SHORT FORM ORDER

INDEX No. 13-64764
CAL. No. 15-00344MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 5-14-15
ADJ. DATE 9-2-15
Mot. Seq. #002 - MG;CASEDISP

OMAR TAWANCY,

Plaintiff,

- against -

DANIEL FITZSIMMONS,

Defendant.

RICHARD J. KATZ, LLP
Attorney for Plaintiff
80 Broad Street, 33rd Floor
New York, New York 10004

PICCIANO & SCAHILL, P.C.
Attorney for Defendant
900 Merchants Concourse, Suite 310
Westbury, New York 11590

Upon the following papers numbered 1 to 49 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 29 - 47; Replying Affidavits and supporting papers 48 - 49; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted.

Plaintiff Omar Tawancy commenced this action to recover damages for personal injuries he allegedly sustained as a pedestrian when he was struck by a motor vehicle on the Fire Island Inlet Bridge of the Robert Moses Causeway on August 10, 2013.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff was the sole proximate cause of his own injuries. In support of the motion, defendant submits copies of the pleadings, a certified police accident report, photographs of the subject area where the accident occurred, plaintiff's hospital records, and the transcripts of the parties' deposition testimony.

Defendant testified that at approximately 4:00 a.m. on August 10, 2013, he was driving a truck

northbound on the Fire Island Inlet Bridge at approximately 25 mph. He testified that the weather was dry, it was dark outside, and the vehicle's headlights were illuminated. Defendant testified that the bridge has two lanes of travel, one for northbound traffic and one for southbound traffic, and that they are divided by two solid yellow lines. Defendant testified that he frequently drives over the bridge and has never observed a pedestrian walking on it. He testified that the bridge has signs posted to the right of the northbound lane of travel which prohibits pedestrian and bicyclists from using it. Defendant testified that a truck traveling southbound had just passed him when he heard a "boom." He testified that he assumed his vehicle struck the truck traveling in the southbound lane, and that both he and the other driver stopped and exited their vehicles. Defendant testified that he observed plaintiff lying on the ground on the southbound side of the road approximately five feet from the side railing, near the curb, and that, prior to seeing him on the ground, he did not observe plaintiff on the bridge. He testified that plaintiff was wearing a dark-blue sweatshirt and shorts. Defendant testified plaintiff was conscious and that after the accident, when the police arrived, plaintiff told them that he had been drinking and was intoxicated. Defendant testified that his vehicle sustained damage to the front driver side of the hood.

Plaintiff testified that on the evening prior to the accident, he was at a party on Fire Island, and that he had drank several beers. He testified that he was walking north over the bridge with the intention of meeting up with his friend who would drive him home. He testified that he was walking along the curb in the southbound lane, and that he has no recollection of the accident or of seeing defendant's vehicle. Plaintiff testified that he was unconscious for approximately one hour and taken by ambulance to the hospital.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980].

Every driver has a common law duty to keep a proper lookout and to see that which should be seen through the proper use of his or her senses (*see* ***Palmeri v Erricola***, 122 AD3d 697, 996 NYS2d 193[2d Dept 2014]; ***Calderon-Scotti v Rosenstein***, 119 AD3d 722, 989 NYS2d 514 [2d Dept 2014]; ***Laino v Lucchese***, 35 AD3d 672, 672, 827 NYS2d 249 [2d Dept 2006]). As there may be more than one cause of an accident, a plaintiff in a personal injury action seeking summary judgment on liability has the burden of presenting prima facie evidence that the defendant was negligent, and that he or she was free from comparative fault (*see* ***Tsang v New York City Tr. Auth.***, 125 AD3d 648, 3 NYS3d 370 [2d Dept 2015]; ***Gorenkoff v Nagar***, 120 AD3d 470, 990 NYS2d 604 [2d Dept 2014]; ***Sirlin v Schreib***, 117 AD3d 819, 985 NYS2d 688 [2d Dept 2014]; ***Lanigan v Timmes***, 111 AD3d 797, 975 NYS2d 148 [2d Dept 2013]).

Here, defendant established prima facie his entitlement to judgment as his testimony establishes

that he did not observe plaintiff on the bridge and did not have a reason to suspect that a pedestrian would be on the bridge. His testimony established that he was operating his vehicle in a reasonable manner and he was not a proximate cause of plaintiff's injuries. The burden, therefore, shifted to plaintiff to proffer evidence in admissible form raising a triable issue of fact (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

In opposition to the motion, plaintiff submits an affirmation of his attorney. However, it is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065 [1979]; ***Burns v City of Poughkeepsie***, 293 AD2d 435 [2d Dept 2002]). No affidavit or testimony by plaintiff has been submitted to raise a triable issue of fact. Plaintiff's alleged loss of memory does not excuse him from meeting his burden, as no expert evidence has been submitted to establish same (*see* ***Sawyer v Dreis & Krump Mfg. Co.***, 67 NY2d 328, 502 NYS2d 696 [1986]; ***Mancia v Metro. Transit Auth. Long Island Bus***, 14 AD3d 665, 790 NYS2d 31 [2d Dept 2005]). Furthermore, plaintiff remains obliged to provide some proof from which negligence can reasonably be inferred (***Santiago v Quattrociocchi***, 91 AD3d 747, 937 NYS2d 119 [2d Dept 2012]).

Accordingly, defendant's motion for summary judgment dismissing the complaint against him is granted.

Dated: Jun 15, 2016

A.J.S.C.

____ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**