

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33185
N/kmb

_____AD3d_____

Argued - November 14, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2011-05307

DECISION & ORDER

Evelyn Camarillo, plaintiff-respondent, v Jose Sandoval, et al., defendants, Jose L. Navarro, appellant, Giovanni Rodriguez, et al., defendants-respondents.

(Index No. 1998/09)

Robert P. Tusa (Sweetbaum & Sweetbaum, Lake Success, N.Y. [Marshall D. Sweetbaum], of counsel), for appellant.

Rimland & Associates, New York, N.Y. (Victor Goldblum and Matthew A. Kaufman of counsel), for plaintiff-respondent.

Nancy L. Isserlis, Long Island City, N.Y. (Lawrence R. Miles of counsel), for defendants-respondents.

In an action to recover damages for personal injuries, the defendant Jose L. Navarro appeals from an order of the Supreme Court, Kings County (Bayne, J.), dated April 15, 2011, which denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the order is affirmed, with one bill of costs, payable to the respondents appearing separately and filing separate briefs.

The plaintiff allegedly was injured when a car driven by the defendant Giovanni Rodriguez, in which she was a passenger, struck the rear of a car driven by the defendant Jose L. Navarro. Navarro moved for summary judgment dismissing the complaint and all cross claims

December 6, 2011

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insofar as asserted against him. The Supreme Court denied the motion, and we affirm.

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non-negligent explanation for the accident” (*Oguzturk v General Elec. Co.*, 65 AD3d 1110, 1110 [internal quotation marks omitted]; see *Carman v Arthur J. Edwards Mason Contr. Co., Inc.*, 71 AD3d 813; *Foti v Fleetwood Ride, Inc.*, 57 AD3d 724, 724; *Hughes v Cai*, 55 AD3d 675). Here, although Navarro testified at his deposition that he was traveling in the same lane for 19 or 20 blocks before he stopped completely at a red light and was rear-ended by Rodriguez’s vehicle, the plaintiff’s deposition testimony, submitted by Navarro in support of his motion, was that Navarro was traveling in an adjacent lane and swerved in front of Rodriguez’s vehicle before quickly coming to a stop. In light of the plaintiff’s testimony, the defendant failed to eliminate all triable issues of fact (see *Scheker v Brown*, 85 AD3d 1007; *Reitz v Seagate Trucking, Inc.*, 71 AD3d 975; *Oguzturk v General Elec. Co.*, 65 AD3d at 1110-1111; *Guerra v Cantos*, 38 AD3d 714; *Briceno v Milbry*, 16 AD3d 448; *Mohan v Puthumana*, 302 AD2d 437; *Rozengauz v Lok Wing Ha*, 280 AD2d 534). Contrary to Navarro’s contention, the plaintiff’s testimony was not incredible as a matter of law, and any inconsistencies in her testimony raise an issue of credibility that must be resolved by the fact-finder (see *Frazier v Hertz Vehs., LLC*, 78 AD3d 767, 768; see generally *Ferrante v American Lung Assn.*, 90 NY2d 623, 631).

Accordingly, the Supreme Court properly denied Navarro’s motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

SKELOS, J.P., HALL, LOTT and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court