Ramos v County of Suffolk
2020 NY Slip Op 34806(U)
September 30, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618262/2018
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 618262/2018
CAL. No. 201902321MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 2/20/20 (001)
MOTION DATE 3/5/20 (002)
ADJ. DATE 7/30/20
Mot. Seq. # 001 MotD
002 XMD

----------X

RAMON ANTONIO RAMOS,

Plaintiff,

- against -

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, and POLICE OFFICER CHRISTOPHER VITALE,

Defendants.

----------X

DAVID J. RAIMONDO & ASSOCIATES
Attorney for Plaintiff
2780 Middle Country Road, Suite 312
Lake Grove, New York 11755

DENNIS M. COHEN, ESQ.
SUFFOLK COUNTY ATTORNEY
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, New York 11788

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed January 15, 2020; Notice of Cross Motion and supporting papers by defendants, filed February 25, 2020; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers by plaintiff, filed May 5, 2020; by defendants filed, May 6, 2020; Other ___; it is

ORDERED that the motion by plaintiff Ramon Antonio Ramos for, *inter alia*, summary judgment in his favor and against defendants County of Suffolk, Suffolk County Police Department, and Police Officer Christopher Vitale is granted in part and denied in part; and it is further

ORDERED that the cross motion by defendants Suffolk, Suffolk County Police Department, and Police Officer Christopher Vitale for summary judgment dismissing the complaint is denied.

Plaintiff Ramon Antonio Ramos commenced this action to recover for personal injuries he allegedly sustained as a result of a motor vehicle-bicycle accident that occurred on December 18, 2017, at approximately 4:18 p.m, in the marked crosswalk at the intersection of Third Avenue and Union Boulevard in Islip, New York. The accident allegedly occurred when a Suffolk County Police Department ("SCPD") vehicle, operated by Police Officer Christopher Vitale, attempted to make a left

turn from westbound Union Boulevard onto southbound Third Avenue, and struck plaintiff's bicycle, which was traveling eastbound on Union Boulevard in a marked crosswalk.

Plaintiff now moves for summary judgment in his favor on the issue of defendants' negligence. He also seeks to strike defendants' first affirmative defense of culpable conduct, second affirmative defense of assumption of risk, third affirmative defense of failure to state a cause of action pursuant to Insurance Law § 5012 (d), and seventh affirmative defense premised upon Vehicle and Traffic Law §§ 1103 and 1104. Plaintiff also seeks an immediate trial for the purpose of assessing damages. Plaintiff argues that Officer Vitale was negligent in violating, *inter alia*, Vehicle and Traffic Law § 1141, by failing to yield the right-of-way to his bicycle. In support of his motion, plaintiff submits, among other things, his affidavit, the transcripts of his testimony from his hearing held pursuant to General Municipal Law § 50-h and from his examination before trial, and the transcript of Officer Vitale's testimony from his examination before trial.

Defendants cross-move for summary judgment dismissing the complaint. They contend that Officer Vitale only can be held liable for injuries to plaintiff if he acted in reckless disregard in the operation of his vehicle, and that his conduct did not rise to the level of reckless disregard. In support of their cross motion, defendants submit, among other things, the transcripts of plaintiff's testimony from his hearing held pursuant to General Municipal Law § 50-h and from his examination before trial, and the transcript of Officer Vitale's testimony from his examination before trial.

At plaintiff's statutory hearing, he testified that he was riding a bicycle at the time of the accident, that prior to the accident he had a green light in his favor, and that he checked for oncoming traffic before crossing over Third Avenue in the marked crosswalk. Plaintiff testified that he observed Officer Vitale's vehicle, which was traveling on Union Boulevard, with no lights illuminated and no directional signals activated at that time. Plaintiff further testified that the accident occurred when he was in the middle of the crosswalk, and Officer Vitale's vehicle suddenly turned left, striking the left side of his body. Plaintiff stated that there was a crosswalk control device, but that he did not recall the signal displayed. The roads allegedly were dry and it allegedly was light outside at the time of the accident. Plaintiff stated that he lost consciousness after the impact, and that he did not regain consciousness until he was at the hospital.

At plaintiff's deposition, he testified that prior to the accident, he stopped at the intersection to check for oncoming traffic. Plaintiff further testified that Officer Vitale's vehicle did not have any lights, signals, or sirens activated at the time of the accident. Officer Vitale's vehicle allegedly did not slow down as it approached the intersection. Plaintiff testified that prior to the collision, the pedestrian traffic signal was lit with a "doll." He also testified that traffic was "light" at the time of the accident, and he subsequently stated that there was no traffic. Plaintiff stated that he did not speak to a police officer regarding the accident after it occurred.

In plaintiff's affidavit, he avers that prior to the accident, he was riding his bicycle eastbound on the sidewalk along Union Boulevard, and that he brought his bicycle to a stop at the end the sidewalk at the intersection of Union Boulevard and Third Avenue. He further avers that he observed that the crossing signal on the opposite side of the sidewalk on Third Avenue was illuminated, and that he

checked for oncoming vehicle traveling on Third Avenue before crossing the subject crosswalk. He states that he observed Officer Vitale's vehicle, which had no emergency lights or directional signals activated, traveling westbound on Union Boulevard, at that time. Plaintiff avers that the accident occurred when his bicycle, which was halfway across the marked crosswalk, crossing over Third Avenue, was struck by Officer Vitale's vehicle, which attempted to make a left turn, without signaling, onto southbound Third Avenue.

At Officer Vitale's deposition, he testified that he was operating a SCPD vehicle on the date of the accident. He stated that he was en route to a call regarding "disorderly males by a dumpster," and that he was not responding to an emergency at that time. Officer Vitale explained that prior to the accident, his vehicle was traveling westbound on Union Avenue with a green light in its favor, and that he was waiting for "eastbound traffic to go straight" before making a left turn at the intersection. He testified that his left directional was activated at the time of the accident. He further explained that "as [he] was making the turn, [he] had already hit the sun glare, which kind of blurred [his] vision a little bit." Officer Vitale testified that he did not see plaintiff until the moment of impact. He subsequently testified that he saw plaintiff "maybe a second before" the impact. According to Officer Vitale's testimony, his supervisor, Officer Augustine, arrived at the scene of the accident to complete an accident report, and Officer Vitale explained to him how the accident occurred. There allegedly were no other witnesses or vehicles in the vicinity of the accident.

A person operating a bicycle on a roadway is entitled the rights and bears the responsibilities of a driver operating a motor vehicle (*see* Vehicle and Traffic Law § 1231; ***Lindner v Guzman***, 163 AD3d 947, 82 NYS3d 476 [2d Dept 2018]; ***Palma v Sherman***, 55 AD3d 891, 891, 867 NYS2d 111 [2d Dept 2008]). In general, an operator of a motor vehicle is required to keep a reasonably vigilant lookout for bicyclists, and to operate the vehicle with reasonable care to avoid colliding with anyone on the road (*see* ***Chilinski v Maloney***, 158 AD3d 1174, 70 NYS3d 635 [4d Dept 2018]; ***Palma v Sherman***, *supra*). Vehicle and Traffic Law § 1141 further requires that a vehicle intending to turn left within an intersection or into an alley, private road, or driveway must 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 (*see* ***Ming-Fai Jon v Wager***, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; ***Giannone v Urdahl***, 165 AD3d 1062, 86 NYS3d 562 [2d Dept 2018]; ***Lebron v Mensah***, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]). Nonetheless, a bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position (*see* ***Flores v Rubenstein***, 175 AD3d 1490, 109 NYS3d 390 [2d Dept 2019]; ***Palma v Sherman***, *supra*).

Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of authorized emergency vehicles from certain traffic laws when they are involved in an "emergency operation" (*see* ***Fuchs v City of New York***, 186 AD3d 459, 126 NYS3d 652 [2d Dept 2020]; ***Anderson v Suffolk County Police Dept.***, 181 AD3d 765, 121 NYS3d 304 [2d Dept 2020]). An "emergency operation," as defined by Vehicle and Traffic Law § 114-b, includes, among other things, "responding to, or working or assisting . . . [a] police call." The privileges set forth in Vehicle and Traffic Law § 1104 include disregarding regulations governing the direction of movement or turning in specified directions (see Vehicle and Traffic Law § 1104[a]; [b] [4]). Nonetheless, the privileges afforded by Vehicle and Traffic Law §1104 "shall not

relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]; *see* ***Fuchs v City of New York***, *supra*; ***Anderson v Suffolk County Police Dept.***, *supra*). Thus, the manner in which a driver of an authorized emergency vehicle operates the vehicle in an emergency situation may not form the basis for civil liability to an injured third party except when that authorized emergency driver acted in reckless disregard for the safety of other (*see* ***Saarinen v Kerr***, 84 NY2d 494, 620 NYS2d 297 [1994]; ***Fuchs v City of New York***, *supra*; ***Wong v City of New York***, 183 AD3d 635, 121 NYS3d 610 [2d Dept 2020]). The "reckless disregard" standard requires proof that "that the driver intentionally committed an act of an unreasonable character, while disregarding a known or obvious risk that was so great as to make it highly probable that harm would follow" (***Calixto v City of New York***, 185 AD3d 543, 544-545, 124 NYS3d 879 [2d Dept 2020], quoting ***Rios v City of New York***, 144 AD3d 1011, 1011-1012, 42 NYS3d 54 [2d Dept 2016]; *see* ***Wong v City of New York***, *supra*).

Defendants established that Officer Vitale was engaged in an emergency operation at the time of the accident (*see* Vehicle and Traffic Law § 114-b; ***Proce v Town of Stony Point***, 185 AD3d 975, 127 NYS3d 541 [2d Dept 2020]; ***Martinez v City of New York***, 175 AD3d 1284, 105 NYS3d 901 [2d Dept 2019]). Officer Vitale's deposition testimony indicates that he was responding to a call for assistance at the time of the accident. Contrary to plaintiff's contention, Officer Vitale's testimony that he was not responding to an "emergency" at the time of the accident is irrelevant inasmuch as Vehicle and Traffic Law § 114-b evinces no "legislative intent to vary the definition of 'emergency operation' based on individual police department incident classifications" (***Criscione v City of New York***, 97 NY2d 152, 157, 736 NYS2d 656 [2001]; *see* ***Oddo v City of Buffalo***, 159 AD3d 1519, 72 NYS3d 706 [4d Dept 2018]). In light of the foregoing, the branches of plaintiff's motion seeking summary judgment in his favor on the issue of defendants' negligence, and dismissal of defendants' seventh affirmative defense premised upon Vehicle and Traffic Law §§ 1103 and 1104 are denied.

Nonetheless, defendants' submissions failed to establish, prima facie, that Officer Vitale did not act in reckless disregard for the safety of others in the operation of his vehicle (*see* ***Rodriguez-Garcia v Southampton Police Dept.***, 185 AD3d 744, 124 NYS3d 870 [2D Dept 2020]; ***Cordero v Nunez***, 179 AD3d 635, 113 NYS3d 593 [2d Dept 2020]; ***Connelly v City of Syracuse***, 103 AD3d 1242, 959 NYS2d 779 [4d Dept 2013]; ***Burrell v City of New York***, 49 AD3d 482, 853 NYS2d 598 [2d Dept 2008]; *cf.* ***Jimenez-Cruz v City of New York***, 170 AD3d 975, 95 NYS3d 573 [2d Dept 2019]). As previously indicated, Officer Vitale's deposition testimony demonstrates that his visibility was obstructed by sun glare before he attempted to turn left, and that he did not see plaintiff until at most "maybe one second" before the collision. Officer Vitale admitted that his vehicle had neither emergency lights nor sirens activated at the time of the accident. Moreover, defendants presented conflicting evidence as to whether Officer Vitale activated his vehicle's left turn signal prior to the collision. As defendants failed to make a prima facie case, their motion is denied, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

As to the branches of plaintiff's motion seeking dismissal of defendants' first, second, and third affirmative defenses, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law (*see* ***Edwards v Walsh***, 169

AD3d 865, 94 NYS3d 629 [2d Dept 2019]; ***Gonzalez v Wingate at Beacon***, 137 AD3d 747, 26 NYS3d 562 [2d Dept 2016]; ***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]). In the context of a motion to dismiss an affirmative defense, "the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (***LG Funding, LLC v United Senior Props. of Olathe, LLC***, 181 AD3d 664, 665, 122 NYS3d 309 [2d Dept 2020], quoting ***Bank of N.Y. v Penalver***, *supra* at 797; *see* ***Gonzalez v Wingate at Beacon***, *supra*).

As to defendants' first affirmative defense of culpable conduct, the issue of issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion when the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see* ***Hai Ying Xiao v Martinez***, 185 AD3d 1014, 126 NYS3d 369 [2d Dept 2020]; ***Balladares v City of New York***, 177 AD3d 942, 114 NYS3d 448 [2d Dept 2019]; ***Higashi v M&R Scarsdale Rest., LLC***, 176 AD3d 788, 111 NYS3d 92 [2d Dept 2019]). Although a driver with the right-of-way is entitled to anticipate that other drivers will obey traffic laws requiring them to yield to him or her, a driver with the right-of-way still has a duty to use reasonable care to avoid a collision (*see* ***Ballentine v Perrone***, 179 AD3d 993, 114 NYS3d 696 [2d Dept 2020]; ***Fernandez v American United Transp., Inc.***, 177 AD3d 704, 113 NYS3d 145 [2d Dept 2019]; ***Jeong Sook Lee-Son v Doe***, 170 AD3d 973, 96 NYS3d 302 [2d Dept 2019]). Nonetheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (*see* ***Balladares v City of New York***, 177 AD3d 942, 114 NYS3d 448 [2d Dept 2019]; ***Fernandez v American United Transp., Inc.***, *supra*; ***Enriquez v Joseph***, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]).

Plaintiff's submissions were sufficient to establish his entitlement to summary judgment dismissing defendant's first affirmative defense of culpable conduct (*see* ***Lebron v Mensah***, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; ***Foley v Santucci***, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; ***Sirlin v Schreib***, 117 AD3d 819, 985 NYS2d 688 [2d Dept 20014]). Contrary to defendants' contention, the certified police accident report is admissible under the business record exception of CPLR 4518 (a) inasmuch as the information contained in the police accident report was based upon information provided by Officer Vitale, who was a witness and police officer at the accident scene with a duty to report his observations to the reporting officer, Officer Augustine (*see* ***Lindsay v Academy Broadway Corp.***, 198 AD2d 641, 603 NYS2d 622 [3d Dept 1993]; *cf.* ***Memenza v Cole***, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]; ***Matter of Chu Man Woo v Qiong Yun Xi***, 106 AD3d 818, 964 NYS2d 647 [2d Dept 2013]). Plaintiff demonstrated that he was entitled to assume that Officer Vitale would obey the traffic laws requiring him to yield, and that he had at most seconds to react to avoid the collision (*see* ***Foley v Santucci***, *supra*; ***Rohn v Aly***, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]). In opposition, defendants failed to raise a triable issue of fact (*see* ***Smith v Fuentes***, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]; ***Foley v Santucci***, *supra*). Thus, plaintiff's application to dismiss defendants' affirmative defense of culpable conduct is granted.

Plaintiff is also entitled to dismissal of defendants' second affirmative defense of assumption of risk. Plaintiff testified that he was riding his bicycle on a roadway at the time of the accident. "The mere riding of a bicycle does not mean the assumption of risk by the rider that he may be hit by a car" (***Story v Howes***, 41 AD2d 925, 925, 344 NYS2d 10 [1st Dept 1973]). In opposition to plaintiff's prima facie showing of entitlement to summary judgment dismissing defendants' affirmative defense of assumption

of risk, defendants failed to raise a triable issue of fact as to the applicability of the assumption of risk doctrine (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Thus, plaintiff's application to dismiss defendants' second affirmative defense of assumption of risk is granted.

With respect to defendants' third affirmative defense of failure to state a cause of action pursuant to Insurance Law § 5012 (d), no motion lies under lies under CPLR 3211 (b) to strike such a defense, "as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (***Lewis v US Bank N.A.***, 186 AD3d 694, 697, 2020 NY Slip Op 04547 [2d Dept 2020], quoting ***Jacob Marion, LLC v Jones***, 168 AD3d 1043, 1044, 93 NYS3d 120 [2d Dept 2019]; ***Mazzei v Kyriacou***, 98 AD3d 1088, 951 NYS2d 557 [2d Dept 2012]). A plaintiff moving for summary judgment on the issue of serious injury must make a prima facie showing that he or she suffered serious injuries pursuant to Insurance Law § 5102 (d), and that his or her injury was causally related to the accident (*see* ***Wilcoxen v Palladino***, 122 AD3d 727, 996 NYS2d 191 [2d Dept 2014]; ***Nicholson v Bader***, 105 AD3d 719, 962 NYS2d 350 [2d Dept 2013]; ***Alexander v Gordon***, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; ***Kapeleris v Riordan***, 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

As plaintiff failed to address the issue of whether he sustained a "serious injury" within the meaning of Insurance Law § 5012 (d) as a result of the subject accident in his moving papers, he failed to make a prima facie case that he sustained a serious injury within the meaning of the statute (*see* ***Dowling v Valeus***, 119 AD3d 834, 989 NYS2d 386 [2d Dept 2014]; ***Altamura v OneBeacon Ins. Group***, 68 AD3d 792, 889 NYS2d 472 [2d Dept 2009]). Thus, plaintiff's application to dismiss defendants' third affirmative defense of failure to state a cause of action pursuant to Insurance Law § 5012 (d) is denied. Plaintiff's application for an immediate trial for the purpose of assessing damages is also denied.

Accordingly, the motion by plaintiff is granted in part and denied in part, and the cross motion by defendants is denied.

Dated: September 30, 2020

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**