

Moore v Cox
2025 NY Slip Op 35572(U)
January 23, 2025
Supreme Court, Queens County
Docket Number: Index No. 723606/22
Judge: Timothy J. Dufficy
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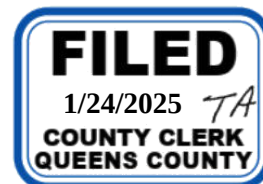
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY

PART 35

Justice

-----x
DOROTHEA MOORE

Plaintiff,

Index No.: 723606/22

-against-

Mot. Date: 11/19/24

Mot. Seq.: 1

NICHOLAS E. COX,

Defendant.

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The following papers were read on this motion by defendant for an order, pursuant to CPLR 3212 granting summary judgment, on the issue of liability, in his favor and dismissing plaintiff's complaint against him

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 15-26
Answering Affidavits-Exhibits.....	EF 27-32
Replying Affidavits.....	EF 33

Upon the foregoing papers, it is ordered that the motion by defendant is denied.

This action arises out of a two vehicle accident, that occurred on November 19, 2019, at about 8:30 a.m., on Beach Channel Drive near Beach 92nd Street, in Rockway Beach, New York. Plaintiff and the defendant were operators of motor vehicles that were in a collision.

Both parties agree that Beach Channel Drive is a two-way roadway running eastbound and westbound with two travel lanes in each direction. To the right of westbound Beach Channel Drive, there is a McDonald's restaurant that has a drive-through exit onto westbound Beach Channel Drive. Both parties also agree that at the time of the accident, there was a large truck stopped in front of the McDonald's in the right lane.

Defendant moves for summary judgment on the issue of liability. He submits, *inter alia*, his deposition transcript and the plaintiff's deposition transcript. He also

submits a police accident report that the Court will not consider as it is not certified (see *Yassin v Blackman*, 188 AD3d 62 [2d Dept. 2020]).

At his deposition, the defendant testified that: as he was traveling westbound on Beach Channel Drive, the McDonald's was on his right; the exit for the drive through of the McDonald's was to the right and past the restaurant as one was driving westbound on Beach Channel Drive; and, if the accident had not occurred, it was intention to take Beach Channel drive to the Cross Bay Bridge, which was approximately 150-200 feet from Beach 92nd Street to the Cross Bay Bridge. At the time of the accident, there was one moving lane, as there was an 18-wheeler truck that was located in front of the McDonald's, parked in the right travel lane. As he was traveling in the left lane at about 20 miles per hour, the right front side of his vehicle was struck by the front of the plaintiff's vehicle. He testified that his vehicle was completely in the left lane at impact.

Plaintiff testified that prior to the accident, she had purchased food from the McDonald's using the drive through and it was her intention to proceed right from the exit of the drive through onto westbound Beach Channel Drive to head west to the Cross Bay Bridge. Her view was obstructed by a truck parked to her left. She stopped and claimed that a person in the truck waved to her to indicate that she could proceed. She did not see any vehicles traveling in the left lane of Beach Channel Drive before she entered the roadway. As she was turning onto Beach Channel Drive, she first saw the defendant's vehicle a second before the accident. It was in the left lane moving over to the right lane and traveling "pretty fast".

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Id*; see also *Zuckerman v City of New York*, 49 NY2d 557 [1980]). To defeat summary judgment, the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp, supra*).

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (see *Shabat v State of New York*, 177 AD3d 1009 [2d Dept, 2019], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Ortiz v.*

Varsity Holdings, LLC, 18 NY3d 335 [2011]). “[T]he moving party has the initial burden of coming forward with sufficient proof in admissible form to enable the court to determine that it is entitled to judgment as a matter of law” (*see Rosa v Gordils*, 211 AD3d 1060 [2d Dept 2022], quoting *Gesuale v Campanelli & Assoc., P.C.*, 126 AD3d 936 [2d Dept 2015]). “Defendants moving for summary judgment in a negligence action arising out of an automobile accident have the burden of establishing, prima facie, that they were not at fault in the happening of the accident” (*see Id.*, quoting *Elusma v Jackson*, 186 AD3d 1326 [2d Dept 2020]; *Nesbitt v Gallant*, 149 AD3d 763 [2d Dept 2017]).

There [may] 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 Rosa v Gordils, supra*, quoting *Choo v Virginia Transp. Corp.*, 204 AD3d 743 [2d Dept 2022]; *see Shuofang Yang v Sanacore*, 202 AD3d 1120 [2d Dept 2022]). “[T]he issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts” (*see Rosa v Gordils, supra*, quoting *Rodriguez v. Palacio*, 199 AD3d 728 [2d Dept 2021]).

Summary judgment on the issue of liability is not warranted where “the conflicting deposition testimony . . . submitted in support of the motion regarding the manner in which the accident occurred fail[s] to eliminate triable issues of fact as to that issue” (*see Golovnya v. Artemchenko*, 210 AD3d 1058, 1058 [2d Dept. 2022], quoting *Cho v Demelo*, 175 AD3d 1235, 1237 [2d Dept]; *see also Cruz v Valentine Packaging Corp.*, 167 AD3d 707, 708-709 [2d Dept 2018]).

“[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se” (*E.B. v Gonzalez*, 208 AD3d 618, 619 [2d Dept 2020] [internal quotation marks omitted]; *see Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept 2020]). Vehicle and Traffic Law Section 1128(a) states in pertinent part: “[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.”

Here, the parties have conflicting versions of whether the defendant’s vehicle was in the left lane at the time of the accident, as alleged by the defendant or moving into the right lane, as alleged by the plaintiff. There are also triable issues of fact as to whether the defendant was comparatively negligent in violating Vehicle and Traffic Law Section § 1128. In light of the conflicting versions of how the accident occurred, there are triable

issues of fact requiring denial of the motion (*see Golovnya v. Artemchenko, supra, Cho v Demelo, supra*).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant is denied; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

Dated: January 23, 2025



TIMOTHY J. DUFFICY, J.S.C.

