Calpakis v Russo
2021 NY Slip Op 33780(U)
March 31, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609730/2020
Judge: Paul J. Baisley, Jr.
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. 609730/2020**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

MICHAEL J. CALPAKIS,

Plaintiff,

-against-

MATTHEW A. RUSSO,

Defendant.

ORIG. RETURN DATE: December 3, 2020
FINAL RETURN DATE: February 25, 2021
MOT. SEQ. #: 001 MG;CASEDISP

PLTF'S ATTORNEY:
MARY ANN CANDELARIO, ESQ.
585 STEWART AVENUE, STE 650
GARDEN CITY, NY 11530

DEFT'S ATTORNEY:
MARTYN MARTYN SMITH & MURRAY
102 MOTOR PARKWAY, STE 230
HAUPPAUGE, NY 11788

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated October 30, 2020 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiff, dated February 12, 2021 ; Replying Affidavits and supporting papers by defendant, dated February 18, 2021 ; Other _____; it is

ORDERED that the motion by defendant Matthew Russo seeking summary judgment dismissing the complaint is granted.

Plaintiff Michael Calpakis commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Portion Road and College Road in the Town of Brookhaven on January 28, 2020. By his complaint, plaintiff alleges, among other things, that as he was attempting to make a left turn onto College Road from the eastbound left turning lane of Portion Road, the front of his vehicle was struck by the vehicle owned and operated by defendant Matthew Russo, causing it to spin and collide with the vehicle traveling directly behind his vehicle. At the time of the accident, defendant's vehicle was traveling westbound on Portion Road.

Defendant now moves for summary judgment on the basis that plaintiff was the sole proximate cause for the subject accident's occurrence. Specifically, defendant asserts that plaintiff's failure to yield the right of way to his vehicle and making a left turn when it was unsafe to do so resulted in the subject collision between the vehicles. In support of the motion, defendant submits copies of the pleadings, his own affidavit, and the certified police accident report. Plaintiff opposes the motion on the grounds that there are triable issues of fact as to the subject accident's occurrence, and that it is premature, since discovery has not been conducted. In opposition to the motion, plaintiff submits his own affidavit.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward

with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, 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 (*Rodriguez v City of New York*, *supra*).

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; *Klein v Crespo*, 50 AD3d 745, 855 NYS2d 633 [2d Dept 2008], *lv denied* 12 NY3d 704, 876 NYS2d 705 [2009]; *Packer v Mirasola*, 256 AD2d 394, 681 NYS2d 559 [1998]). An operator of a motor vehicle has a duty to always be aware of the potential hazards created by prevailing traffic conditions (*see* Vehicle and Traffic Law § 1129; *see generally Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]), and to observe that which he or she can clearly see (*see Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]; *Pawlukiewicz v Boisson*, 275 AD2d 446, 712 NYS2d 634 [2d Dept 2000]; *Mohamed v Frische*, 223 AD2d 628, 636 NYS2d 859 [2d Dept 1996]). Vehicle and Traffic Law § 1141 states, in pertinent part, that a driver of a vehicle intending to turn 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 (*see Wilson v Rosedom*, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]; *Kucar v Town of Huntington*, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]). Furthermore, a driver is negligent if he or she fails to see that which, through the proper use of senses, should have been seen (*Laino v Lucchese*, 35 AD3d 672, 672, 872 NYS2d 249 [2d Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2006]).

Based upon the adduced evidence, defendant demonstrated his prima facie entitlement to judgment as a matter of law by establishing that plaintiff's violation of Vehicle and Traffic Law §1141 in turning directly into the path of his oncoming vehicle when it was not reasonably safe to do so, as it was proceeding lawfully through the intersection, was the sole proximate cause of the subject accident (*see Krajniak v Jin Y Trading, Inc.*, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; *Gause v Martinez*, 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012]). Defendant averred in his affidavit that he was traveling straight in the left lane on westbound Portion Road, that the speed limit on Portion Road is 45 miles per hour, that he was traveling within the speed limit, and that as he approached the intersection he began slowing his vehicle down when he observed a vehicle making a left turn from the eastbound side of Portion Road. Defendant states that as he proceeded through the intersection, plaintiff's vehicle made a left turn directly in front of his vehicle, without warning, that he struck the front of plaintiff's vehicle, causing it to spin and strike the vehicle that was stopped behind plaintiff's vehicle in the left turning lane on the eastbound side of Portion Road. Defendant further states that he did not see plaintiff's vehicle prior to the accident's occurrence, because it was obscured by the prior vehicle making the left turn, and that he did not hear any horns blowing or tires screeching prior to the subject accident. Since, defendant had the right of way, he was entitled to assume that plaintiff would obey the traffic laws requiring him to yield the right of way to defendant's vehicle (*see Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d

Dept 2011]; *Almonte v Tobias*, 36 AD3d 636, 829 NYS2d 153 [2d Dept 2007]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; *see also* Vehicle and Traffic Law § 1142 [a]). Moreover, the certified police report contains a statement by plaintiff in which he states that "he did not see [defendant's] vehicle, and that while turning left he pulled in front of [defendant's] vehicle and the impact between his vehicle and defendant's vehicle caused him to spin and strike the vehicle behind him." The police officer who prepared the report was acting within the scope of his duty in recording defendant's statement, and the statement is admissible as an admission of a party (*see Kryanova v Lowy*, 166 AD3d 600, 87 NYS3d 653 [2d Dept 2018]; *Sydnor v Home Depot U.S.A., Inc.*, 74 AD3d 1185, 906 NYS2d 279 [2d Dept 2010]; *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]; *Guevara v Zaharakis*, 303 AD2d 555, 756 NYS2d 465 [2d Dept 2003]; *cf. Jimenez v Ramirez*, 171 AD3d 902, 98 NYS3d 131 [2d Dept 2019]; *Bailey v Reid*, 82 AD3d 809, 918 NYS2d 364 [2d Dept 2011]).

In opposition to plaintiff's prima facie showing, plaintiff failed to raise a triable issue of fact (*see Wilson v Rosedom*, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]; *Gabler v Marly Bldg, Supply Corp.* 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). "A driver is negligent when an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she should have seen" (*see Stiles v County of Duchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]; *Bolta v Lohan*, 242 AD2d 356, 356, 661 NYS2d 286 [2d Dept 1997]). Plaintiff, in his affidavit, states that prior to the accident he was traveling eastbound on Portion Road, that he brought his vehicle to a stop behind another vehicle at the red light and turned on his turning signal, and that after the light turned green, the vehicle in front of his vehicle made a left turn onto College Road. Plaintiff states that he then looked in front of him for any approaching traffic on the westbound side of Portion Road before beginning his left turn, that he did not see any vehicles approaching the intersection, and that as he slowly began making his left turn, defendant's vehicle, traveling at a high rate of speed, struck the front passenger side of his vehicle. Plaintiff further states that as a result of the impact between his vehicle and defendant's vehicle, his vehicle spun around and struck the vehicle directly behind his vehicle, and that defendant's unsafe rate of speed was the cause of the subject accident. Plaintiff's statements in his affidavit are an attempt to raise a feigned issue of fact and contradict the statement that he did not see defendant's vehicle prior to making his left turn and pulled out in front of defendant's vehicle made to the police officer at the time of the accident. In addition, a witness statement from nonparty Sean Neenan, the operator of the vehicle traveling directly behind plaintiff's vehicle, states that "while he was stopped behind plaintiff's vehicle at the light, plaintiff's vehicle pulled into the intersection and was struck by defendant's vehicle, causing plaintiff's vehicle to spin and strike his vehicle in the front." As a result, plaintiff has failed to present any facts to contradict defendant's version of events or to show that plaintiff did not violate the Vehicle and Traffic Law (*see Desio v Cerebral Palsy Transp., Inc.*, 121 AD3d 1033, 994 NYS2d 681 [2d Dept 2014]).

Furthermore, plaintiff's assertion that defendant's summary judgment motion on the issue of negligence is premature, because discovery has yet to be conducted, is without merit. Before a party can defeat or delay a motion for summary judgment claiming ignorance of fact due to unconducted discovery (*see* CPLR 3212(f)), a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party (*see Berkeley v Fed. Bank & Trust v 229 E. 53rd St. Assoc.*, 242 AD2d 489, 662 NYS2d 481 [1st Dept 1997]), that the claims in opposition are supported by something more than mere hope or conjecture (*see Neryaev v Solon*, 6 AD3d 510, 775 NYS2d 348 [2d Dept 2004]), and that the

party has made reasonable attempts to discover these facts and that the facts sought would give rise to a triable issue (*see Cruz v Ortis El. Co.*, 238 AD2d 540, 656 NYS2d 688 [2d Dept 1997]). Here, plaintiff has failed to make such showing. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: 3/31/21

HON. PAUL J. BAISLEY, JR., J.S.C.