

Falls v Pollard

2021 NY Slip Op 30364(U)

February 8, 2021

Supreme Court, Kings County

Docket Number: 503234/2020

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

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 8th day of FEBRUARY, 2021

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

-----X
HAROLD C. FALLS,

Plaintiff, Index No.: 503234/2020
-against- Decision and Order

JASON POLLARD and DEMI LEE RODRIGUEZ,
Defendants,

-----X

The following papers NYSCEF Doc #'s 12 to 26 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	12-17
Opposing Affidavits (Affirmations)_____	19-22
Reply Affidavits (Affirmations)_____	25-26

After having heard Oral Argument on FEBRUARY 8, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 3212 for an order granting the plaintiff summary judgment on the issue of liability. (MS#1). Defendant opposes the same.

This action for personal injury arise from a motor vehicle accident which allegedly occurred on May 10, 2019.

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.*

Vehicle and Traffic Law § 1143, entitled, "[v]ehicle entering roadway," provides that "[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way (see Vehicle and Traffic Law § 1143; *Bonilla v. Calabria*, 80 AD3d 720, 915 NYS2d 615). "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Adobea v. Junel*, 114 AD3d 818, 819, 980 NYS2d 564). A driver is also bound to see what is there to be seen through the proper use of his or her senses

and is negligent for failure to do so (see *Lu Yuan Yang v. Howsal Cab Corp.*, 106 AD3d 1055, 1056, 966 NYS2d 167; *Katanov v. County of Nassau*, 91 AD3d 723, 725, 936 NYS2d 285).

In the present case, plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating that defendant negligently entered the roadway from the entrance of the McDonalds without yielding the right-of-way to the plaintiff (see *Vehicle and Traffic Law* § 1143; *Marcel v. Sanders*, 123 AD3d 1097, 1 NYS3d 230; *Desio v. Cerebral Palsy Transp., Inc.*, 121 AD3d 1033, 994 NYS2d 681; *Abatzidis v. Fenton*, 116 AD3d 802, 802, 983 NYS2d 423); quoting *Cook v. Gomez*, 138 AD3d 675, 677, 30 NYS3d 148, 150–51 (2 Dept' 2016). The defendant's failure to yield the right of way to plaintiff is a violation of *Vehicle and Traffic Law* § 1143, quoting, *Palumbo v. Holtzer*, 235 AD2d 409, 410, 652 NYS2d 98, 98 (1997). In these circumstances, plaintiff was "entitled to anticipate that [the defendant] would obey traffic laws which required them to yield" (see *Jacino v. Sugerman*, 10 AD3d 593, 595, 781 NYS2d 663 [2004]). Moreover, "to be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." Quoting *Rodriguez v. City of New York*, 31 NY3d 312, 324–25, 101 NE3d 366, 374 (2018).

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 are 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 plaintiff's motion for summary judgment on the issue of liability is hereby granted. (MS#1).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
February 8, 2021

ENTER FORTHWITH:


HON. RICHARD VELASQUEZ