

<b>O'Brien v Hong Trieu Tu</b>
2013 NY Slip Op 30665(U)
April 3, 2013
Supreme Court, Queens County
Docket Number: 27224/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

CASEY O'BRIEN, Index No.: 27224/2011  
Plaintiff, Motion Date: 02/15/13  
- against - Motion No.: 80  
Motion Seq.: 1  
HONG TRIEU TU and ALLEN TU,  
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by plaintiff, Casey O'Brien, for an order pursuant to CPLR 3212 granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6  
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10  
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, Casey O'Brien, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on September 10, 2011, at approximately 4:45 p.m., at the intersection of 61<sup>st</sup> and York Avenue in New York County, New York.

Plaintiff claims that at the time of the accident, he was riding his bicycle southbound on York Avenue between 61<sup>st</sup> and 62<sup>nd</sup> Street when defendant Allen Tu made a left turn from York Avenue onto 61<sup>st</sup> Street colliding with his bicycle. Plaintiff states that as a result of the accident he sustained severe physical injuries including a concussion, a fractured vertebrae and tears in his left shoulder which required surgical repair.

Adam J. Roth, Esq., counsel for plaintiff, now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment in favor of plaintiff on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of the police accident report (MV-104AN); and copies of the transcripts of the examinations before trial of the plaintiff and the defendant, Allen Tu.

In the accident description section of the police report, the police officer, who did not witness the accident, describes the accident, based upon the statements of the two drivers as follows:

"Veh 1 (defendant) states he was making a left turn when bicyclist struck his passenger front door at a high speed also causing damage to passenger side mirror and windshield. Bicyclist does not remember incident. Bicyclist did hit his head. Witnesses state they only saw bicyclist being ejected from the bicycle."

Plaintiff, age 28, testified at an examination before trial held on July 12, 2012 that on the date of the accident, September 10, 2011, he was operating a bicycle southbound in the far right lane of York Avenue. He stated that as he approached the intersection with 61<sup>st</sup> Street the light was green in his favor. He observed the defendants' vehicle stopped in the northbound lanes of York Avenue. When the plaintiff was about 15 feet from the intersection he observed the defendant's vehicle begin to move. He began to apply his brakes as the BMW began to make a left turn across the southbound lanes of York Avenue onto 61<sup>st</sup> Street. He applied his brakes as hard as he could but he made contact with the front of the defendant's vehicle. As a result of the impact his head hit the windshield of the car and his body flipped over the front of the car. He landed on his back at which time he lost consciousness. He was transported by ambulance to the emergency room at New York Presbyterian Hospital.

Defendant, Allen Tu, was deposed on July 12, 2012. He stated that prior to the accident he got off the 59<sup>th</sup> Street Bridge, turned onto York Avenue from First Avenue and was intending to turn back to East 61<sup>st</sup> Street to look for a parking space. He stated that he stopped at the corner of York and 61<sup>st</sup> prior to making the turn and waited while yielding the right of way to vehicles coming from the opposite direction. The light was green in his favor. He stated that he did not see the bicyclist before he made the left turn. He stated that he completed the left turn onto westbound 61<sup>st</sup> Street and the front of his car was in the

crosswalk area when the bicycle struck his car. He said the bicycle hit with a loud impact. He stopped the vehicle, got out and saw the plaintiff on the ground.

Plaintiff's counsel, argues in support of the motion for summary judgment, that the defendant driver violated VTL §§ 1141 and 1163 by failing to yield the right of way to a vehicle approaching from the opposite direction prior to making the left turn and by turning at the intersection without waiting until the turn could be made with reasonable safety. Counsel contends that the defendant was negligent based upon his failure to observe and yield to the plaintiff's vehicle who was traveling straight ahead on York Avenue with the right of way. Plaintiff claims that defendant was negligent in making his left turn directly in front of the plaintiff's bicycle (citing Ducie v Ippolito, 95 AD3d 1067 [2d Dept. 2012] Socci v Levy, 90 AD3d 1020 [2d Dept. 2011]; Stanford v Dushey, 71 AD3d 988 [2d Dept. 2010]).

In opposition to the motion, defendant's counsel, Timothy Tenke, Esq., asserts that the plaintiff's testimony does not establish plaintiff's freedom from comparative negligence. He points out that the plaintiff testified that he observed defendants' vehicle fifteen to twenty feet prior to his entering the intersection. He also stated that he observed the defendants' vehicle seven seconds before the impact.

Upon review of the plaintiff's motion, the defendants' opposition and the plaintiffs' reply thereto, this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2d Dept 2005]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

Based upon a review of the respective pre-trial testimony of the parties this Court finds that there are material issues of fact which preclude granting summary judgment to the plaintiff on the issue of liability. The plaintiff contends that the defendant violated Vehicle and Traffic Law § 1141 in making a left turn

when it was not reasonably safe to do so, directly into the path of plaintiff's oncoming bicycle. The court's have held that a plaintiff is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the defendant's violation of VTL § 1141 in turning left directly into the path of an oncoming vehicle, which was lawfully present in the intersection (see Ducie v Ippolito, 95 AD3d 1067 [2d Dept. 2012]; Gause v. Martinez, 91 AD3d 595 [2d Dept. 2012]; Socci v Levy, 90 AD3d 1020 [2d Dept. 2011]; Ahern v Lanaia, 85 AD3d 696 (2d Dept. 2011)).

However, the Appellate Division has stated that "there can be more than one proximate cause of an accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Winner v Star Cruiser Transp., Inc., 95 AD3d 1109 [2d Dept. 2012] citing Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Villa v Leandrou, 94 AD3d 980 [2d Dept 2012]; Calcano v Rodriguez, 91 AD3d 468 [1<sup>st</sup> Dept. 2012]). Although the plaintiff had the right-of-way, was proceeding lawfully on York Avenue, and was entitled to anticipate that the defendant would obey the traffic laws (see Martin v Ali, 78 AD3d 1135, 1136 [2010]; Yelder v Walters, 64 AD3d 762 [2009]), the plaintiff driver also has a duty to keep a proper look out and to exercise reasonable care to avoid a collision with another vehicle already in the intersection (see Gause v. Martinez, 91 AD3d 595 [2d Dept. 2012]; Bonilla v Calabria, 80 AD3d 720 [2d Dept. 2011]; Todd v Godek, 71 AD3d 872 [2d Dept. 2010]; Tapia v Royal Tours Serv., Inc., 67 AD3d 894 [2d Dept 2009]; Sirot v Troiano, 66 AD3d 763 [2d Dept 2009]). Bicyclists traveling in the street are subject to the same duties applicable to drivers of motor vehicles (see N.Y. Veh. & Traf. § 1231), and a bicyclist entering an intersection is therefore required to yield the right-of-way to traffic already in that intersection (see Steinsnyder v United States, 2013 U.S. Dist. LEXIS 45945 [NY Dist. Ct. Eastern Dist. 2013]; Joannis v Cahill, 71 AD3d 1437 [4<sup>th</sup> Dept. 2010]; Hyatt v Messana, 67 AD3d 1400 [4th Dept. 2009]).

Here, the defendant testified that he had completed his left turn and was already at the crosswalk on 61<sup>st</sup> Street when the plaintiff struck his vehicle with his bicycle. Further, the plaintiff testified that he observed the defendants' vehicle begin to make the left turn about 7 seconds before the impact occurred. Therefore, this court finds that there is conflicting testimony as to the facts surrounding the accident, including, but not limited to, the issue concerning which vehicle lawfully entered the intersection first, whether defendant violated VTL § 1141, and if he did, whether such violation was the sole

proximate cause of the accident (see Soibov v Palmer, 102 AD3d 951 [2d Dept. 2013]; Gause v Martinez, 91 AD3d 595 [2d Dept. 2012]).

The plaintiff's evidentiary submissions did not prove his freedom from comparative negligence as a matter of law, and as such, are insufficient to establish, prima facie, that the defendant's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926[2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Therefore, viewing the evidence in the light most favorable to the non-moving party (Stukas v Streiter, 83 AD3d 18 [2nd Dept. 2011]; Judice v DeAngelo, 272 AD2d 583, [2nd Dept. 2000] this court finds that there are factual issues concerning whether the plaintiff and defendant each met their respective duty to observe what should have been observed and the duty to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]).

Accordingly, for all off the above stated reasons, it is hereby

ORDERED, that the motion by plaintiff for partial summary judgment on the issue liability is denied.

Dated: April 3, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**