

Kantor v Alyeshmerni
2021 NY Slip Op 33100(U)
November 10, 2021
Supreme Court, Queens County
Docket Number: Index No. 706008/2020
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

-----X
JONATHAN KANTOR,

Index No.: 706008/2020

Plaintiff,

Motion

Date: November 3, 2021

-against-

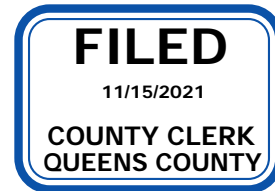
Motion Cal. No.: 10

Motion Sequence No.: 1

OMID ALYESHMERNI and MIRIAM
ALYESHMERNI,

Defendants.

-----X



The following e-file papers numbered 17-28, 36-41 submitted and considered on this motion by Plaintiff Jonathan D. Kantor (hereinafter referred to as "Kantor") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment on the issue of liability against defendants Omid Alyeshmerni and Miriam Alyeshmerni (hereinafter collectively referred to as "Alyeshmerni") and setting this matter down for an immediate jury trial on the issue of damages; pursuant to CPLR 3211 striking the fourth affirmative defense of culpable conduct raised in Alyeshmerni's answer.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion- Affirmation in Support- Exhibits	EF 17-28
Affirmation in Opp- Exhibits.....	EF 36-39
Reply Affirmation.....	EF 40-41

Relevant Procedural History

Kantor initiated this personal injury action on May 28, 2020 seeking to recover damages for serious injuries that he alleged he sustained as a result of a motor vehicle accident which occurred on November 28, 2019 on Broadway at or near its intersection with Mann Place, Village of Lawrence, County of Nassau, State of New York. Alyeshmerni served a verified answer on July 20, 2020, asserting affirmative defenses, including as a fourth affirmative defense Kantor's culpable conduct. Discovery is not complete. Kantor now moves for summary judgment on the issue of liability and to strike the culpable conduct affirmative defense. In support of the motion, Kantor submitted the pleadings; his verified bill of particulars; party deposition transcripts; certified police report; and color photographs. Essentially, Kantor argues that Alyeshmerni is solely responsible for this accident because the defendant driver failed to comply with applicable traffic rules and regulations, including Vehicle and Traffic Law sections 1128, 1143 and 1173.

Statement of Material Facts

Kantor's statement of material facts as per section 202.8-g is the following:

1. The accident took place on November 28, 2019. (See certified police accident report)
2. The accident occurred at approximately 1:20 p.m. (See certified police accident report)
3. Defendant Alyeshmerni operated a 2017 Toyota sedan with an Arizona license plate, FP 19220 (See certified police accident report)
4. Plaintiff operated a 2017 Mercedes Benz sedan with a New York license plate, HBB 2549 (See certified police accident report)
5. The accident took place while defendant was pulling out of the driveway at 172 Broadway in Lawrence, New York. (See certified police accident report)
6. The crash took place on Broadway. (Alyeshmerni deposition transcript; certified police accident report)
7. Prior to the accident with plaintiff, defendant operator Alyeshmerni stopped her vehicle more than one time before exiting the driveway onto Broadway. At that time approximately 5 to 10 vehicles passed her on Broadway. (Alyeshmerni deposition transcript; certified police accident report)
8. Defendant operator Alyeshmerni was pulling out of the driveway onto Broadway with the intention to make a left turn onto Mann Place at the time of the accident. (Alyeshmerni deposition transcript; certified police accident report)
9. Defendant's Miriam Alyeshmern (sic) view was obstructed by parked vehicles on her left side at

the time she pulled out of the driveway and crashed into plaintiff. (Alyeshmerni deposition transcript; certified police accident report)

10. Plaintiff was travelling (sic) West down Broadway when defendant operator Miriam Alyeshmern (sic) pulled out of the driveway and crashed into plaintiff. (Kantor's deposition transcript; certified police accident report)

11. Defendant crashed into plaintiff's vehicle and impacted plaintiff's right rear side of his vehicle with the front of her vehicle. (Kantor's deposition transcript; certified police accident report)

12. Plaintiff did not see defendant's vehicle while traveling West on Broadway. The first time he became aware of defendant's vehicle was on impact. (Kantor's deposition transcript; certified police accident report)

13. The impact caused the defendant's vehicle to travel 10 to 20 feet down the block. (Kantor's deposition transcript; certified police accident report)

14. As a result of the impact by defendant's vehicle, plaintiff's left shoulder was pushed into the seatbelt and his back and neck whipped laterally from side to side. (Kantor's deposition transcript; certified police accident report)

15. Plaintiff suffered severe spinal injuries requiring spinal surgery as a result of this accident.

Deposition Testimony of Kantor

In regards to Kantor's deposition testimony on the issue of liability, Kantor testified on March 8, 2021, in sum and substance, that the accident occurred on November 28, 2019. He was operating a 2017 Mercedes C class Coupe. He was coming from the gym and headed home. He recalled that the accident occurred on Thanksgiving Day. He was proceeding straight on Broadway for approximately eight to ten minutes, and, the accident occurred near the intersection of Broadway and Mann Place. The weather was clear. He testified that prior to the incident, he was traveling between 25 and 30 miles per hour, and that the speed limit in the area was 30 miles per hour. The first time he saw the other vehicle was at the time of impact, and that the other vehicle came into contact with the right side, rear tire and rear quarter panel of his car. At the time of the occurrence he was wearing his seatbelt. After the impact, Kantor stated that the rear of his vehicle was pushed to the double-yellow line in the street, almost to oncoming traffic. The other vehicle was described by him as a black Toyota Camry. Kantor was shown an image which he stated he recalled, and that the other vehicle that hit him was coming out of a driveway, but he did not know the address where the car was exiting. He testified that the address where the other car was exiting the driveway is contained in the police report. Kantor also testified about his injuries and medical treatment.

Deposition Testimony of Miriam Alyeshmerni

Alyeshmerni gave sworn testimony in this matter on May 13, 2021. She testified that the

accident occurred on November 28, 2019. She was operating a 2017 Toyota Camry which is owned by her parents, which she testified that she was driving with their permission. She resides in Arizona and at the time of the occurrence was driving with a valid driver's license from the State of Arizona, and the Toyota Camry she was driving is also registered and insured in the State of Arizona. She testified that she was temporarily staying at an address in Lawrence, New York while she was attending college.

Alyeshmerni was shown a copy of a MV-104 for identification. She testified that she recognized the document, and that she had completed it. According to Alyeshmerni, prior to the incident, she was pulling straight out of the driveway and before she proceeded, she looked to her left, and there were "a lot of cars parked in front of the house." (p. 18 lines 14-24). The accident occurred on Broadway, and she stated there was a portion of the street she could not view as she was exiting due to the parked cars. As she was exiting she saw five to ten cars on Broadway pass in front of her. When she pulled her vehicle out of the driveway her view was still partially obstructed by the cars in front of her home. She intended to exit the driveway and make a left turn, and did not see the other vehicle prior to the contact. The front part of the vehicle came into contact with the other vehicle's back wheel. She recalled apologizing to the person she had the accident with. Alyeshmerni testified that she told her parents that she was pulling out of the driveway and hit the car.

Law and Application

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent demonstrates a *prima facie* case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). To be entitled to partial summary judgment a plaintiff does not bear the ...burden of establishing... the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Sanders v Sangemino*, 185 AD3d 617 [2d Dept 2020], *lv dismissed* 35 NY3d 1110 [2020]).

Certified Police Accident Report

In the Second Department, where a party affirmatively proffers a police accident report in support of a motion for summary judgment, the report must be in admissible form and satisfy two levels of hearsay. A certified police report is admissible if “the report is made based upon the officer’s personal observations and while carrying out police duties.” (*See Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; *see also Memenza v Cole*, 131 AD3d 1020 [2d Dept 2015].) The criteria for the foundation of the admissibility of business records of a department or bureau of a municipal corporation or of the State can be made with a certification (*see* CPLR 2306; 4518[c]). Such certification must state that the business record “was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.” (CPLR 4518[a]; *Id.*). Assuming that the police report is certified, the statement contained in the police report must still satisfy a hearsay exception. (*See Johnson v Lutz*, 253 NY 124 [1930]; *Shehab v Powers*, 150 AD3d 918 [2d Dept 2017]; *Pavane v Marte*, 109 AD3d 970 [2d Dept 2013]; *DeLuca v Blanco*, 31 AD3d 600 [2d Dept 2006]; *Noakes v Rosa*, 54 AD3d 317 [2d Dept 2005]). In this case, the Court finds that the police report is admissible. It contains a description of the accident indicates that Alyeshmerni’s vehicle struck Kantor’s vehicle while pulling out of a driveway.

Vehicle and Traffic Law

New York Vehicle and Traffic Law (“VTL”) § 1128 entitled “[d]riving on roadways laned for traffic”(a) states: Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

- (a) 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 has first ascertained that such movement can be made with safety.

“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] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law.” (*See Cook v Gomez*, 138 AD3d 675 [2d Dept 2016]; *see also Adobe v Junel*, 114 AD3d 818 [2d Dept 2014]).

VTL §1173 entitled “[e]merging from alley, driveway, private road or building” states the following:

“The driver of a vehicle emerging from an alley, driveway, private road or building shall stop such vehicle immediately prior to driving onto a sidewalk extending across any alleyway, building entrance, road or driveway, or in the event there is no sidewalk, shall stop at the point nearest the roadway to be entered where the driver has a view of approaching traffic thereon.”

Further, a driver is charged with seeing what there is to be viewed through the proper use of their senses, and are negligent if they fail to do so (*see Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055 [2d Dept 2013]).

The Court finds that Kantor has sufficiently presented evidence to establish his entitlement to judgment on the issue of liability (*see CPLR 3212; Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]; *Rodriguez v City of New York*, 31 NY3d 312 [2018]).

In opposition, Alyeshmerni claimed that the deposition testimony established that she looked both ways prior to proceeding to back her car out of the driveway; that she had waited and let several cars proceed before she attempted to pull out completely and turn; and, that several parked cars blocked her view, and as she proceeded she made contact with Kantor's vehicle, never seeing it before the contact occurred although she had looked both ways. Thus, there is a question of fact as to whether the defendant-driver was negligent, and that the defendant driver did not violate the VTL statutes aforementioned, and that there is an issue as to whether the collision was a T-bone collision or a sideswipe. They also contend that Kantor was comparatively negligent because Kantor's vehicle darted out from behind the parked cars which were obstructing defendant-driver's view, thus a question of fact remains as to whether Kantor acted reasonably in failing to avoid the Alyeshmerni vehicle. Alyeshmerni cites case law related to pedestrian-motor vehicle accident cases, arguing that the facts of this case are akin to a pedestrian darting-out scenario. In those cases, the Court held that plaintiff's can be held to be the sole proximate cause of their injuries when the plaintiff pedestrian darts in front of a vehicle (*see Boereau v Scott*, 140 AD3d 687 [2d Dept 2016] [trial court reversed and summary judgment on the issue of liability granted to appellant defendant- infant plaintiff darted out into traffic from parked vehicles]; *Balliet v North Amityville Fire Dept.*, 133 AD3d 559 [2d Dept 2015] [trial court reversed and summary judgment granted to appellant defendants Jenkins and LL Cool J., Inc. on the issue of liability- plaintiff was the sole proximate cause of the accident based upon her conduct of failing to cross the street at the intersection and emerging from between stopped vehicles]; *Galo v Cunningham*, 106 AD3d 865 [2d Dept 2013] [trial court reversed and summary judgment granted to appellant defendant on the issue of liability-plaintiff ran into the middle of the street outside of a crosswalk]; *Sheppard v Murci*, 306 AD2d 268 [3d Dept 2007] [trial court reversed and summary judgment granted to defendant based upon infant plaintiff darting from out behind stopped vehicles directly into defendant's path]). They also submitted an ARCAA report dated September 3, 2021.

In reply, Kantor asserted that Alyeshmerni failed to raise a triable issue of fact- that the defendant driver entered the roadway from the driveway without yielding the right of way and that the defendants' negligence was the sole proximate cause of the accident (*see Harvey v White*, 169 AD3d 884 [2d Dept 2019]). Defendant driver admitted at her deposition that she did not see Kantor's vehicle prior to pulling out of the driveway. Whether the collision was a T-bone or a sideswipe is of no consequence because the evidence established that Kantor's vehicle was hit in the rear passenger side. The opinion of an unqualified "accident reconstruction expert" should not be considered by the Court because it is not reliable. Here, Kantor was driving with the right of way on the roadway within the requisite speed limit. Just because defendant driver was unable to see Kantor's vehicle in no way means that he darted out from behind parked cars. Moreover based upon

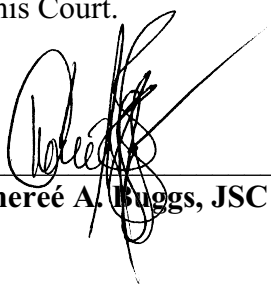
her own testimony, she was able to see and yielded the right away to between 5 to 10 vehicles passing in front of her on the roadway, but failed to see Kantor's vehicle.

The Court finds that Alyeshmerni failed to raise a triable issue of fact. A driver has a duty to see what there is to be seen and the failure to do so constitutes negligence (*see Abbas v Salavel*, 73 AD3d 1100 [2d Dept 2010]; *Laino v Lucchese*, 35 AD3d 672 [2d Dept 2006]). "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. A driver traveling with the right-of-way may nevertheless be found partially responsible for an accident if he or she did not use reasonable care to avoid the accident. Although a driver with the right-of-way...has a duty to use reasonable care to avoid a collision... a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision." (*See Jeong Sook Lee-Son v Doe*, 170 AD3d 973 [2d Dept 2019]; *see also Adobe v Junel*, 114 AD3d 818 [2d Dept 2014]; *see also Fried v Misser*, 115 AD3d 910 [2d Dept 2014].) Here, Kantor established that Alyeshmerni violated sections 1128(a), 1143 and 1173 and that he had the right of way and that Alyeshmerni failed to yield the right of way and that Alyeshmerni was the sole proximate cause of the accident. Moreover, Alyeshmerni admitted at the deposition that she could not see Kantor's vehicle prior to the collision, and the defendant driver admitted that she hit Kantor's vehicle while attempting to come out of her driveway (*see Alston v Irizarry*, 195 AD3d 578 [2d Dept 2021]; *Candelario v Gold*, 184 AD3d 798 [2d Dept 2020]; *Harvey v White*, 169 AD3d 884 [2d Dept 2019]; *compare Jo v Gore*, 195 AD3d 700 [2d Dept 2021]). The ARCAA report dated September 3, 2021 is not in admissible form as it is not sworn to or notarized (*see CPLR 3212; 4518; compare Redd v Juarbe*, 124 AD3d 1274 [4th Dept 2015]). The Court finds that the pedestrian-darting out cases cited by Alyeshmerni are wholly unrelated to the facts of this case.

Therefore, Plaintiff's motion is granted in its entirety. Upon the completion of discovery on the issue of damages, and the filing of a Note of Issue along with the appropriate fees, this matter shall proceed to Trial on the issue of damages only.

The foregoing constitutes the decision and Order of this Court.

Dated: November 10, 2021



Hon. Chereé A. Buggs, JSC