

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

ANDREW SKINNER, ANDREW SKINNER,
Plaintiff,

INDEX NO. 450119/2017

MOTION DATE 04/16/2019

MOTION SEQ. NO. 003

- v -

ROBERT OWENS, ORIGINAL JJ TRUCKING CORP.,
RYDER TRUCK RENTAL, INC.,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for summary judgment on the issue of liability as against defendants based on the fact that the defendant Robert Owen's actions were the sole proximate cause of the subject incident and to dismiss defendants' affirmative defenses alleging any form of comparative negligence, contributory negligence and culpable conduct of plaintiff is granted. This action stems from a motor vehicle incident which occurred on April 27, 2016, and tragically resulted in the death of decedent plaintiff Heather April Lough. Ms. Lough was operating a bicycle in the crosswalk with a green walk light in her favor at the intersection of Southern Boulevard and Bedford Park Boulevard in the County of Bronx, City and State of New York, when she was struck by a left turning vehicle operated by defendant Robert Owens in the course of his employment with defendant Original JJ Trucking Corp. d/b/a Diversified Transport Services.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). Pursuant to VTL § 1231, every person riding a bicycle on a roadway is afforded the same rights and duties applicable to drivers. Under VTL § VTL 1163(a) “no person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless such movement can be made with reasonable safety.”

In support of her motion, plaintiff submit the affidavits of three-eye witnesses to the subject incident, the police accident reports/highway 1 reports, deposition of defendant Robert Owens, photographs of defendants’ vehicle and the scene of the accident, the closing statement and deposition of Detective Michael Murphy who investigated the scene of the accident, and the Certified Transcript of defendant Robert Owens’ criminal allocution and sentencing (Mot, Exh A, B, E, F, G, I, J).

Mark Jennings Jr., who witnessed the accident, testified that he had a clear view of the incident and witnessed the decedent plaintiff scream when she was struck by defendants’ vehicle while in the crosswalk with the green walk signal in her favor (Mot, Exh A). Catherine Farrell, who witnessed the accident, testified that she witnessed the accident and saw defendants’ vehicle make a swooping left turn without stopping hitting [decedent plaintiff]” (*id.*). Caleb Guzman, who witnessed the accident, testified that plaintiff was in the crosswalk with the light in her favor when she was struck by defendants’ left turning vehicle (*id.*). On July 11, 2018, defendant

Owens pled guilty to Vehicle and Traffic Law Section 1212-Reckless Driving (Mot, Exh B).

Thus, plaintiff has demonstrated that defendant Owens violated section 1212 and 1163(a) of the VTL and has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact.

Defendants' opposition fails to raise a triable issue of fact. In opposition defendants state that the motion for summary judgment is premature as all discovery has not been completed and call into question plaintiff's comparative negligence. As to defendants' assertion that the instant case is premature for summary judgment, the Court has continuously held that summary judgment is permissible notwithstanding the fact that all discovery has been completed (*Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dep't 2010]; see also *Rosario v Vasquez* 93 AD3d 509 [1st Dep't 2012]). As to plaintiff decedent's alleged comparative negligence, defendant Owens testified that he did not see plaintiff when he executed the left turn, thus defendants' assertion that plaintiff decedent could have been comparatively negligent is speculative and insufficient to raise an issue of fact.

Defendant Owens had a duty not to execute the left turn unless it could be made with reasonable safety. Plaintiffs have met their burden and demonstrated that, as a lawful bicyclist, crossing the street within the crosswalk with the light in her favor, decedent plaintiff was free from any contributory negligence and in no way caused the accident. Thus, defendants have failed to raise a triable issue of fact and plaintiff's motion for summary judgment on the issue of liability as against defendants and to dismiss defendants' affirmative defenses alleging any form of comparative negligence, contributory negligence and culpable conduct of plaintiff is granted.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the issue of liability as against defendants is granted; and it is further

ORDERED that the branch of plaintiffs' motion to dismiss defendants' affirmative defenses related to comparative negligence of plaintiff is granted; and it is further

ORDERED that an immediate trial as to the amount of damages to which plaintiffs are entitled shall be had before the Court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this Order, serve a copy of this Oder with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a Note of Issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision/Order of the Court.

10/2/19  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE