

Colasacco v Fils-Aime
2025 NY Slip Op 35493(U)
January 24, 2025
Supreme Court, Westchester County
Docket Number: Index No. 55800/2024
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
JAMIE B. COLASACCO,

Plaintiff,

DECISION & ORDER

Index No. 55800/2024

Mot. Seq. Nos. 1,2

-against-

BERTRAND FILS-AIME,

Defendant.

-----X
QUINN KOBA, J.

By notice of motion (motion sequence no. 1), defendant, BERTRAND FILS-AIME, seeks an order for summary judgment, pursuant to CPLR 3212, dismissing the complaint; or, for partial summary judgment if the Court finds triable issues of material fact exist as to plaintiff's liability pursuant to *Leathers v Approved Oil Co. of Brooklyn, Inc.*, 212 AD3d 584 [1st Dept. 2023]) (the "Fils-Aime Motion"). Plaintiff opposes the Fils-Aime Motion.

By notice of motion (motion sequence no. 2), plaintiff, JAMIE B. COLASACCO ("Colasacco"), seeks an order, pursuant to CPLR 3212, for partial summary judgment on the issue of Fils-Aime's liability, together with such other and further relief as this Court deems just and proper (the "Colasacco Motion"). Fils-Aime opposes the Colasacco Motion.

The following papers were considered on the motions, which are consolidated for resolution:

PAPERS

NYSCEF DOC. No.

The Fils-Aime Motion

Notice of Motion,
Affirmation in Support,
Statement of Material Facts,
Exhibits A - E

15-20

Affirmation in opposition,
Counterstatement of material facts,
Exhibits 1-9,
Affidavit of service

30-54

Reply affirmation, 55-57
Exhibits A-C

The Colasacco Motion

Notice of Motion, 41-53
Statement of material facts,
Affirmation in support,
Exhibits A - J

Affirmation in opposition, 59
Exhibit 1,
Response to statement of material facts

Reply Affirmation 60

Upon the foregoing papers, the motions are determined as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On or about January 17, 2024, Colasacco commenced this action by filing a summons and a verified complaint alleging he sustained serious injuries on October 17, 2023 when the vehicle he owns and was operating, a Hyundai Kona (the "Colasacco Vehicle"), was struck by a 2005 Lexus owned and operated by Fils-Aime (the "Fils-Aime Vehicle") at or near the intersection of Route 9W on the Palisades Interstate Parkway. On March 4, 2024, issue was joined when Fils-Aime filed his verified answer.

The following materials were submitted in support of the Fils-Aime Motion: the affirmation of Fils-Aime, sworn to on August 7, 2024 (the "Fils-Aime Affirmation" [Ex. C]), dash cam video footage of the accident (Ex. D), and a certified copy of the police report of the subject accident, dated October 18, 2023 (the "Police Report" [Ex. E]).

The following is a summary of the Fils-Aime Affirmation. At approximately 6 a.m. on the date of the accident, Fils-Aime was driving the Fils-Aime Vehicle, travelling between 20-30 MPH on the Bear Mountain Circle, a one-way circular road with two traffic lanes. The Fils-Aime Vehicle's headlights were on. Fils-Aime put the Fils-Aime Vehicle's right directional signal on. The Fils-Aime Vehicle was moving from the left lane into the right lane to take the Palisades Parkway exit, when the Colasacco Vehicle "suddenly and without warning" struck the Fils-Aime Vehicle on its passenger side. Fils-Aime did not have time to brake or take any other mitigating action to prevent the accident. Fils-Aime did not observe the Colasacco Vehicle prior to the accident.

Fils-Aime viewed the dash cam video footage taken from the Colasacco Vehicle. Fils-Aime attests that the same accurately shows the Colasacco Vehicle entering the Bear Mountain Circle from the right of the Fils-Aime Vehicle "without obeying the yield sign. It never stopped, and failed to yield at the yield sign and entered the Bear Mountain Circle," striking the Fils-Aime Vehicle on the right side (see the Fils-

Aime Affirmation at ¶¶ 14-16).

The following is a summary of the description of the accident in the Police Report. The Fils-Aime Vehicle was travelling in the Bear Mountain Circle, making a right to take the Palisades Parkway exit. The Colasacco Vehicle was coming from Route 9W and into the Bear Mountain Circle. The Colasacco Vehicle failed to yield the right of way, "colliding" with the Fils-Aime Vehicle.

In opposition, Colasacco submitted, *inter alia*, the affidavit of Colasacco, sworn to on November 8, 2024 (the "Colasacco Affidavit"), a video footage from the dash cam inside the Colasacco Vehicle on the date of the accident (Ex. 6), copies of the transcripts from Colasacco and Fils-Aime's depositions (Exs. 8 and 9, respectively).

The following is a summary of Colasacco's deposition testimony. On the date of the accident, Colasacco was driving the Colasacco Vehicle to work. The weather and road conditions were clear and dry. Colasacco believes the Colasacco Vehicle's headlights were on. The Colasacco Vehicle was travelling in the left lane on Route 9W, which has two travel lanes, towards the Bear Mountain Circle, a one-way roadway with two travel lanes. The Colasacco Vehicle was entering the Bear Mountain Circle from Route 9W, at a rate of speed between 28-32 MPH, when it was struck on the front left side by the Fils-Aime Vehicle. Colasacco did not see the Fils-Aime Vehicle prior to the accident. The Colasacco Vehicle was in the right lane when the accident occurred.

There is a yield sign controlling entry, including the Colasacco Vehicle's entry, into the Bear Mountain Circle from Route 9W. Colasacco looked to the left, then to the right, and then to the left again as he was approaching the subject yield sign and entering the Bear Mountain Circle. Colasacco did not see any vehicles travelling on the Bear Mountain Circle prior to entering the same. Colasacco did not come to a stop at the subject yield sign prior to entering the Bear Mountain Circle.

Colasacco acknowledged having read the Police Report. He did not attempt to have it changed. Also, on the date of the accident, the Colasacco Vehicle was equipped with dash cam he had installed. Colasacco was shown the video footage and that the same fairly and accurately depicted how the accident occurred.

The following is a summary of Fils-Aime's deposition testimony. At approximately 6-6:15 a.m. on the date of the accident, Fils-Aime was travelling to work in the Fils-Aime Vehicle. The Fils-Aime Vehicle was travelling in the Bear Mountain Circle, moving towards the Palisades Parkway exit when the Colasacco Vehicle struck it. The Fils-Aime Vehicle had its right directional signal on before moving to the right. The Fils-Aime Vehicle's headlights were on, and it was travelling between 20-30 MPH when the accident occurred. Fils-Aime never saw the Colasacco Vehicle prior to the accident. The Colasacco Vehicle did not yield the right-of-way to the Fils-Aime Vehicle.

In reply, Fils-Aime submitted copies of the transcripts from Colasacco and Fils-Aime's depositions and photographs of the damage to the Fils-Aime Vehicle.

In support of the Colasacco Motion, Colasacco submitted, *inter alia*, the Colasacco Affidavit, copies of the transcripts from Colasacco and Fils-Aime's depositions, the dash cam video footage of the accident, and aerial images of the Bear Mountain Circle.

In opposition, Fils-Aime submitted the same evidentiary materials which were submitted on the Fils-Aime Motion. An affirmation was submitted in reply.

As a preliminary matter, the Court observes that the affirmation submitted in opposition to the Fils-Aime Motion and the supporting and reply affirmations submitted on the Colasacco Motion are not properly sworn and are rendered ineffective because they fail to substantially comply with the required form language in CPLR 2106 (see *Matter of Grandsard v Hutchison*, 227 AD3d 491 [1st Dept 2024]; see generally, *Matter of Sweet v Fonvil*, 227 AD3d 849 [2d Dept 2024]). Counsel is advised that compliance with this Rule is expected on all future motions.

The Court also observes that the Fil-Aime Affirmation and the Colasacco Affidavit submitted on the motions do not contain a certificate of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (see 22 NYCRR § 202.8-b). Although these omissions will be overlooked in this instance, counsel are advised that compliance with this rule is expected for all future motions.

DISCUSSION

"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]). Once a prima facie showing is made, the burden shifts to the nonmovant to establish genuine issues of fact (see *e.g.*, *Zuckerman v City of New York*, 49 NY2d 557[1980]).

"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 defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (internal quotation marks and citations omitted). A driver of a motor vehicle has a common-law duty to see that which he or she should have seen through the proper use of his or her senses (internal citations omitted). A driver is negligent where he or she failed to see that which, through proper use of his or her senses, he or she should have seen (internal citations omitted). 'Since there can be more than one proximate cause of an accident, a defendant seeking summary judgment must establish freedom from comparative fault as a matter of law' (*Fergile v Payne*, 202 AD3d 928, 930, 163 N.Y.S.3d 216 [2022] [internal quotation marks omitted]; see *Mohammed v City of New York*, 206 AD3d 988, 989, 168 N.Y.S.3d 894 [2022]). '[G]enerally, it is for the trier of fact to determine the issue of proximate cause' (*M.M.T. v Relyea*, 177 AD3d 1013, 1013, 114 N.Y.S.3d 385 [2019] [internal quotation marks omitted])" (*Alterisio v Rodriguez*, 228 AD3d 712, 713 [2d Dept. 2024]). 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]).

Fils-Aime alleges Colasacco violated VTL § 1142(b), which requires the driver of a vehicle approaching a yield sign to slow down to a reasonable speed for the existing conditions, or to stop if necessary as provided in VTL 1172. VTL 1142(b) also provides . . . "that if such driver is involved in a collision with . . . a vehicle in the intersection after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his failure to yield the right of way."

Fils-Aime also alleges that Colasacco violated VTL § 1172(b), which provides as follows: "The driver of a vehicle approaching a yield sign if required for safety to stop shall stop at a clearly marked yield 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 the right to proceed shall be subject to the provisions of section eleven hundred forty-two of this title."

Fils-Aime further alleges Colasacco violated VTL § 1145, which provides as follows: " . . . the driver of a vehicle approaching or about to enter a rotary traffic circle or island shall yield the right of way to any vehicle already traveling on such circle or around such island."

Colasacco alleges that Fils-Aime violated VTL § 1128(a), which states that "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Colasacco also alleges that Fils-Aime violated VTL § 1163(a), which provides as follows: "No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided."

A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence *per se* (see *Seizeme v Levy*, 208 AD3d at 809), and the burden shifts to the other driver to establish a non-negligent cause for the collision (see *Hauswith v Transcare New York, Inc.*, 97 AD3d 792, 949 NYS2d 154 [2d Dept 2012]).

Here, neither party tendered sufficient evidence establishing their entitlement to judgment as a matter of law dismissing the complaint or granting partial summary judgment on the issue of liability. Likewise, neither party eliminated triable issues of facts regarding the circumstances of the accident. Each party's submissions present conflicting accounts of the accident from which different inferences may be drawn, thereby precluding the grant of either motion. Moreover, the dash cam video footage of the accident does not conclusively resolve the issues of fault or proximate cause.

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

Accordingly, it is hereby

ORDERED that defendant, BERTRAND FILS-AIME's, motion (motion sequence no. 1), made pursuant to CPLR 3212, is DENIED; and it is further

ORDERED that plaintiff, JAMIE B. COLASACCO's, motion (motion sequence no. 2), pursuant to CPLR 3212, for partial summary judgment on the issue of liability is DENIED.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
January 24, 2025

ENTER:



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

To: All Counsel VIA NYSCEF