

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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THERON RUCKER,

Plaintiff(s),

- against -

Index
Number: 10536/05

Motion
Date: 01/09/07

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF HEALTH AND MENTAL
HYGIENE, BUREAU OF OPERATIONS and
SIRJU MAHADEO,

Defendant(s).

Motion
Cal. Number: 11

-----X

The following papers numbered 1 to 9 read on this motion by plaintiff for an order granting summary judgment against defendant on the issue of liability.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 -4
Affirmation in Opposition-Exhibits.....	5 - 7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff for summary judgment on the issue of liability is granted.

This is an action for personal injury allegedly sustained by plaintiff as a result of being struck while riding a bicycle by a motor vehicle owned by the City and operated by Mahadeo at the intersection of 164th Street and Hillside Avenue in Jamaica, Queens. Plaintiff alleges that he was riding his bicycle on 164th Street and proceeded to make a right turn onto Hillside Avenue when he was struck by the vehicle operated by Mahadeo. Plaintiff testified in his deposition that there is a traffic light controlling said intersection, and that the light controlling traffic on 164th Street was green in his favor as he was in the process of turning right

onto the right lane of Hillside Avenue (see Exhibit "B" deposition transcript pp 7-8). As he made the right turn, the next thing he remembers is waking up in an ambulance (id pp 10-11).

The City concedes in its affirmation in opposition that the vehicle that was involved in the accident was owned by the City and that it was operated by Mahadeo within the scope and course of his employment by the City.

Mahadeo failed to answer or appear in this action and plaintiff moved for a default judgment against him on the issue of liability. The motion was granted, there appearing no opposition, by order of Justice David Elliot, issued on May 30, 2006.

Plaintiff argues that he is entitled to summary judgment merely by virtue of the default judgment against Mahadeo on the issue of liability which, consequently, renders the City vicariously liable pursuant to Vehicle and Traffic Law §388. This argument is without merit. A default judgment against the operator of a motor vehicle does not preclude the owner of the vehicle from contesting the issue of the driver's negligence (see Balanta v. Stanlaine Taxi Corp., 307 AD 2d 1017 [2nd Dept 2003]).

However, the record on this motion establishes plaintiff's prima facie entitlement to summary judgment. It is uncontested that plaintiff had the green light giving him the right of way at the intersection. "The driver who has a green light has the right to assume that the light is red for cross traffic and that other drivers will stop for the red light" (PJI 2:79, citing Shea v. Judson, 283 NY 393 [1940]). The City neither demonstrates nor alleges that the traffic light governing Mahadeo's movement was not red and that Mahadeo did not proceed into the intersection through the red light.

VTL §1110 provides that the driver of a vehicle shall obey the instructions of any official traffic control device, and VTL §1111 provides, inter alia, that a driver must stop at a red light. Since defendants do not contest that there was a traffic signal at the subject intersection or that plaintiff had the green light entitling him to proceed, it is likewise presumed that Mahadeo had the red light obligating him to stop. The failure of a driver to stop at a red light constitutes negligence as a matter of law (see, Carpio v. Leahy Mechanical Corp., 30 AD 3d 554 [2nd Dept 2006]).

Plaintiff established his prima facie entitlement to summary judgment as a matter of law by proffering uncontested testimony that the traffic control device governing the subject intersection was green in his favor and that he was struck by defendant's vehicle after he entered the intersection (see, Diasparra v. Smith, 253 AD 2d 840 [2nd Dept 1998]; Salenius v. Lisbon, 217 AD 2d 692 [2nd Dept 1995]).

The burden thereupon shifted to defendant to establish any issues of fact so as to preclude the granting of summary judgment (see, Zuckerman v. City of New York, 49 NY 2d 557 [1980]). The City

has failed to meet its burden. The City fails to raise a triable issue of fact as to whether plaintiff had been comparatively negligent (see, Balanta v. Stanlaine Taxi Corp., supra; Carpio v. Leahy Mechanical Corp., supra; Diasparra v. Smith, supra). The City neither disputes any of the testimony in plaintiff's deposition nor proffers any evidence so as to raise any triable issue of fact as to whether plaintiff was comparatively negligent.

The negligence of the operator of a motor vehicle is imputed to its owner where the use or operation of the automobile was permissive on the part of the owner (see Vehicle and Traffic Law §388). Since plaintiff has established that Mahadeo was negligent, the City is, likewise, liable vicariously. In the instant case, the City admits that the vehicle that was involved in the accident was owned by the City and that Mahadeo was a permissive operator of the vehicle. Moreover, since the City concedes that its vehicle was operated by Mahadeo within the scope and course of his employment, the City is also liable under the doctrine of respondeat superior.

Consequently, inasmuch as plaintiff has met his burden that Mahadeo was negligent and that his negligence was the sole substantial factor in causing the accident, plaintiff is entitled to summary judgment against the City as a matter of law on the issue of liability.

Dated: January 11, 2007

KEVIN J. KERRIGAN, J.S.C.