

Jeffrey v Kin Wah So

2023 NY Slip Op 31671(U)

May 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 527835/2022

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of May, 2023.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
HAKIM JEFFREY,

Index No.: 527835/2022

Plaintiff,

-against-

DECISION AND ORDER

KIN WAH SO, UBER TECHNOLOGIES, INC. and UBER
USA, LLC,

Motion Sequence #1

Defendants.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	8-13,
Opposing Affidavits (Affirmations).....	18, 22,
Reply Affidavits (Affirmations)	20.

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Hakim Jeffrey (the "Plaintiff") moves (motion sequence #1) for summary judgment on the issue of liability and dismissal of the affirmative defenses relating to the issue of liability as against Defendant, Kin Wag So (the "Defendant So"). The action concerns a motor vehicle collision at the intersection of 37th Avenue and 30th Street in Queens, New York on October 31, 2021. Plaintiff contends that the vehicle owned and operated by Defendant So proceeded into the intersection when faced with a stop sign and struck Plaintiff's vehicle, having failed to yield the Plaintiff's right of way. Plaintiff argues that this constituted negligence on the part of Defendant So and also was a violation of New York Vehicle and Traffic Law (VTL) 1142(a). Defendant So

opposes the motion and contends, by means of his attorney's affirmation, that the motion is premature and issues of fact remain. Defendants, Uber Technologies, Inc. and Uber USA, LLC (collectively "Defendant Uber") also oppose the motion as to any determination relating to its liability¹.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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" *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency

¹ As an initial matter, the motion only relates to Defendant So's liability. Therefore, whether Defendant Uber has liability will not be determined herein.

of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Plaintiff provides his affidavit and a police report. While the police report is certified, none of the statements therein are attributed to any person. Therefore, the report has little probative value. Plaintiff, in his affidavit states, “[a]t the time and location of the accident, I was operating a 2016 Mazda motor vehicle owned by Kamille Barnett. At the intersection of 37th Avenue and 30th Street, defendant, KIN WAH SO, had a stop sign. As the cab approach the intersection, I observed the cab failed to stop at the stop sign and entered the intersection, striking my vehicle.” “Prior to the accident, I had no indication that the defendant was going to fail to stop at the Stop sign. I had no warning, did not hear any horns, screeching tires, nor did I have an opportunity to sound the horn or avoid the accident.”

This evidence is sufficient for Plaintiff to meet his *prima facie* burden establishing that Defendant So either failed to stop or “failed to yield the right of way after stopping at a stop sign controlling traffic in violation of Vehicle and Traffic Law § 1142(a).” *Hull v. Spagnoli*, 44 AD3d 1007, 1007, 844 N.Y.S.2d 416, 417 [2d Dept 2007]; see also *Friedberg v. Citiwide Auto Leasing, Inc.*, 22 AD3d 522, 523, 801 N.Y.S.2d 770, 771 [2d Dept 2005]; *Hunt v. New York City Transit Auth.*, 166 AD3d 735, 737, 87 N.Y.S.3d 563 [2d Dept 2018] and *Fernandez v. Am. United Transportation, Inc.*, 177 A.D.3d 704, 707, 113 N.Y.S.3d 145 [2d Dept 2019].

In opposition to the motion, Defendant So provides his attorney's affirmation. However, the affirmation fails to raise a material issue of fact. Additionally, Defendant So contends that the motion is premature based on outstanding discovery. The motion is not premature. Motions for summary judgement have been denied as premature when a party opposing summary judgment is entitled to further discovery and "when it appears that facts supporting the position of the opposing party exist but cannot be stated." *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 81 [2nd Dept, 2010]; see *Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724 [2nd Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd Dept, 2006]. Accordingly, the Plaintiff's motion is granted against Defendant So only and Defendant So's third affirmative defense in relation to Plaintiff's comparative negligence is dismissed. See *Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021].

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion for summary judgment on the issue of liability as against Defendant So (motion sequence #1) is granted and Defendant So's third affirmative defense is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.