). MOL refers to the Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, dated August 30, 2024 (NYSCEF Doc. No. 16).

way, plaintiff asserts defendants violated VTL § 1141. Plaintiff also asserts defendants violated VTL § 1163 in turning left without activating his left turn signal. Said violations constitute negligence (MOL at 5-11). As defendants are liable, plaintiff contends the affirmative defenses in question must be dismissed as being without merit (*Id.* at 11-17).

In opposition to the motion, defendants submit, *inter alia*, the affirmation of Robinson, affirmed on the 30th day of September 2024 (Ex. A [NYSCE Doc. No. 21]), defendants' attorney's affirmation, dated October 1, 2024, and response to plaintiff's statement of material facts.

In his affirmation, Robinson, who is employed by YSP, states he was operating a 2009 Toyota motor vehicle owned by YSP south on Nepperhan Avenue at or near its intersection with Ashburton Avenue (*Id.* at ¶¶ 2-3). As he approached the intersection, Robinson states he activated his left turn signal and entered the left turn lane to make a left turn unto Ashburton Avenue. The traffic light was green. When he began his left turn, Robinson avers the motorcycle was about 10 to 12 car lengths away. His view of plaintiff was unobstructed, so he assumed plaintiff could also see him. He asserts he was well into his turn and believed he had control of the intersection and that the turn could be made with reasonable safety before the accident. It appeared to him that the motorcycle accelerated as it approached him. He believed the motorcyclist was not paying attention as he entered the intersection. He denied making any statement to the police officer as to how the accident occurred (*Id.* at ¶¶ 4-11).

Defendants contend summary judgment must be denied as there are genuine issues of material fact regarding liability and the Motion is premature in that minimal discovery has occurred (Cohen Aff. at ¶ 3).³ Defendants further contend the statements in the police report regarding the video footage of the incident are inadmissible hearsay as the video recording is neither part of the record nor authenticated, citing CPLR 4518(a). Moreover, defendants assert there is no evidence that the police officer witnessed the accident, so the statements contained in his report are hearsay and thus inadmissible (*Id.* at ¶¶ 4-9). Defendants argue genuine issues of material fact exist as to whether plaintiff was negligent or contributed to the happening of the accident by

³Cohen Aff. refers to the Affirmation in Opposition of William Cohen, dated October 1, 2024.

failing to use reasonable care to avoid the collision in that Robinson turned on his left directional signal, entered the intersection before plaintiff when his distance from plaintiff - 10 to 12 car lengths - did not constitute an immediate hazard, his vehicle should have been clearly visible to plaintiff and it appeared plaintiff accelerated toward him rather than slowed down to avoid an impact (*Id.* at ¶¶ 10-13).

In reply, plaintiff argues defendants' third, fourth, seventh and eighth affirmative defenses must be dismissed as they failed to address plaintiff's arguments that the same are without merit (Greenspan Reply Aff. at ¶ 1, et. seq.). Plaintiff further contends Robinson's admissions and omissions - failure to attest to plaintiff's speed before the collision, admission plaintiff had a steady green light, observation that plaintiff's motorcycle was approaching the intersection, failure to state he had a green turn signal or honked his horn, lack of denial he left the scene of the accident and failed to exchange information with plaintiff - support the grant of partial summary judgment to plaintiff (*Id.*). Plaintiff reiterates the police report is admissible for the reasons stated in his moving papers and contends he officer's observations regarding the content of the video tape are admissible because he personally reviewed it. Moreover, the cases cited by plaintiff support the grant of judgment to him on liability.

ANALYSIS

I. Summary Judgment Standard

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotations and citations omitted]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack

thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure" (*Id.* [internal quotation marks and citation omitted]).

Summary judgment is not warranted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Karel v Pizzorusso*, 215 AD3d 738 [2d Dept 2023]).

A plaintiff moving for summary judgment in a negligence action on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to plaintiff, and that the defendant's negligence was a proximate cause of the plaintiff's alleged injuries (see *Dieubon v Moore*, 229 AD3d 686 [2d Dept 2024]). "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 (internal quotation marks and citations omitted). However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*Choo v Virginia Transp Corp*, 204 AD3d 743, 744 [2d Dept 2022] [internal quotation marks and citation omitted]).

Here, plaintiff established, *prima facie*, his entitlement to judgment as a matter of law on the issue of liability through his affirmation. The Court notes that the certified copy of the police accident report constitutes inadmissible evidence because the police officer did not witness the accident, both plaintiff and defendant denied speaking to the officer yet statements are attributed to them in the report and the video surveillance tape allegedly reviewed by the police officer is not authenticated (see CPLR 4518; *Torres v Hickman*, 162 AD3d 821 [2d Dept 2018]; *Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; *People v Abrams*, 231 AD3d 963 [2d Dept 2024]).

In opposition to plaintiff's *prima facie* showing, however, defendants, through Robinson's Affirmation, met defendants' burden of demonstrating the existence of genuine issues of material fact as to whether he was negligent, whether he violated VTL § 1141 or VTL § 1163 and whether the plaintiff was negligent in failing to keep a proper lookout and in failing to see what could be seen through the reasonable use of his senses to avoid the accident as Robinson swears plaintiff was "10 to 12" car lengths from the intersection when he began his turn, that he started his turn from

the left turn only lane, that his left turn signal was on when he attempted to make the left turn, his vehicle was visible to plaintiff, who appeared to accelerate rather than slow down as he approached the intersection and did not appear to be paying attention and he was significantly through his turn in the intersection before plaintiff reached it (see *Saviano v TT of Massapequa, Inc*, 223 AD3d 851 [2d Dept 2024]; *St. Fort Colin v Perry*, 231 AD3d 989 [2d Dept 2024]). Here, there are disputed material facts, conflicting inferences may be drawn from the evidence, and there are issues of credibility. Therefore, the branch of the motion seeking partial summary judgment on liability must be denied.

II. Dismissal of Defendants' Affirmative Defenses

CPLR 3211(b) provides 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" (CPLR 3211[b]). The plaintiff must demonstrate, "prima facie, that those affirmative defenses and counterclaims were waived, were without merit, or were conclusory in nature and contained no factual allegations (see CPLR 3211[e][internal citation omitted])" (*US Bank N.A. v Okoye-Oyibo*, 213 AD3d 718, 721-722 [2d Dept 2023]). "The nonmoving defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed [internal quotation marks and citations omitted]" (*South Point, Inc. v Redman*, 94 AD3d 1086, 1087 [2d Dept 2012]).

Here, plaintiff met his *prima facie* burden to strike defendants' third, fourth, fifth, seventh and eighth affirmative defenses. Defendants did not submit any opposition to plaintiff's *prima facie* showing. Thus, defendants' third, fourth, fifth, seventh and eighth affirmative defenses are deemed abandoned (see *Elam v Ryder Sys., Inc.*, 176 AD3d 675 [2d Dept 2019]). Plaintiff failed to meet his *prima facie* burden to dismiss the first affirmative defense (culpable conduct), so that branch of the motion is denied as to that affirmative defense.

All other arguments raised, and evidence submitted, on the Motion have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the branch of the Motion seeking partial summary judgment on the issue of liability is DENIED; and it is further

ORDERED that the branch of the Motion seeking dismissal of certain affirmative defenses raised by defendants is GRANTED to the extent that the third, fourth, fifth, seventh and eighth affirmative defenses contained in the defendants' answer are severed therefrom and are DISMISSED and this branch of the Motion is otherwise DENIED; and it is further

ORDERED that the **parties shall appear for a Preliminary Conference in Courtroom 1602 of this Courthouse on January 10, 2025 at 9:30 a.m.**

The foregoing shall constitute the Decision and Order of the Court in this matter.

Dated: White Plains, New York
December 16, 2024

ENTER



HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF