Magee v Zeman
2019 NY Slip Op 34369(U)
August 28, 2019
Supreme Court, Suffolk County
Docket Number: Index No.625549/2018E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Dennis Magee,

Plaintiff,

-against-

Joanne Zeman,

Defendant.

Motion Sequence No.: 001; MG
Motion Date: 6/14/19
Submitted: 619/19

Index No.: 625549/2018**E**

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Clerk of the Court

Upon the **E-file document list** numbered 8 to 17 read on plaintiff's motion for an order pursuant to CPLR 3212 granting summary judgment against defendant on the issue of liability and striking defendant's affirmative defense of comparative negligence; it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted and defendant's affirmative defense of comparative negligence is stricken.

Plaintiff Dennis Magee commenced this action by the filing of summons and complaint on December 31, 2018 to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred on May 24, 2017 at approximately 5:15 p.m., near the intersection of College Road and Palm Street in Suffolk County, New York. Issue was joined on January 17, 2019. Plaintiff now moves for summary judgment on the issue of liability and to strike defendant's affirmative defense of comparative negligence. In support of his motion, plaintiff submits an attorney

affirmation, a sworn affidavit, a copy of the pleadings, and the certified police accident report. By way of his sworn affidavit, plaintiff alleges that while he was traveling southbound on College Road within the posted speed limit, and after he entered the intersection with Palm Street, defendant Joanne Zeman, who was traveling northbound on College Road, suddenly and without warning crossed over both double yellow lines prior to reaching the intersection and traveled directly into the path of plaintiff's vehicle, striking it head-on. Plaintiff further alleges that he attempted to avoid the collision by applying his brakes, however, he only had a moment to react and was unable to avoid the accident. According to the certified police report, defendant advised that she was "going to make a left turn and started making the turn too soon, crossing into oncoming traffic." Plaintiff argues that defendant violated sections 1141, 1163, and 1120 of the Vehicle and Traffic Law and that these violations and her failure to keep a proper lookout and observe what she should have seen with proper use of her senses were the proximate cause of the collision. Defendant opposes the motion claiming summary judgment is premature as there has been no discovery, that the police report is inadmissible hearsay, and that plaintiff has failed to show that he acted reasonably under the circumstances. Plaintiff replies.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact *(see* ***Rotuba Extruders, Inc. v. Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion who must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v. Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v. Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v. Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v. City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v. Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]) and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, *supra*; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept. 2010]).

Vehicle and Traffic Law § 1141 requires that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." A driver with the right of way is entitled to anticipate that other motorists will obey traffic laws that require them to yield the right of way (*see* ***Lebron v.***

Mensah, 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Bullock v. Calabretta***, 119 AD3d 884 [2d Dept 2014]; ***Kucar v. Town of Huntington***, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]; ***Todd v Godek***, 71 AD3d 872 [2d Dept 2010] ***Kann v. Maggies Paratransit Corp.***, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Gabler v. Marly Bldg. Supply Corp.***, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). A driver is not required to anticipate that an automobile going in the opposite direction will cross over [a double yellow line] into oncoming traffic" (***Barbaruolo v. Difede,*** 73 AD3d 957, 900 NYS2d 671 [2d Dept. 2010]). Vehicle and Traffic Law §1163 provides, in pertinent part, that "no person shall turn a vehicle at an intersection unless the vehicle is in proper position...or turn a vehicle from a direct course or move right of left upon a roadway unless and until such movement can be made with reasonable safety." Further, the general rule under Vehicle and Traffic Law §1120 is that a "vehicle shall be driven upon the right half of the roadway," with limited exceptions not applicable herein. A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se (***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Barbaruolo v. Difede,*** 73 AD3d 957, 900 NYS2d 671 [2d Dept. 2010]***;*** ***Ciatto v. Lieberman,*** 266 AD2d 494, 698 NYS2d 54 [2d Dept. 1999]; *see also* ***Barbieri v. Vokoun***, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept. 2010]; ***Smith v. State of New York,*** 121 AD3d 1358, 1358-59, 955 NYS2d 329 [3d Dept. 2014]. Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (*see* ***Laino v Lucchese***, 35 AD3d 672, 827 NYS2D 249 [2d Dept 2006]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Bongiovi v. Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle" (***Gause v. Martinez,*** 91 AD3d 595, 936 NYS2d 272 [2d Dept. 2012] *quoting* ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009]; ***Cox v Nunez***, 23 AD3d 427 [2d Dept 2005]). There can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question of fact for the jury to decide (*see* ***Bullock v. Calabretta***, 119 AD3d 884, 989 NYS2d 862 [2d Dept. 2014]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]). The fact that a party violated the Vehicle and Traffic Law would not preclude a finding that comparative negligence by another party contributed to the accident (*see* ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009]; ***Cox v. Nunez***, 23 AD3d 427 [2d Dept 2005]). However, a plaintiff need not prove that he or she was free from comparative fault in order to establish his or her prima facie entitlement to summary judgment (*see* ***Rodriguez v. City of New York***, 31 NY3d 312, 2018 NY Slip Op 02287 [2018]; ***Edgerton v. City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]).

Generally, an uncertified MV-104 police accident report constitutes hearsay and is inadmissible, unless it is subject to an exception to the hearsay rule (*see* ***Siemucha v. Garrison,*** 111 AD3d 1398, 1399, 975 NYS2d 518 [4th Dept. 2013]; *see also* ***Lacagnino v. Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept. 2003]; ***Hegy v. Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept. 1999]). Here, however, the police accident report is certified, and the statement by defendant that she was "going to make a left turn and started making the turn too soon, crossing into oncoming traffic" is admissible under the admission against interest exception to the hearsay rule (*see* ***Lebron***

v. Mensah, 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Jackson v. Trust,*** 103 AD2d 851, 852, 962 NYS2d 267 [2d Dept. 2013]; ***Scott v. Kass,*** 48 AD3d 785, 851 NYS2d 649 [2d Dept. 2008]; ***Wu v. Continental Truck body Corp.,*** 2019 NY Slip Op. 30571, 2019 WL 1093458 [Sup. Ct. NY Cty. 2019]). This admission, as well, supports the facts as presented by plaintiff (*see* ***Rosenblatt v. Venizelos,*** 49 AD3d 519, 853 NYS2d 578 [2d Dept. 2008]; *see also* ***Lariviere v. New York City Transit Authority,*** 82 AD3d 1165, 920 NYS2d 231 [2d Dept. 2011]).

Here, plaintiff demonstrates his prima facie entitlement to judgment as a matter of law on the issue of liability by establishing that defendant violated Vehicle and Traffic Law sections 1141, 1163, and 1120, in that while plaintiff was traveling southbound on College Road, defendant, who was traveling northbound on College Road, crossed over both double yellow lines prior to reaching the intersection of Palm Street and traveled directly into the path of plaintiff's vehicle, at a time when it was not reasonably safe to do so, colliding head-on with plaintiff's vehicle, and that defendant's violations were the sole proximate cause of the accident (*see, e.g.,* ***Kerolle v. Nicholson,*** 172 AD3d 1187, 101 NYS3d 387 [2d Dept. 2019]; ***Yu Mei Liu v. Weihong Liu,*** 163 AD3d 611, 81 NYS3d 75 [2d Dept. 2018]; ***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Ahearn v. Lanaia,*** 85 AD3d 696, 924 NYS2d 802 [2d Dept. 2011]; ***Heath v. Liberato,*** 82 AD3d 841, 918 NYS2d 353 [2d Dept. 2011]; ***Berner v. Koegel,*** 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Moreback v. Mesquita,*** 17 AD3d 420, 793 NYS2d 148 [2d Dept 2005]; ***Foster v. Sanchez,*** 17 AD3d 312, 792 NYS2d 579 [2d Dept. 2005]).

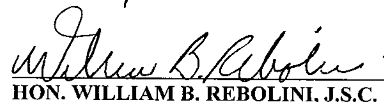
Having made the requisite prima facie showing of entitlement to summary judgment on the issue of liability, the burden shifted to defendant to rebut the presumption of negligence or raise a triable issue of fact (*see* ***Kerolle v. Nicholson,*** 172 AD3d 1187, 101 NYS3d 387 [2d Dept. 2019]; ***Yu Mei Liu v. Weihong Liu,*** 163 AD3d 611, 81 NYS3d 75 [2d Dept. 2018]; *see also* ***Bene v. Dalessio,*** 135 AD3d 679, 22 NYS3d 237 [2d Dept. 2016]; ***Cortes v. Whelan,*** 83 AD3d 763, 922 NYS2d 419 [2d Dept. 2011]; ***Balducci v. Velasquez,*** 92 AD3d 626, 938 NYS2d 178 [2d Dept. 2012]). Here, however, defendant only submits the affirmation of her attorney, who lacks personal knowledge of the facts, and thus, it has no probative value (*see* ***Lazarre v. Gragston,*** 164 AD3d 574, 81 NYS3d 541 [2d Dept. 2018]; ***Cullin v. Spiess,*** 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). Being that defendant has not opposed the facts alleged by plaintiff as to how the accident occurred, the facts as presented in plaintiff's moving papers may be deemed admitted by the Court (***Kuehne & Nagel, Inc. v. Baiden,*** 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., Inc. v. Sokolowsky,*** 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v. Mentesana,*** 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Thus, defendant has not raised a triable issue of fact to rebut the presumption of negligence. Instead, defendant argues that the motion is premature and that she is entitled to discovery prior to consideration of plaintiff's motion for summary judgment. This argument, however, is unfounded, as defendant fails to adequately demonstrate how discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge or control of plaintiff (*see* CPLR 3212 (f); ***Williams v. Spencer-Hall,*** 113 AD3d 759, 979 NYS2d 157 [2d Dept. 2014]; ***Cajas-Romero v. Ward,*** 106 AD3d 850, 965 NYS2d 559 [2d Dept. 2013]; ***Romero v. Greve,*** 100 AD3d 617, 953NYS2d 296 [2d Dept. 2012]). Indeed, "mere hope or speculation that evidence sufficient to

defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (***Cajas-Romero v. Ward***, *supra,* 106 AD3d at 852). Defendant provides no evidentiary basis for her claim that further discovery may reveal facts known only to plaintiff (*see* ***Lazarre v. Gragston,*** 164 AD3d 574, 81 NYS3d 541 [2d Dept. 2018]; ***Yu Mei Liu v. Weihong Liu,*** 163 AD3d 611, 81 NYS3d 75 [2d Dept. 2018]). Indeed, defendant has personal knowledge of what occurred immediately prior to and during the time of the accident, and thus, defendant could have presented her version of the accident but declined to submit an affidavit to that effect. Under these circumstances, a denial of summary judgment as premature is unwarranted (*see* ***Kerolle v. Nicholson,*** 172 AD3d 1187, 101 NYS3d 387 [2d Dept. 2019]; ***Deleg v. Vinci,*** 82 AD3d 1146, 919 NYS2d 396 [2d Dept. 2011]; *see also* ***Williams v. Spencer-Hall,*** 113 AD3d 759, 979 NYS2d 157 [2d Dept. 2014]; ***Cajas-Romero v. Ward,*** 106 AD3d 850, 965 NYS2d 559 [2d Dept. 2013]; ***Kimyagarov v. Nixon Taxi Corp.,*** 45 AD3d 736, 846 NYS2d 309 [2d Dept. 2007]; ***Abramov v. Miral Corp.,*** 24 AD3d 397, 398 [2d Dept. 2005]).

Moreover, plaintiff is entitled to an order striking the defendant's affirmative defense of comparative negligence. It is well established that plaintiff is not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Harrinarain v. Sisters of St. Joseph,*** —NYS3d—, 173 AD3d 983 [2d Dept. 2019]). Here, however, plaintiff has the burden on a motion to dismiss to demonstrate that same is without merit (*see* ***Poon v. Nisanov,*** 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept. 2018]). Inasmuch as plaintiff indicates he was unable to avoid the accident, and has otherwise demonstrated he was not at fault in the happening of the accident, and defendant has not offered any evidence in admissible form to raise a triable issue of fact in that regard, the affirmative defense of comparative negligence is stricken (***Id.***). The Court has considered the remaining contentions of defendant on the issue of liability and finds them to be without merit. Thus, the Court concludes that based upon the admissible evidence presented by plaintiff, which have not been refuted by any admissible evidence from defendant, the negligence of defendant was the proximate cause of the accident.

Accordingly, the motion by plaintiff for summary judgment against defendant on the issue of liability is granted and defendant's affirmative defense of comparative negligence is stricken.

Dated: 8/28/2019



HON. WILLIAM B. REBOLINI, J.S.C.

_______ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION