At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on April 29, 2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ADAM RAMIREZ and HALLIE RAMIREZ,

Plaintiffs,

-against-

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, INTERNATIONAL CO., LP, and JOSEPH MILSTEAD, JR.,

Defendants.

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DECISION/ORDER

Index # E2018-2052
RJI # 52-41073-2019

Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court

Appearances:

Finkelstein & Partners, LLP
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Law Office of Ronald W. Ramirez
By: Ronald W. Ramirez, Esq.
Attorneys for the Defendants
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Hinshaw & Culbertson, LLP
By: David Alfini, Esq.
Co-Counsel for the Defendants
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MEDDAUGH, J.:

The Plaintiffs, by their attorneys, have applied for an Order granting them partial summary judgment on the issue of liability only, and striking the first affirmative defense which

asserted that the Plaintiff, Adam Ramirez (hereinafter the Plaintiff) was comparatively negligent.

This action arises out of a two-car automobile accident which occurred on April 25, 2017, at approximately 4:30 to 5:00 p.m., at the intersection of the exit ramp from State Route 23 and Route 9G in Greenport, New York. At the time of the accident, the Plaintiff was the owner and operator of a 2007 Honda Pilot, and was proceeding on the exit ramp from Route 23 toward the intersection with Route 9G.

The other vehicle was operated by the Defendant, Joseph Milstead, Jr. (hereinafter Milstead or the Defendant), which was owned by his employer. At Milstead's deposition, defense counsel conceded agency, with no reservation of right, and indicated that Milstead was acting within the scope of his employment with the Terminix International Company Limited Partnership and/or International Co. LP (hereinafter Terminix), and he was covered by the Zurich policy (Terminix's Insurance). Therefore, Plaintiff's counsel asserts that the Terminix Defendants are vicariously liable, pursuant to Section 388(1) of the Vehicle & Traffic Law, for any negligence committed by Mr. Milstead.

The Plaintiff testified that, at the time of the accident, he was employed with the New York State Department of Corrections, and he left work that day at approximately 4:30 p.m. He also testified that it had been raining on and off that day and the roads were wet when the accident occurred.

The Plaintiff testified that, as he entered the ramp, he first observed that the Milstead vehicle was completely stopped at a yield sign on Route 9G, and that he was on the ramp for approximately 100 feet before the collision occurred. He also indicated that the ramp contained a single lane of travel, and that there was no sign governing the Plaintiff's direction of travel on the ramp into the subject intersection.

The Plaintiff indicated that Milstead accelerated away from the yield sign and entered into the intersection where the two vehicles collided, with the right front passenger side of Plaintiff's vehicle impacting the rear passenger side of the Milstead vehicle. The Plaintiff testified that he was driving approximately 20 to 25 m.p.h. at the time of the accident, and only seconds elapsed from the time he saw the other vehicle stopped at the yield sign, until the other vehicle accelerated so quickly into the intersection that the Plaintiff had no time to avoid the impact.

Milstead testified at deposition that he was at the intersection of Route 9G and Route 23, heading toward the Rip Van Winkle Bridge at about 5:00 p.m. when the accident occurred. He indicated that he came to a complete stop at the yield sign of route 9G for 10 to 15 seconds while he was "checking the intersection." Milstead acknowledged that the cars coming in from Route 23 had the right-of-way. He indicated that he looked to his right for approximately two seconds after coming to a stop, and then looked to his left for another two seconds even though no cars could have been approaching from that direction, and then he looked again to his right for two seconds before proceeding.

Milstead acknowledged that he did not see the Plaintiff's vehicle until immediately prior to the impact. He testified that the accident occurred approximately 5-20 feet beyond the yield sign, and that he was first alerted to the impending collision about a second before the impact, when he heard a "beep" from another vehicle. He indicated that he may have seen the other vehicle at the moment that he heard the beep, but he just kept driving forward as there was nothing else that he could do. He indicated that he was driving approximately 15 miles per hour at the time of the collision.

Mr. Milstead also stated both that he was not distracted by anything at the time of the crash, and that nothing obstructed his vision or prevented him from seeing the Plaintiff's vehicle

on the ramp.

Plaintiff's counsel argues that Milstead violated Section 1142(b) of the Vehicle & Traffic Law when he accelerated into the intersection when it was not safe to do so, and without yielding the right-of-way to the plaintiff's vehicle which was very near to the intersection.

The Plaintiff argues that the Court should strike the Defendant's first affirmative defense, alleging that the Plaintiff was comparatively negligent. It is asserted that the Plaintiff was entitled to rely on the Defendant to obey the law that required him to yield the right-of-way, and to not proceed into the intersection in front of the Plaintiff's vehicle.

In opposition, the Defendants argues that all drivers have an independent duty to see what there is to be seen through the proper use of their senses and that, even if a Defendant was negligent as a matter of law for violating the vehicle and traffic law, there can still be issues of fact as to whether the Plaintiff was also at fault for causing the accident.

The Defendants also assert that both the Plaintiff and Milstead testified that it was dark and rainy at the time that the accident occurred.

It is further argued that the parties' deposition testimony raises issues of fact as to whether Plaintiff was speeding, or driving in an unsafe manner that contributed to the accident. Defense counsel asserts that, the testimony indicated that the Plaintiff approached Milstead's vehicle so quickly that Milstead did not even see Plaintiff's vehicle until it impacted his own. The Defendants further assert that, even if Plaintiff was not speeding, there are still issues of fact as to whether Plaintiff was driving in an unsafe manner given the dark and rainy conditions, and the wet roads.

The Court notes that Milstead testified at his deposition, that it was raining lightly at the time of the accident, that the sun had not yet set, and there was still daylight at the time of the

accident. Milstead also testified that the rain did not prevent from seeing anything. He also testified that there was nothing that obstructed his ability to see the Plaintiff's vehicle as it approached the intersection from the entrance ramp.

In reply, Plaintiff's counsel argues that an issue as to the Plaintiff's comparative negligence relates to the damages portion of a trial, and does not affect a Plaintiff's right to win summary judgment on liability.

The Plaintiffs assert that Milstead was obligated to comply with the yield sign, and by proceeding into the intersection without yielding the right-of-way and causing an accident, was a violation of V&T §§ 1142(a) and 1172(a), which constitutes negligence as a matter of law. Therefore, it is argued that the Defendant's motion on the issue of liability should be granted.

It is further argued that the Defendants' the First Affirmative defense, which asserts comparative negligence, must be dismissed because the Plaintiff had every right to rely upon the fact that Milstead would obey the traffic laws which required him to yield the right-of-way.

Moreover, it is argued that there is no proof that the Plaintiff was speeding, and Milstead testified that there was nothing obstructing his vision of the Plaintiff's approach to the intersection. Additionally, it is argued that, because only seconds elapsed from the time the Plaintiff saw the Milstead vehicle stopped at the yield sign and the time that the Milstead vehicle accelerated into the intersection, weighs against a finding that the Plaintiff was comparatively negligent. Finally, it is asserted that Milstead testified that he did not see the Plaintiff's vehicle until right before the impact, and he could not point to anything that the Plaintiff did which was negligent in causing the accident.

CONCLUSIONS OF LAW

The Plaintiffs seek partial summary judgment on the issue of liability, and to strike the

Defendants' first affirmative defense which asserted that the Plaintiff was comparatively negligent.

"It is well established that 'the 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"(*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]). Once the movant makes the proper showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact which requires a trial of the action" (*id.* at 324).

The Court finds in the case at bar, that the Plaintiff has made a prima facie showing that the Defendant Milstead was negligent, as a matter of law, when he failed to yield the right-of-way to the defendant in violation of Vehicle and Traffic Law § 1142(b) (*Cenovski v. Lee*, 266 A.D.2d 424, 698 N.Y.S.2d 868 [2 Dept., 1999]; see, also, *Batal v. Associated Universities, Inc.*, 18 A.D.3d 484, 795 N.Y.S.2d 268 [2 Dept., 2005]; *Bolta v. Lohan*, 242 A.D.2d 356, 661 N.Y.S.2d 286 [2 Dept., 1997]). Furthermore, Milstead's testimony confirms that he did not see what, by the proper use of his senses, he should have seen (*Ali v. Tip Top Tows, Inc.*, 304 A.D.2d 683, 757 N.Y.S.2d 757 [2 Dept., 2003]; *Nunziata v. Birchell*, 238 A.D.2d 555, 656 N.Y.S.2d 383 [2 Dept., 1997]). Moreover, the Plaintiff's case was buttressed by the Defendant's admission that he failed to see the Plaintiff's vehicle prior to the collision, even though he also testified that his view of the Plaintiff's approach was not obstructed (*Ashby v. Est. of Encarnacion*, 178 A.D.3d 763, 111 N.Y.S.3d 894 [2 Dept., 2019]).

The Defendants have claimed that the issue of the Plaintiff's fault in the accident precludes an award of the summary judgment. In *Rodriguez v. City of New York*, 31 N.Y.3d 312,

76 N.Y.S.3d 898 (2018), the Court of Appeals held that a Plaintiff shall be entitled to partial summary judgment on the issue of a Defendant's liability, even when the Defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence. The Court explained, the system of comparative negligence adopted in this state, "direct[s] courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to plaintiff" (*Id.* at 18).

Therefore, the Plaintiffs established their prima facie entitlement to summary judgment on the issue of liability (*Morgan v. Hachmann*, 9 A.D.3d 400, 780 N.Y.S.2d 33, 33 [2 Dept., 2004])

Subsequent to *Rodriguez v. City of New York*, it has been held that "[e]ven though a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff" (*Sapienza v. Harrison*, 191 A.D.3d 1028, 142 N.Y.S.3d 584 [2 Dept., 2021]; *Balladares v. City of New York*, 177 A.D.3d 942, 114 N.Y.S.3d 448 [2 Dept., 2019]).

The Court finds that the Plaintiff's deposition testimony is sufficient to establish, prima facie that he was not at fault in the happening of the accident. The Plaintiff testified that he had the right-of-way as he approached the intersection, where he observed the Defendant stopped at the yield sign. It is well established that, where as here, the Plaintiff has the right-of-way, he was entitled to anticipate the Defendant's compliance with his obligation to yield at the yield sign, and 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 (*Balladares v. City of New York, supra.; Le Claire v. Pratt*, 270 A.D.2d 612, 704 N.Y.S.2d 354 [3 Dept., 2000]; *Sapienza v. Harrison, supra.*). Moreover, the Plaintiff's case was buttressed by the Defendant's admission that he failed to see the Plaintiff's vehicle prior to the collision, even though he also testified that his view of the Plaintiff's approach was not obstructed (*Ashby v. Est. of Encarnacion*, 178 A.D.3d 763, 111 N.Y.S.3d 894 [2 Dept., 2019])

In opposition to that portion of the Plaintiff's motion which seeks to strike the Defendant's first affirmative defense of comparative negligence, the Defendant asserted that the parties' deposition testimony raises issues of fact as to whether Plaintiff was speeding or driving in an unsafe manner, given the dark and rainy conditions, and the wet roadway. The Court finds that the Defendant's claim is mere speculation and is insufficient to defeat the motion *(Ashby v. Est. of Encarnacion, supra.*; *Klein v. Byalik*, 1 A.D.3d 399, 766 N.Y.S.2d 687 [2 Dept., 2003]; *Szczotka v. Adler*, 291 A.D.2d 444, 737 N.Y.S.2d 121 [2 Dept., 2002]). It has been held that, where as here, the Plaintiff has the right-of-way, he was entitled to anticipate the Defendant's compliance with his obligation to yield at the yield sign, and 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 (*Balladares v. City of New York, supra.*; *Le Claire v. Pratt*, 270 A.D.2d 612, 704 N.Y.S.2d 354 [3 Dept., 2000]; *Sapienza v. Harrison, supra.*).

Accordingly the Court finds that the Plaintiffs has demonstrated their entitlement to partial summary judgement on the issue of liability, as well as to strike the Defendant's first affirmative defense.

WHEREFORE, it is hereby

ORDERED that the Plaintiffs' motion for summary judgment on the issue of liability

and to strike the Defendant's first affirmative defense asserting the Plaintiff was guilty of comparative negligence is granted in its entirety.

All papers, including the original copy of this Decision and Order, are being uploaded to NYSCEF for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

Dated: November 19, 2021
Monticello, New York

ENTER:

Mark M Meddaugh

HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated March 29, 2021
2. Statement of Uncontested Material Facts submitted by George A. Kohl, II, Esq., with Word Count Certification, dated March 29, 2021
3. Affirmation in Support of George A. Kohl, II, Esq., dated March 29, 2021
4. Affirmation in Opposition of Ronald W. Ramirez, sworn to April 27, 2021
5. Statement of Uncontested Material Facts submitted by Ronald W. Ramirez, Esq., dated April 27, 2021
6. Word Count Certification, submitted by Ronald W. Ramirez, Esq., dated April 27, 2021
7. Reply Affirmation of George A. Kohl, II, Esq., dated May 21, 2021