SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

806

CA 16-02181

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND SCUDDER, JJ.

JOHN J. GABRIEL, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREAT LAKES CONCRETE PRODUCTS LLC, AND
WAYNE T. BONNETT, DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 23, 2016. The order denied in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when his vehicle was struck by a cement-mixer truck operated by defendant Wayne T. Bonnett and owned by defendant Great Lakes Concrete Products LLC. Plaintiff appeals from an order that, inter alia, denied that part of his motion seeking summary judgment dismissing defendants' affirmative defense of comparative negligence. We affirm.

In support of his motion, plaintiff submitted evidence that the truck driven by Bonnett was traveling in the center lane, and then moved into the right lane and struck plaintiff's vehicle, thus establishing that Bonnett's negligence was a proximate cause of the accident (*see Williams v New York City Tr. Auth.*, 37 AD3d 827, 827-828; *see also* Vehicle and Traffic Law § 1128 [a]; *see generally Russo v Pearson*, 148 AD3d 1762, 1763). Defendants raised a triable issue of fact in opposition, however, by submitting evidence that Bonnett checked his mirror, saw that the lane was clear, and put on his signal prior to moving into the right lane, and that plaintiff was accelerating in order to pass Bonnett on the right at the time of the accident and therefore did not use reasonable care to avoid the collision (*see Romano v 202 Corp.*, 305 AD2d 576, 577). Thus, viewing the evidence in the light most favorable to defendants (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340), we conclude that defendants raised a triable issue of fact concerning the cause of the accident

(*see Fogel v Rizzo*, 91 AD3d 706, 707), and whether plaintiff's conduct contributed to it (*see Romano*, 305 AD2d at 577; *see generally Russo*, 148 AD3d at 1763).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court