

Rathgeber v Johnson

2025 NY Slip Op 30836(U)

March 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 514985/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of March, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

NATALIE RATHGEBER,

Plaintiff,

Index No.: 514985/2022

-against-

DECISION AND ORDER

DA'NEEKA JOHNSON and CREST TRANSPORTATION SERVICES, INC. d/b/a ASSIST AMBULANCE,

Mot. Seq. No. 2

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Statement of Material Facts/ Affirmation in Support/Exhibits/.....	29 – 37, 39
Affirmation in Opposition/Exhibits/Counterstatement to Plaintiff's Statement of Material Facts.....	41 – 44
Reply Affirmation.....	48

Plaintiff Natalie Rathgeber (“Plaintiff”) commenced this action alleging that she sustained personal injuries as a result of a motor vehicle accident that occurred on April 6, 2022. At the time of the accident, Plaintiff was on a Citi Bike traveling on a two-way street without a bike lane. Plaintiff asserts that she was struck from behind by an ambulance owned by defendant Crest Transportation Services, Inc. d/b/a Assist Ambulance (“Crest”), operated by its employee, defendant Da’Neeka Johnson (“Johnson”).

Plaintiff moves for an order, pursuant to CPLR 3212, granting her partial summary judgment against Defendants on the issue of liability because there are no triable issues of fact; and upon granting summary judgment, setting the matter down for an assessment of damages pursuant to CPLR 3212 (c) (Mot. Seq. No. 2). Defendants oppose the motion.

In her motion, Plaintiff asserts that Defendants violated Vehicle and Traffic Law § 1146¹ and such violation was the sole proximate cause of the accident. Plaintiff argues that Johnson failed to

¹ Vehicle and Traffic Law § 1146 (a) states, in part, that “every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist . . . upon any roadway” (VTL § 1146 [a]).

ascertain whether she could safely pass Plaintiff on the roadway before attempting to do so. Since she had the right of way, Plaintiff contends that she was entitled to anticipate that Johnson would obey the law which required her to exercise due care while attempting to pass Plaintiff. In further support of her motion, Plaintiff references the police report and the ambulance's dash cam video. Plaintiff next argues that as the employer, Crest is vicariously liable since Johnson was driving the ambulance through the course of her employment.

In opposition, Defendants argue that the motion must be denied because Plaintiff relies upon inadmissible evidence and her counsel's affirmation is not properly affirmed. Defendants contend that Plaintiff relies upon deposition testimony which was not in proper form and an uncertified copy of the police report. With respect to the affirmation, Defendants assert that it does not conform to the amended version of CPLR 2106. In addition, Defendants claim that there is a question of fact as to what caused the accident. According to Defendants, Plaintiff's own testimony establishes that she failed to use reasonable care while riding on the roadway to avoid the incident. At her deposition, Defendants argue that Plaintiff testified that, as she was approaching a cone partially in the roadway, she sped up without turning her head to the left or indicating that she was moving to the left as the front of the ambulance was passing her. Defendants further assert that Plaintiff failed to establish that Johnson failed to use due care to avoid colliding with Plaintiff. In fact, Defendants aver that by moving to the left, Johnson exercised due care to avoid colliding with Plaintiff (VTL § 1146 [8]), and took reasonable steps to discharge her statutory duty to pass to the left of Plaintiff at a safe distance (VTL § 1122-a). Defendants contend that the dash cam video shows that (a) Johnson veered to the left as she was approaching Plaintiff, (b) at least the front of the ambulance had safely passed Plaintiff and (c) Plaintiff gave no hand signal to indicate she was about to move left and she did not turn her head to look at the ambulance. Moreover, Defendants maintain that the dash cam video establishes that the ambulance did not strike Plaintiff or her bicycle in the rear.

In her reply, Plaintiff maintains that Crest is vicariously liable since the accident occurred while Johnson was driving the ambulance through the course of her employment. With respect to the procedural issues raised by Defendants, Plaintiff argues that the unsigned deposition testimony is in admissible form since it was submitted to the deponent for review and was not returned within 60 days. Plaintiff further argues that the police report was included for "information purposes." Though Plaintiff acknowledges that the exact language of CPLR 2106 was not used in the affirmation, it was still sworn to under penalty of perjury and Plaintiff requests that the Court exercise its discretion and consider the motion on its merit. With respect to the substantive portion of Defendants' opposition, Plaintiff contends that they have not raised an issue of fact. According to Plaintiff, Defendants'

argument that Plaintiff attempted to move to the left is speculative and contradicted by her testimony and the dash cam video. Specifically, Plaintiff testified that the cone was not blocking her availability to operate the bicycle and she did not have to turn to avoid it.

As a preliminary matter, the Court turns to the issue of the admissibility of certain documents. With respect to her own deposition transcript, the Court finds that it is admissible “since the transcript was submitted by the party deponent [herself] and, therefore, was adopted as accurate by the deponent” (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]). Turning to the transcript of Crest’s witness Carlo Gattnig, the Court also finds that it is admissible because it was “certified [by the court reporter, and the defendants did not raise any challenges to its accuracy” (*id.*). Though Plaintiff argues that the police report was submitted solely for “information purposes,” this does not make it admissible (*see Yassin v Blackman*, 188 AD3d 62, 63 [2d Dept 2020] [“An uncertified police accident report does not constitute admissible evidence, absent a proper foundation for its admissibility”]). Even if the police report was certified, the Court would still deem it inadmissible since it contains self-serving hearsay statements from Plaintiff relevant to the ultimate issue of fact (*Casey v Tierno*, 127 AD2d 727, 727 [2d Dept 1987]). Regarding Plaintiff’s counsel’s affirmation, the Court does not consider the lack of verbatim usage of the language in amended CPLR 2106 to be fatal (*see Michaels v State of New York*, NYLJ, Jul. 30, 2024 at 17, col 1, 2024 NYLJ LEXIS 2430 at *2-3 [Ct Cl 2024]).

“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” (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018], citing *Rodriguez v City of New York*, 31 NY3d 312 [2018]). It is now well-settled that a plaintiff is no longer required to establish the “absence of his or how own comparative fault” to be entitled to summary judgment (*Rodriguez*, 31 NY3d at 324-325). In addition, the Court need not consider a plaintiff’s conduct in analyzing his or her entitlement to summary judgment where the plaintiff did not move to strike any affirmative defense asserting comparative negligence (*see Garutti v Kim Co Refrig. Corp.*, 222 AD3d 728, 729 [2d Dept 2023]; *Ramirez v Wangdu*, 195 AD3d 646, 646 [2d Dept 2021]).

“A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law” (*Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]). In a negligence action involving a bicycle and motor vehicle, the Second Department stated,

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. 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 in a dangerous position (*Palma v Sherman*, 55 AD3d 891, 891 [2d Dept 2008]).

In addition, Vehicle and Traffic Law § 1122 (a) directs “[t]he driver of a vehicle overtaking another vehicle proceeding in the same direction [to] pass to the left thereof at a safe distance and [] not again drive to the right side of the roadway until safely clear of the overtaken vehicle” (VTL § 1122 [a]).

Upon consideration of the documents submitted, the Court finds that Plaintiff has established her prima facie burden demonstrating entitlement to summary judgment as a matter of law. It is undisputed that Plaintiff was traveling straight on the far right when her bicycle came in contact with the ambulance, as it was passing her, causing her to fall. The Court finds that through her deposition testimony, Plaintiff has demonstrated that Johnson struck her in violation of VTL § 1146. Accordingly, the burden now shifts to Defendants to raise an issue of fact.

Defendants' opposition stands or falls on whether Plaintiff veered to the left and struck the ambulance. This is solely based on counsel's speculation since there is no testimony presented rebutting Plaintiff's testimony that she did not turn to avoid the cone (*see Sabharwal v Hyundai Mar. & Fire Ins. Co., Ltd.*, 216 AD3d 1015, 1018 [2d Dept 2023] [assertion made by an attorney without personal knowledge fails to raise a triable issue of fact]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [“[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment.]). Moreover, the dash cam videos presented do not support defense counsel's assertion that Plaintiff veered to the left.

Accordingly, it is hereby

ORDERED, that the branch of Plaintiff's motion for summary judgment on liability (Mot. Seq. No. 2) is granted; and it is further

ORDERED, that the branch of Plaintiff's motion for an order setting this matter down for an inquest on damages is denied. This action will proceed to trial on the issue of damages only.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**