Foster v White & Blue Corp.
2021 NY Slip Op 30771(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 522761/2016
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 1st day of March 2021.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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TRACY FOSTER and MARCUS SMITH,

Index No.: 522761/2016

Plaintiffs,

DECISION & ORDER

-against-

WHITE AND BLUE CORP., EMMANUEL ACOSTA and J.C. SINGLETARY,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	54, 55
Opposing Affidavits (Affirmations)	65, 67
Reply Affidavits (Affirmations)	66, 71

Introduction

Defendant, J.C. Singletary moves, by notice of motion, sequence number six, pursuant to CPLR § 3212, for summary judgment on the issue of liability, dismissing the

complaint and all crossclaims against him. Plaintiffs, Tracy Foster and Marcus Smith, and defendants White and Blue Corp. and Emmanuel Acosta oppose this motion.[1]

Background

This action involves a motor vehicle accident on June 1, 2016, near the intersection of Marcus Garvey Boulevard and Willoughby Avenue in Brooklyn, New York. Marcus Garvey Boulevard is a one-way street with two moving lanes and parking on either side of the street. The intersection is controlled by a traffic signal.

Defendant J.C. Singletary testified at an EBT on March 4, 2020 (*see* NYSCEF Doc. # 60, Singletary EBT). Singletary testified that he drove his vehicle down Marcus Garvey Boulevard to make a left on to Willoughby Avenue (*see id.* at 16). He moved into the left lane and came to a stop at the red light (*see id.* at 22, 23). While he was stopped, Singletary noticed another vehicle parked along the curb to his left (*see id.* at 34). As Singletary made a left turn on to Willoughby Avenue, the vehicle to his left pulled out of its parking spot, and the front right of the other vehicle contacted the driver's door of Singletary's vehicle (*see id.* 25-27).

Plaintiff Tracy Foster testified at an EBT on July 12, 2018 (*see* NYSCEF Doc. # 61, Foster EBT). Foster testified that she and Marcus Smith were passengers inside of the taxi that contacted Singletary's vehicle (*see id.* at 10). Foster entered the taxi while it was parked on the left side of Marcus Garvey Boulevard near the intersection with

[1] On January 29, 2020, the Honorable Lizette Colon issued a Final Pre-Note Order, wherein it stated that "[p]ursuant to CPLR §3126, failure to strictly comply with this final order, will result in preclusion, the striking of a pleading and/or sanctions as may be appropriate" (NYSCEF Doc. # 59). That order scheduled defendants White and Blue Corp.'s examination before trial (EBT) on or before March 4, 2020. To date, the EBT has not taken place.

Willoughby Avenue and saw Singletary's vehicle to the right of the taxi in the left moving lane, and noticed Singletary talking on his cell phone and playing music very loudly (*see id.* at 13, 14, 16, 19, 30, 31). The taxi drove straight into the intersection as Singletary's vehicle was making a left turn (*see id.* at 24). Foster did not see the accident between the taxi and Singletary's vehicle (*see id.* at 23).

Plaintiff Marcus Smith testified at an EBT on July 12, 2018 (*see* NYSCEF Doc. # 62, Marcus EBT). Marcus testified that when he got in the taxi it was parked on Willoughby Avenue in the left parking lane (*see id.* at 12, 13, 16). The taxi drove "straight out of the parking lane" and was "in motion to go in to [*sic*] the lane" to drive straight when it collided with Singletary's vehicle (*see id.* at 17). The taxi never entered the moving lane and Singletary's vehicle was in the left moving lane at the time of the accident (*see id.* at 17, 18). At the time of the collision, Singletary was in the process of making a left turn in the moving lane (*see id.* at 20, 21).

Singletary annexed the Certified Police Accident Report to his motion (*see* NYSCEF Doc. # 56, Certified Police Accident Report). The report lists two vehicles: Singletary's vehicle ("VEH1") and Acosta's vehicle ("VEH2") (*see id.*). The Officer's Notes reads "DRIVER OF VEH1 STATES THAT HE WAS TRYING TO MAKE A LEFT TURN WHILE VEH2 HIT HIM FROM SIDE CAUSING DAMAGE. DRIVER OF VEHICLE 2 STATES THAT HE WAS ALSO MAKING A LEFT TURN WHILE VEHICLE 1 HIT HIM[.]" (*see id.*). The report notes that the points of contact on Singletary's vehicle were the driver's side door and front left of his vehicle, and the

points of contact on Acosta's vehicle were the front passenger door and the front right of the vehicle (*see id.*).

This action was commenced by the filing of the summons and complaint on December 22, 2016 (*see* NYSCEF Doc. # 1). Issue was joined on March 9, 2017, and March 16, 2017 (*see* NYSCEF Doc. # 2, 3).

Discussion

Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]).

> Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment has the burden of establishing freedom from comparative negligence as a matter of law (*see Inesta v. Florio*, 159 A.D.3d 682, 71 N.Y.S.3d 161; *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124; *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282). "In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he

> or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident" (*Ellis v. Vazquez*, 155 A.D.3d 694, 695, 63 N.Y.S.3d 530; *see Fried v. Misser*, 115 A.D.3d 910, 911, 982 N.Y.S.2d 574; *Brandt v. Zahner*, 110 A.D.3d at 753, 974 N.Y.S.2d 482; *Topalis v. Zwolski*, 76 A.D.3d 524, 525, 906 N.Y.S.2d 317). The issue of comparative fault is generally a question for the trier of fact (*see* CPLR 1411; *Inesta v. Florio*, 159 A.D.3d 682, 71 N.Y.S.3d 161; *Gezelter v. Pecora*, 129 A.D.3d 1021, 1022, 13 N.Y.S.3d 141; *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d at 777, 949 N.Y.S.2d 124; *Allen v. Echols*, 88 A.D.3d 926, 927, 931 N.Y.S.2d 402).

(*Ballentine v. Perrone*, 179 A.D.3d 993, 114 N.Y.S.3d 696 [2 Dept., 2020]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Vehicle and Traffic Law § 1141 provides that the "driver of a vehicle intending to turn to the left within an intersection . . . shall 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" (VTL § 1141). Vehicle and Traffic Law § 1128(a) provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver first ascertained that such movement can be made with safety" (VTL § 1128(a)). While a driver is required to "see

that which through proper use of [his or her] senses [he or she] should have seen, 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" (*see Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 [2 Dept., 2010], quoting *Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 254 [2 Dept., 2005]); *see also Platt v. Wolman*, 29 A.D.3d 663, 816 N.Y.S.2d 121 [2 Dept., 2006]). "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 Yelder v. Walters*, 64 A.D.3d 762, 883 N.Y.S.2d 290 [2 Dept., 2009]). "A driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident" (*Mu-Jin Chen v. Cardenia*, 138 A.D.3d 1126, 31 N.Y.S.3d 134 [2 Dept., 2016], citing *Arias v. Tiao*, 123 A.D.3d 857, 1 N.Y.S.3d 133 [2 Dept., 2014]; *Todd v. Godek*, 71 A.D.3d 872, 895 N.Y.S.2d 861 [2 Dept., 2010]).

In the case at bar, Singletary did not show entitlement to summary judgment as to liability. Although Singletary is entitled to anticipate that Acosta's vehicle would have obeyed the traffic law requiring him to yield to Singletary's vehicle, Singletary must still make a showing that he is free from comparative fault (*see Criollo v. Maggies Paratransit Corp.*, 155 A.D.3d 683, 63 N.Y.S.3d 516 [2 Dept., 2017]; *Gobin v. Delgado*, 142 A.D.3d 1334, 38 N.Y.S.3d [2 Dept., 2016]; *Vainer v. DiSalvo*, 79 A.D.3d 1023, *supra*). It is unclear from Singletary's testimony whether he saw Acosta's vehicle moving prior to the collision, and whether he could have done anything to avoid the collision. He failed to demonstrate that he kept the proper lookout, or that his alleged

negligence, if any, did not contribute to the accident (*see Ballentine v. Perrone*, 179 A.D.3d 993, *supra*).

Conclusion

Accordingly, defendant's motion for summary judgment as to liability is denied.

This constitutes the decision and order of this case.

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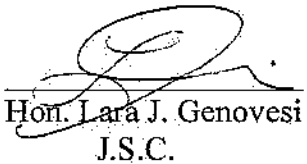

Hon. Lara J. Genovesi
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