Garcia v Barrow
2019 NY Slip Op 34808(U)
December 6, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-605481
Judge: George Nolan

SHORT FORM ORDER

INDEX No. 17-605481
CAL. No. 19-01027MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 6-3-19
ADJ. DATE 9-2-19
Mot. Seq. # 001 - MD

OSCAR A. GARCIA,

Plaintiff,

- against -

HORACE BARROW,

Defendant.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant, on May 8, 2019 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers filed by plaintiff, on June 17, 2019 ; Replying Affidavits and supporting papers filed by defendant, on June 21, 2019 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Horace Barrow for summary judgment dismissing the complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Oscar A. Garcia, as a result of a motor vehicle accident, which occurred on January 1, 2016, at or near the circular intersection of Flanders Road, Peconic Avenue, and Riverleigh Avenue. The accident allegedly occurred when defendant's vehicle and plaintiff's bicycle collided.

Defendant now moves for summary judgment dismissing the complaint, arguing that defendant was not negligent, as he had the right of way and plaintiff crossed the grassy center of the traffic circle and collided with his vehicle. Defendant also alleges that plaintiff was negligent per se, as he did not have a working light affixed to the front of his bicycle, in violation of Vehicle and Traffic Law § 1236. In support of his motion, defendant submits, *inter alia*, transcripts of the depositions of the parties and a certified copy of the police report. Plaintiff opposes, the motion, arguing that triable issues of fact exist

with respect to who had the right of way in the traffic circle. Plaintiff submits an overhead satelitte map of the traffic circle and an uncertified ambulance report.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*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 moving party has the initial burden of proving entitlement to summary judgment (*id*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). 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 750, 911 NYS2d 155 [2d Dept 2010]).

"[A] person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle" (***Palma v Sherman***, 55 AD3d 891, 891, 867 NYS2d 111 [2d Dept 2008]; *see* Vehicle and Traffic Law § 1231). In addition, a bicyclist is required to use reasonable care, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in danger (*see* ***Flores v Rubenstein***, 175 AD3d 1490, 109 NYS3d 390 [2d Dept 2019]; ***Palma v Sherman***, *supra*). Vehicle and Traffic Law § 1146 provides that a motor vehicle driver "shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary." In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists (*see* ***Chilinski v Maloney***, 158 AD3d 1174, 158 AD3d 1174 [4th Dept 2018]; ***Palma v Sherman***, *supra*; *see also* Vehicle and Traffic Law § 1146). A motorist is also required to "see that which through the proper use of [his or her] senses [he or she] should have seen" (***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see* ***Shvydkaya v Park Ave. BMW Acura Motor Corp.***, 172 AD3d 1130, 100 NYS3d 320 [2d Dept 2019]; ***Berish v Vasquez***, 121 AD3d 634, 993 NYS2d 567 [2d Dept 2014]). Vehicle and Traffic Law § 1145 states that "except where a traffic control device directs otherwise, 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 traveling on such circle or around such island. A violation of this statute constitutes negligence *per se*" (*see* ***Katikireddy v Espinal***, 137 AD3d 866, 867, 26 NYS3d 775 [2d Dept 2016]). To meet his or her burden on a summary judgment motion, a defendant in a negligence action must establish, prima facie, that he or she was not at fault in the happening of the accident (*see* ***Matias v Bello***, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; ***King v Perez***, 160 AD3d 708, 71 NYS3d 358 [2d Dept 2018]).

Defendant has failed to establish a prima facie case of entitlement to summary judgment dismissing the complaint, as triable issues of fact remain as to how the accident occurred (*see* ***Matias v Bello***, *supra*; ***Searless v Karczewski***, 153 AD3d 957, 60 NYS3d 431 [2d Dept 2017]; *see generally* ***Calderon-Scotti v Rosenstein***, 119 AD3d 722, 989 NYS2d 514 [2d Dept 2014]; ***Gause v Martinez***, 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012]). Defendant testified that he was traveling on Flanders Road in Riverhead on the evening of the accident. He testified the roads were dry, the weather was cold and clear, and the traffic conditions were light. He testified he entered the traffic circle, and heard a loud crash on the left side of his vehicle. He testified that he immediately stopped his car, and saw plaintiff on the ground behind his vehicle. He testified that he did not see plaintiff until after the collision had occurred.

Plaintiff testified that on the evening of the accident, he was riding his bicycle, at approximately 8:00 p.m., on Riverleigh Road in Riverhead, approaching a traffic circle. Plaintiff admitted that he was not wearing a helmet and that his bicycle did not have a headlight on the front. Plaintiff also admitted during his deposition that he had approximately eight beers the night before, for New Year's Eve, but denied drinking on the day of the accident. He testified that the traffic circle controlled four roads, and that there was a grassy median in the center of the circle. He testified that it was his intention to proceed north, straight through the traffic circle, onto Peconic Avenue, toward Main Street. He testified that as he approached the traffic circle, he stopped his bicycle for two seconds before entering the flow of traffic. He testified that his bicycle never left the roadway and that he did not enter the grassy median. He testified that as he approached the location where Flanders Road merges into the traffic circle, he was struck by defendant's vehicle. He does not recall whether he saw defendant's vehicle before he was struck.

Here, the differing deposition testimony submitted by defendant in support of his motion supports different conclusions as to fault and contributory negligence (*see* ***Cho v Demelo***, 175 AD3d 1235, 108 NYS3d 159 [2d Dept 2019]; ***Cruz v Valentine Packaging Corp.***, 167 AD3d 707, 89 NYS3d 316 [2d Dept 2018]; ***Goulet v Anastasio***, 148 AD3d 783, 48 NYS3d 731 [2d Dept 2017]). While it is undisputed that plaintiff violated Vehicle and Traffic Law § 1236 by not having a light on the front of his bicycle, there can be more than one proximate cause of an accident (*see* ***Richardson v Cablevision Sys. Corp.***, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; ***Miron v Pappas***, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]). The undisputed fact that plaintiff was riding his bicycle without a headlight does not preclude a finding that defendant's negligence contributed to the accident (***Richardson v Cablevision Sys. Corp.***, *supra*).

Generally, as there can be more than one proximate cause of an accident, it is for the trier of fact to determine same (*see* ***Ardanuy v RB Juice, LLC***, 164 AD3d 1296, 83 NYS3d 634 [2d Dept 2018]; ***Lukyanovich v H.L. Gen. Contrs., Inc.***, 141 AD3d 693, 35 NYS3d 463 [2d Dept 2016]; ***Kalland v Hungry Harbor Assoc.***, *LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]). The defendant testified at his deposition that he did not see the plaintiff until after the accident occurred. Accordingly, viewing the facts in the light most favorable to the plaintiff, defendant has failed to demonstrate, prima facie, that he kept a proper lookout and that his alleged negligence did not contribute to the accident (*see* ***Higashi v M&R Scarsdale, LLC***, __ AD3d ___, 2019 NY Slip Op 07240 [2d Dept 2019]; ***Brandt v Zahner***, 110

AD3d 752, 752-753, 974 NYS2d 482 [2d Dept 2013]; ***Topalis v Zwolski***, 76 AD3d 524, 906 NYS2d 317 [2d Dept 2010]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint is denied.

Dated: December 6, 2019

HON. GEORGE NOLAN J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION