

Ludizaca v Bisceglie
2020 NY Slip Op 34329(U)
December 2, 2020
Supreme Court, Kings County
Docket Number: 507923/2020
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of DECEMBER, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X
JOSE JOVANNY LUDIZACA,

Plaintiff,

Index No.: 507923/2020
Decision and Order

-against-

VINCENZA BISCEGLIE and DANIEL BISCEGLIE

Defendants,

-----X

The following papers NYSCEF Doc #'s 7 to 17 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	7-15
Opposing Affidavits (Affirmations)_____	16
Memorandum of Law_____	17

After having heard Oral Argument on DECEMBER 2, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff, JOSE JOVANNY LUDIZACA, moves pursuant to CPLR 3212, for an Order granting summary judgment in their favor and dismissing all claims. (MS#1). Defendants, oppose the same contending there are issues of fact for the jury.

ARGUMENTS

Plaintiff contends that that there are no material questions of law or fact on the issue of liability, because the undisputed evidence shows the plaintiff had the right of

way and defendant had a stop sign and was the sole proximate cause of this accident, there are no issues of fact.

Defendant in opposition contends the plaintiff failed to meet their initial burden entitling summary judgment, and that this motion is premature as no discovery has been conducted.

FACTS

This action arises out of a motor vehicle accident which is alleged to have occurred on August 7, 2019 on 55 Street at the intersection of Nurge Avenue in Queens, New York. It is alleged plaintiff was traveling westbound with the right-of-way and no traffic control signals. It is alleged and undisputed that the defendant was traveling northbound on Nurge Avenue, with a stop sign, when the front bumper of defendant's vehicle struck the driver's side of plaintiff's vehicle.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established

sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party”. CPLR 3212 (b). The “motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” *Id.*

In the present case, the plaintiff’s affidavit established his prima facie entitlement to judgment as a matter of law by establishing that the defendant’s vehicle proceeded into the intersection controlled by a stop sign without yielding the right-of-way to the plaintiff’s approaching vehicle in violation of Vehicle and Traffic Law § 1142(a). The evidence submitted by the plaintiff in support of his motion established, prima facie, that the defendant failed to properly observe and yield to cross traffic before proceeding into the intersection (*see Mohammad v. Ning*, 72 A.D.3d 913, 914, 899 N.Y.S.2d 356; *Exime v. Williams*, 45 AD3d 633, 634, 845 NYS2d 450; *Hull v. Spagnoli*, 44 AD3d 1007, 1007, 844 NYS2d 416; *Gergis v. Miccio*, 39 AD3d 468, 468–469, 834 NYS2d 253; *Bongiovi v. Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354. Additionally, “[a] driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law’ ” (*Mohammad v. Ning*, 72 AD3d at 914–915, 899 NYS2d 356, *quoting Gergis v. Miccio*, 39 AD3d at 468, 834 NYS2d 253; *see Exime v. Williams*, 45 AD3d at 633, 845 NYS2d 450; *Marcel v. Chief Energy Corp.*, 38 AD3d 502, 503, 832 NYS2d 61); *quoting, Briggs v. Russo*, 98 AD3d 547, 547–48, 949 NYS2d 719, 721 (2d Dep’t 2012). Thus, the question of whether the defendant stopped their vehicle at the stop sign is not dispositive, since the evidence established that defendant failed to yield the right-of-way even if they did stop (*see Mohammad v. Ning*, 72 AD3d at 915, 899 NYS2d 356; *Exime v. Williams*, 45 A.D.3d at 634, 845 NYS2d 450; *McCain v. Larosa*, 41 AD3d 792, 793, 838 NYS2d 663; *Morgan v.*

Hachmann, 9 AD3d 400, 400, 780 NYS2d 33); *quoting Briggs v. Russo*, 98 A.D.3d 547, 548, 949 NYS2d 719, 721 (2012). Additionally, the “driver who had the right of way was entitled to anticipate that the driver with the stop sign would obey the traffic law requiring them to yield” (*Hull v. Spagnoli*, 44 AD3d 1007, 1007, 844 NYS2d 416; *see Mohammad v. Ning*, 72 AD3d at 914, 899 NYS2d 356; *McCain v. Larosa*, 41 AD3d 792, 793, 838 NYS2d 663; *Gergis v. Miccio*, 39 AD3d at 468, 834 NYS2d 253); *quoting, Briggs v. Russo*, 98 AD3d 547, 548, 949 NYS2d 719, 722 (2012).

In opposition, defendant fails to raise a triable issue of fact because they fail to submit an admissible affidavit by the defendant and instead only submit an attorney affirmation. (*see Sehgal v. www.nyairportsbus.com, Inc.*, 100 AD3d 860, 955 NYS2d 604, 2012 NY Slip Op.; *Hanakis v. DeCarlo*, 98 AD3d at 1084, 951 NYS2d 206; *Perez v. Brux Cab Corp.*, 251 AD2d 157, 159, 674 NYS2d 343). The attorney affirmation submitted by defendant is not based on personal knowledge of the facts and have no probative value (*see, Skinner v. City of Glen Cove*, 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai*, 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690). *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996).

Accordingly, the plaintiffs motion for summary judgment is hereby granted, for the reasons stated above.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
December 2, 2020


HON. RICHARD VELASQUEZ