

Rose v Merchant Funding Serv. Corp.

2019 NY Slip Op 35139(U)

November 18, 2019

Supreme Court, Bronx County

Docket Number: Index No. 25174/2018

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 15



ROSE, GIOVANNI

Index No. 0025174/2018E

-against-

Hon. MARYANN BRIGANTTI,

MERCHANT FUNDING SERVICE CORP.

Justice Supreme Court

The following papers numbered 1 to 6 Read on this motion, (Seq. No. 1) for
SUMMARY JUDGMENT LIABILITY, noticed on **December 14 2018**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1-4
Answering Affidavit and Exhibits	No(s). 5-6
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is

Plaintiff's Motion is decided in the annexed memorandum decision and order.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 11/18/2019

Hon. Mary Ann Briganti
MARYANN BRIGANTTI, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
GIOVANNI ROSE,

Plaintiff,

Index No.: 25174/2018

-against-

MERCHANT FUNDING SERVICE CORP., and
RICARDO BAUTISTA-ACEVEDO,
Defendants.

-----X
HON. MARY ANN BRIGANTTI:

Plaintiff, GIOVANNI ROSE, moves for partial summary judgment in his favor on the issue of the liability of Defendants.

This is an action to recover damages for alleged personal injuries sustained by Plaintiff in a motor vehicle accident, which occurred on or about February 19, 2018, 11 p.m., near the intersection Duncan Street and Paulding Avenue, in the Bronx, New York. It is alleged that Defendant RICARDO BAUTISTA-ACEVEDO was the driver of the motor vehicle owned by Defendant MERCHANT FUNDING SERVICE CORP.

In support of his Motion, Plaintiff's submissions include his Affidavit and the Police Accident Report. In opposition, Defendants' Counsel submitted his Affirmation.

According to Plaintiff, as he was driving eastbound on Duncan Street, towards its intersection with Paulding Avenue, he observed Defendants' vehicle fail to stop at the Stop sign at the intersection for traffic traveling on Paulding

Avenue. There was no Stop sign controlling traffic on Duncan Avenue, and Plaintiff's vehicle had the right of way. After Defendants' vehicle struck Plaintiff's vehicle, Defendant BAUTISTA-ACEVEDO fled the scene of the accident, but later returned to retrieve his license plate, which had fallen off of his car as a result of the impact. Defendant was then arrested for leaving the scene of the accident. (Plaintiff GIOVANNI ROSE Affidavit, dated November 14, 2018; *see* Police Accident Report and Criminal Complaint).

Vehicle and Traffic Law §1142 (a) provides that "every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection."

Vehicle and Traffic Law §1172 (a) provides that "every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two."

A plaintiff meets her prima facie burden for summary judgment by demonstrating that a defendant failed to stop for a Stop sign, in violation of Vehicle and Traffic Law §§ 1142(a) and 1172(a), which constitutes negligence as a matter of law. The vehicle with the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield, and has no duty to watch for and avoid a driver who might fail to stop at a Stop sign (*Gonzalez v Bishop*, 157 AD3d 460, 460 [1st Dept 2018]).

Accordingly, Plaintiff made a prima facie showing of his entitlement to partial summary judgment on the issue of Defendants' liability by attesting that Defendant failed to stop at the Stop sign, failed to yield the right of way, and consequently struck Plaintiff's vehicle. Thus, Plaintiff shifted the burden to Defendants to advance a non-negligent explanation for the accident (*see Harrigan v Sow*, 165 AD3d 463 [1st Dept 2018]).

Herein, however, Defendant driver, BAUTISTA-ACEVEDO, the person with knowledge of the relevant facts concerning the circumstances surrounding the happening of the accident, has not submitted his own affidavit, and, in his Counsel's Affirmation, there is merely a recitation of general principals; and so Defendants have not made the requisite showing.

It is well-established that where the submission on the part of the party opposing a summary judgment motion "consisted only of the bare affirmation of

[his] ... attorney who demonstrated no personal knowledge of the manner in which the accident occurred [, s]uch an affirmation by counsel is without evidentiary value and thus unavailing” (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]). In *Zuckerman*, as here, the opponent of the motion proffered no affidavit made by a party or eyewitness having knowledge of the relevant facts. There was no explanation for the failure to submit affidavits. (*Zuckerman v New York*, 49 NY2d at 563).

A plaintiff’s motion for partial summary judgment on liability was properly granted, where, as here, in “opposition to plaintiff’s prima facie showing, defendants failed to submit any evidence to raise a triable issue of fact, and instead relied solely upon ... the arguments of counsel ... [, who] claimed no personal knowledge of the accident, his affirmation has no probative value ... [D]efendants have personal knowledge of the facts, yet "failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact" ” (*Thompson v Pizzaro*, 155 AD3d 423, 423 [1st Dept 2017]).

Furthermore, the Court of Appeals recently established “that to obtain partial summary judgment on defendant's liability he [plaintiff] does not have to demonstrate the absence of his own comparative fault” (*Carlos Rodriguez, Appellant, v City of New York*, 31 NY3d 312, 323 [2018]).

Accordingly, Plaintiff’s Motion, for partial summary judgment in his favor

on liability against Defendants, is granted, to the extent that Defendants are found liable and Defendant's negligence was a substantial factor in causing the accident. However, this Court makes no determination as to other issues herein, including whether Plaintiff's alleged injuries were proximately caused by the negligence of the Defendants and whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: 11/19/, 2019


HON. MARY ANN BRIGANTTI, J.S.C.