

<b>McKenzie v Leming Mai</b>
2020 NY Slip Op 33076(U)
September 17, 2020
Supreme Court, Kings County
Docket Number: 507366/2019
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

Index No.: 507366/2019  
Motion Date: 8/5/20  
Motion Seq.: 02

-----X  
DONALD MCKENZIE,

Plaintiff,

- against -

**DECISION AND ORDER**

LEMING MAI,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 02) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 on this motion for summary judgment and dismissal of defendant’s affirmative defenses of comparative fault.

In this action to recover damages for personal injuries, the plaintiff, Donald McKenzie, moves for an Order pursuant to CPLR § 3212(b) seeking summary judgment on the issue of liability and dismissal all affirmative defenses of comparative negligence and for such other and further relief as this Court deems just and proper. For the reasons set forth below, the plaintiff’s motion is granted in its entirety.

In support of the motion the plaintiff submits the pleadings, deposition testimony of the plaintiff and defendant, the sworn affidavit of nonparty witness Jason Battista, a certified copy of the police report, and 23 photographs depicting the damage to the plaintiff’s car after the accident.

This action arises out of a vehicular collision that occurred on October 6, 2017, in the County of Westchester, State of New York. According to the plaintiff’s deposition testimony, the plaintiff was travelling along Marble Avenue, and came to a complete stop when he approached the intersection at the Saw Mill River Parkway. The intersection is controlled by a three-phase traffic light containing a red, yellow and green light. As the plaintiff approached the intersection the light was red. Marble Avenue has two left turning lanes, and plaintiff’s car was stopped in the far-left lane for approximately three minutes. The plaintiff intended to make a left turn onto the southbound Saw Mill River Parkway. His was the first vehicle stopped at the traffic light, and no vehicles were behind plaintiff’s car. When the traffic light turned green the plaintiff proceeded straight into the intersection at approximately 10 to 15 miles per hour. Before he was able to complete the turn, he briefly saw the defendant’s vehicle approaching from his left coming from the northbound Saw Mill River Parkway. The plaintiff estimated that the defendant was traveling approximately 80 to 90 miles per hour. He did not hear any honking horns or screeching tires prior to the collision. The defendant’s vehicle collided into the driver’s side of the plaintiff’s vehicle. The force of the impact pushed plaintiff’s vehicle across the street and into a third car, operated by Jason Battista.

According to his affidavit, Mr. Battista's vehicle was stopped at the red traffic light in the left turning lane adjacent to the plaintiff's vehicle for approximately two to three minutes. Like the plaintiff, he intended to turn left onto the southbound Saw Mill River Parkway. When the light turned green he proceeded into the intersection, and while in the middle of the intersection turning left, Mr. Battista saw headlights approaching from his left from the northbound Saw Mill River Parkway. Mr. Battista observed the defendant drive through a steady red light and collide into the plaintiff's vehicle. He estimated the defendant's speed at the time of impact to be 55-75 miles per hour. The plaintiff's vehicle was pushed into his vehicle with such force that Mr. Battista's vehicle hit a guard rail and was propelled into oncoming traffic. He claims that he struck his head on the driver's side window and lost consciousness. Both he and the plaintiff were transported to the hospital by ambulance.

The certified police report contains the description of the accident given by the plaintiff and Mr. Battista at the scene of the accident. According to the report, the plaintiff's vehicle and Mr. Battista's vehicle were in the left turning lanes, and they proceeded to turn left when the light turned green. It states that the plaintiff's vehicle was struck when the defendant drove through the red light. The defendant admitted to striking the plaintiff's vehicle on the driver's side as the defendant travelled northbound on the Saw Mill River Parkway, and that the plaintiff's car struck Mr. Battista's vehicle. The 23 photographs submitted by the plaintiff show extensive damage to the driver's side of the plaintiff's vehicle.

The plaintiff also relies on the defendant's deposition testimony in support of the motion. At his deposition the defendant initially testified that he did not remember seeing the traffic light before the accident. Later on in the deposition the defendant was asked what color the traffic light was when he approached the intersection, and he responded, "I'm not quite sure, I think it's yellow." He then testified that when he passed under the traffic light and entered the intersection the light was still yellow. Thereafter, the defendant was asked whether he stopped his vehicle before arriving at the traffic light. In sum and substance, the defendant responded that when he slowed down his vehicle he had already collided with the plaintiff's vehicle. Moreover, the defendant testified that he could not remember whether the plaintiff's car was moving or stopped at the time of the impact. The defendant was asked how fast his vehicle was traveling when it struck the plaintiff's car, and he answered, "I don't remember" but "[a]round ten miles." He stated that the impact was "light," and that it's "not that serious."

The plaintiff argues that he is entitled to summary judgment, based on the plaintiff's deposition testimony, Mr. Battista's affidavit, the certified police report, and the testimony of the defendant. The plaintiff contends that the proof shows that the defendant was negligent as a matter of law by driving through a steady red light, and failing to yield the right of way to the plaintiff, in violation of VTL §§ 1110(a) and 1111(d)(1). In opposition, the defendant relies on his own deposition testimony, arguing that the plaintiff is not entitled to summary judgment because there is a question of fact as to whether the traffic light facing the defendant was yellow or red when the accident occurred.

VTL § 1110(a)(1) requires that "[e]very person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter." VTL § 1111(d) provides that "[t]raffic, except pedestrians, facing a circular red signal...shall

stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection...and shall remain standing until an indication to proceed is shown...” A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Joaquin v Franco*, 116 AD3d 1009 (2d Dept 2014); *see also Vainer v C.J. DiSalvo*, 79 AD3d 1023 (2d Dept 2010); *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650 (2d Dept 2008). Moreover, “[a] driver is required to see what is there to be seen, and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield.” *Francavilla v Doyno*, 96 AD3d 714, 715 (2d Dept 2012); *see also Keller v Rashid*, 100 AD3d 831 (2d Dept 2012). It is not necessary for the plaintiff to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312 (2018)), as the issue may be decided where the plaintiff seeks summary judgment dismissing a defendant’s affirmative defense of comparative negligence. *Poon v Nisanov*, 162 AD3d 804 (2d Dept 2018).

The plaintiff established his *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendant entered the intersection against the red traffic light, in violation of VTL § § 1110(a)(1) and 1111(d), and that this was the sole proximate cause of the accident. *Joaquin* at 1009-1010; *see also Chen v Heart Transit, Inc.*, 143 AD3d 945 (2d Dept 2016). The plaintiff had the right-of-way and was entitled to assume that the defendant would obey the traffic law by stopping for the red light and yielding the right-of-way to him. *See Derosario v Gill*, 118 AD3d 739, 739 (2d Dept 2014) (“As the driver with the right of way, the defendant was entitled to assume that the plaintiff would obey the traffic laws requiring him to yield”); *Vainer* at 1024. Moreover, the plaintiff was not comparatively negligent for failing to avoid the collision. The plaintiff testified that he only caught a glimpse of the defendant’s vehicle heading toward him after he proceeded into the intersection at a low rate of speed, when the traffic light turned green in his direction. *See Chen* at 946.

In opposition, the defendant has failed to produce evidentiary proof in admissible form to raise a triable issue of fact. He relies solely on his own deposition testimony, which was contradictory and speculative throughout, particularly with respect to the color of the traffic light when his vehicle entered the intersection. The defendant also testified that he did know whether the plaintiff’s vehicle was moving or stopped when the accident occurred. His testimony makes clear that he did not see the plaintiff’s car before the impact, and that he did not yield the right-of-way to the plaintiff’s vehicle, which was proceeding through the intersection with the green light prior to the collision.

The remaining contentions are without merit.

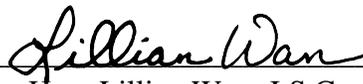
Accordingly, it is hereby

**ORDERED**, that the plaintiff’s motion for summary judgment and dismissal of the defendant’s

affirmative defenses relating to comparative fault is granted.

This constitutes the decision and order of the Court.

Dated: September 17, 2020



Hon. Lillian Wan, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.