

Zhanay v Kaminsky
2022 NY Slip Op 30033(U)
January 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 522762/2019
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.
-----X
LUIS ENRIQUE FRANCO ZHANAY,
Plaintiff,

- against -

NIKOLAY KAMINSKY,
Defendants.
-----X

Index No. 522762/2019

Mot. Seq. 1 & 2

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>9-18; 24-31</u>
Opposing Affidavits (Affirmations) _____	<u>23; 35-37</u>
Reply Affidavits (Affirmations) _____	<u>32; 38</u>

Upon the foregoing papers, defendant Nikolay Kaminsky (defendant) moves for an order pursuant to CPLR 3212, granting him summary judgment dismissing plaintiff's complaint on the grounds that he bears no liability for the subject accident (Motion Sequence 1). Plaintiff Luis Enrique Franco Zhanay (plaintiff) cross-moves for an order awarding him summary judgment on liability, dismissing Kaminsky's affirmative defenses of comparative negligence and assumption of risk, and adjudging that the matter proceed on the issue of damages only (Motion Seq 2).

Background

On October 18, 2019, plaintiff commenced this action to recover for personal injuries allegedly sustained on June 4, 2019, due to a motor vehicle accident that occurred on Kings Highway at or near its intersection with West 4th Street in Brooklyn, New York. Defendant was operating a gray 2017 Nissan Pathfinder on West 4th Street, a one-way roadway, when he stopped at the red light at the intersection with Kings Highway. Plaintiff was standing with his bicycle at the corner, waiting for the traffic signal to change. Upon the light turning green, defendant started making his right turn onto Kings Highway when his vehicle and plaintiff's bicycle collided in the crosswalk.

On April 26, 2021, defendant filed the instant motion for summary judgment on liability. In support of his motion, defendant proffers the deposition testimonies of the parties and a copy of the certified police accident report. According to defendant, he bears no liability for the accident since he had the right-of-way negotiating a right-hand turn, whereas plaintiff was making a left turn onto Kings Highway from West 4th Street traveling the wrong way down a one-way street.

On August 10, 2021, plaintiff cross-moved for summary judgment on liability, also relying on the parties' depositions and the police accident report. According to plaintiff, defendant failed to yield the right-of-way to plaintiff as he rode his bicycle within the pedestrian crosswalk with the pedestrian light in his favor.

Plaintiff has yet to file a note of issue certifying the completion of discovery. The parties' evidence is summarized as follows.

Plaintiff Zhanay's EBT Testimony

Plaintiff testified that he was involved in an accident on June 4, 2019. The accident occurred on Kings Highway and West 4th Street on the crosswalk. It was dark out at the time of the accident (NYSCEF Doc Nos. 15, 29, Zhanay EBT transcript, 35:13-16). Plaintiff's bicycle had a reflector on the front and on the back of the seat but did not have any lights (*id.* at 38-39). Prior to the accident, plaintiff was traveling on West 4th Street and he intended to continue traveling on West 4th Street (*id.* at 43-44). Plaintiff was traveling on the left side of West 4th Street as he approached the intersection (*id.* at 51-52). When plaintiff arrived at the intersection, he brought his bicycle to a stop at the traffic light, which also had a cross walk sign for pedestrians (*id.* at 53-54). After waiting approximately three to four seconds, the crosswalk light changed from red to white and plaintiff began to pedal across the intersection (*id.* at 57). The impact occurred when plaintiff was approximately in the middle of the intersection and had almost entirely crossed the divider on Kings Highway (which is a two-way street) (*id.* at 58). Following the accident, the front bumper of the vehicle involved was over the crosswalk, but the back portion was not in the crosswalk (*id.* at 67). Plaintiff later testified that he had crossed the intersection from the right side and his bicycle had made it entirely past the double yellow line when the accident occurred (*id.* at 80). When plaintiff brought his bicycle to a stop before crossing the intersection, his front tire was in the crosswalk and his back tire was on the sidewalk (*id.* at 81).

Defendant Kaminsky's EBT Testimony

Defendant testified that his was the first vehicle stopped at the red light on West 4th Street at the intersection with Kings Highway (NYSCEF Doc Nos. 16, 30, Kaminsky EBT Transcript, 39:2-5). While stopped at the red light, defendant states that he looked to his right to see if there were any pedestrians on the sidewalk waiting for the light to turn (*id.* at 40-41). Defendant looked to the left and to the right prior to moving his vehicle to see if there was anyone crossing (*id.* at 71-72). There were no pedestrians waiting to cross on either side of Kings Highway at the time (*id.* at 41, 43). Defendant had a clear view of the sidewalk on the other side of Kings Highway while waiting at the light (*id.* at 42:17-25). Defendant did not have to wait for any pedestrians to cross the street from either side of Kings Highway when the light turned green (*id.* at 43). His path was clear to make the right turn without waiting (*id.*). Defendant did not see any bicycles waiting to cross Kings Highway from either direction (*id.* at 43-44). Defendant states that when the light turned green, he started his right turn onto Kings Highway, traveling very slowly, when a bicyclist “came out of nowhere” and hit the left side of his vehicle (*id.* at 29:20-24; 39:8-16; 64:13-17). The bicyclist was coming from West 4th Street turning left (*id.* at 69-70). Defendant saw the bicyclist approaching a half a second before it struck his vehicle (*id.* at 39:6-10). The bicyclist was talking on his phone with the phone in his hand at the time of the accident (*id.* at 44-45; 72:9-22). Defendant pressed his brake when he saw the bicyclist hit his vehicle (*id.* at 67). Defendant did not have any time to react to avoid the accident (*id.* at 45:6-8; 47-48). Nor did defendant honk his horn at any time prior to the accident (*id.* at 67:14-16). Defendant did not see

any lights on the bicycle (*id.* at 66:3-6). There were lights on both sides of the street at the intersection and the area was well lit (*id.* at 45-46; 55:5-9).

Police Accident Report

The certified police accident report reflects the following under the section entitled “Accident Description/Officer’s Notes:”

“At T/P/O driver #1 [defendant] states he was traveling S/B on West 4 St with traffic signal green attempting to make right turn onto King Highway and bicyclists [plaintiff] struck his vehicle causing minor damages to vehicle. Bicyclist states he was crossing the intersection when vehicle 1 was making and right turn and struck him. Bicyclist complaint of pain to leg and was treated by EMS and removed to Maimonides Medical Center” (NYSCEF Doc Nos. 18, 31).

According to plaintiff, the reporting police officer, who did not personally see the crash, faulted the defendant with “failure to yield the right of way” by attributing code 7 to box 19 in the report.

Discussion

A party seeking summary judgment has the burden of establishing a cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor . . . and [the party] must do so by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; *see* CPLR 3212 [b]). Once movant has fulfilled this burden, the nonmoving party must show “facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]). “A motion for 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” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]]).

Here, based upon the evidence submitted, neither party has established entitlement to summary judgment on the issue of liability, as there are conflicting versions of how the accident occurred. Defendant fails to establish as a matter of law that plaintiff violated New York Vehicle and Traffic Law § 1141 by making a left turn directly into the path of defendant’s vehicle (thereby failing to yield the right-of-way). Plaintiff’s EBT testimony indicates that (1) he was stopped at the pedestrian crosswalk waiting for the pedestrian light to turn white and (2) that he intended to continue traveling straight on West 4th Street (albeit going the wrong way on a one-way street), not turn left onto Kings Highway, as asserted by defendant. Similarly, plaintiff fails to establish that the subject accident occurred solely due to defendant’s negligence especially given the issues raised by defendant regarding whether plaintiff was on the phone when the collision occurred and whether plaintiff failed to yield the right-of-way to the defendant’s vehicle. For the reasons set forth above, neither party has met their prima facie burden.

Conclusion

Accordingly, it is

ORDERED that defendant’s motion for summary judgment (motion sequence 1) is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on liability (motion sequence 2) is denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. WAVNY TOUSSAINT

KINGS COUNTY CLERK
FILED
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