

<b>Buffa v Carr</b>
2016 NY Slip Op 31915(U)
August 15, 2016
Supreme Court, Bronx County
Docket Number: 21019/2014E
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IAS PART 21**

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MICHELLE N. BUFFA,

Plaintiff,

-against-

IAN JAMES CARR, ROOFTILE & SLATE CO., INC.,  
and LEO CASTILLO,

Defendants.

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Index No.: 21019/2014E

Decision & Order

**HON. BEN BARBATO:**

**The following papers were considered on this motion for summary judgment and cross-motion for summary judgment:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion and annexed Exhibits and Affidavits.....	1
Castillo Affirmation in Opposition to Motion.....	2
Carr/Rooftile Reply Affirmation.....	3
Plaintiff Notice of Cross-Motion and annexed Exhibits and Affidavits.....	4
Castillo Affirmation in Opposition to Cross-Motion.....	5

Upon the foregoing papers, it is ordered that the motion by defendants Ian James Carr (“Carr”) and Rooftile & Slate, Co., Inc. (collectively, “moving defendants”) for summary judgment as to liability is hereby denied and that the cross-motion by the plaintiff is hereby granted.

This action is to recover damages for physical injuries allegedly sustained by the plaintiff in a motor vehicle accident, which occurred on or near the intersection of Bronx River Parkway and Old Tarrytown Road<sup>1</sup> (the “subject intersection”), Bronx, New York on November 17, 2013. According to the verified complaint, the plaintiff was seated in the passenger seat of the vehicle operated by defendant Leo Castillo (“Castillo”), which was attempting to make a left-hand turn at the aforesaid intersection at the time of the accident. As the Castillo vehicle was pulling out of the meridian dividing the northbound and southbound lanes of Bronx River Parkway, the front end of the vehicle operated by defendant Carr and owned by defendant Rooftile & Slate Co., Inc. struck the passenger side of the Castillo vehicle.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; CPLR 3212 [b]). The court’s function on a motion for summary judgment is issue finding rather than

<sup>1</sup> Old Tarrytown Road is also referred to as “Cemetery Road” by the parties.

issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The moving defendants contend that defendant Castillo bears sole liability for the accident due to his purported failure to yield to traffic with the right of way while making a left-hand turn immediately before impact, as is required under VTL 1141. Where the operator of a vehicle fails to abide by the mandates of the VTL's statutory provisions, such proscribed conduct is deemed negligent as a matter of law (*Martin v Herzog*, 228 NY 164 [1920]; *Davis v Turner*, 132 AD3d 603 [1<sup>st</sup> Dept. 2015]). Nonetheless, "the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (*Desio v Cerebral Palsy Transp., Inc.*, 121 AD3d 1033 [2<sup>nd</sup> Dept. 2014], quoting *Pollack v Margolin*, 84 AD3d 1341, 1342 [2<sup>nd</sup> Dept. 2011]).

In support of their motion for summary judgment, the moving defendants highlight testimony from defendant Carr's deposition, during which he indicated that he did not see any vehicles within the area of the median when he first observed that he was approaching a green traffic light at the subject intersection. As he drew nearer to the subject intersection, he noticed that defendant Castillo's vehicle had entered the median and briefly applied the brakes to decelerate. Defendant Carr further asserted that, after he saw defendant Castillo's car come to a complete stop inside the median, he accelerated to proceed through the intersection. Furthermore, defendant Carr claimed that when his vehicle was approximately twenty-five feet away from the subject intersection, defendant Castillo's car abruptly accelerated through said intersection, causing the two vehicles to collide. This recitation of facts is sufficient to give rise to the presumption that defendant Castillo negligently operated his vehicle by failing to yield while making a left-hand turn, shifting the burden to him to proffer a non-negligent explanation for the collision (*Martinez v Cofer*, 128 AD3d 421 [1<sup>st</sup> Dept. 2015]; *Murchison v. Incognoli*, 5 AD3d 271 [1<sup>st</sup> Dept. 2004]). However, because every driver is bound by the common-law "duty to see what should be seen and exercise reasonable care under the circumstances to avoid an accident" (*Johnson v. Phillips*, 261 AD2d 269 [1<sup>st</sup> Dept. 1999]), defendant Carr's own admission that he first observed defendant Castillo's vehicle begin to cross the southbound lanes of the Bronx River Parkway when his vehicle was twenty-five feet away suggests negligence on his own part, precluding him from entitlement to summary judgment as to liability.

To further demonstrate defendant Castillo's negligence, the moving defendants furnished this court with a transcript of defendant Castillo's deposition testimony, which raises further issues of fact. Significantly, in opposition to the moving defendants' motion, counsel for defendant Castillo directs the court's attention to those portions of defendant Castillo's testimony where he refutes defendant Carr's claim that he was traveling with the right of way immediately prior to the motor vehicle accident. To the contrary, defendant Castillo

stated that when he first made a left turn onto Old Tarrytown Road from the northbound side of Bronx River Parkway, the traffic light on Old Tarrytown Road was red, causing him to stop inside of the median. After a few seconds, the Old Tarrytown Road traffic light turned green, at which point defendant Castillo checked for traffic approaching from the southbound side of Bronx River Parkway. Defendant Castillo averred that, because he did not observe any oncoming traffic, he proceeded through the subject intersection. Thus, defendant Castillo's contentions raise an additional –and material – issue of fact with respect to which driver had the right of way at the time of the accident, further militating against granting summary judgment in favor of the moving defendants.

With respect to plaintiff's cross-motion, counsel for the plaintiff contends that, as an innocent passenger, plaintiff is entitled to summary judgment on the issue of liability regardless of any factual issues concerning comparative fault as between the defendant drivers. While it is correct that an innocent passenger's right to summary judgment should not be precluded on the basis that there are potential issues of comparative negligence as between the drivers of the vehicles involved in the accident (*Johnson v. Phillips*, 261 A.D.2d 269 [1<sup>st</sup> Dept. 1999]), plaintiff's counsel mischaracterizes the law as providing that the plaintiff need only show that she is free from liability. Rather, to be entitled to summary judgment, the plaintiff must satisfy the twofold burden of demonstrating both that she is free from comparative fault as an innocent passenger and that the operators of the vehicles at issue were at fault (*Oluwatayo v Dulinayan*, – NYS3d –, 2016 NY Slip Op 05455 [1<sup>st</sup> Dept. 2016]; *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2<sup>nd</sup> Dept. 2015]). “If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition...summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger” (*Oluwatayo*, 2016 NY Slip Op 05455, \*4; see *Sanchez v Taveraz*, 129 A.D.3d 506 [1<sup>st</sup> Dept. 2015]).

It is undisputed that the plaintiff does not bear any liability for the motor vehicle accident's occurrence, so her entitlement to the relief requested herein centers upon whether she has adequately proven that the defendants are liable as a matter of law. Although the plaintiff's annexed exhibits are not overly persuasive, as discussed in detail above, the proof submitted by the moving defendants makes it evident that, irrespective of which driver had the right of way, at least some of the fault in causing the accident lies with defendant Carr for failing to exercise reasonable care to avoid the impact. Similarly, since defendant Castillo approximated that he was able to view approximately four cars' length of the southbound lanes of the Bronx River Parkway but acknowledged that he did not see the moving defendants' vehicle prior to impact, “which was undeniably present before the collision, [his] testimony established that [he] was negligent as a matter of law” (*Kucar v Town of Huntington*, 81 AD3d 784, 786 [2<sup>nd</sup> Dept. 2011]). Therefore, the plaintiff has shown both that she is free of comparative fault and that at least some liability should be attributed to each of the defendants as a matter of law.

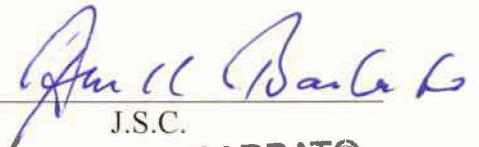
Accordingly, the motion by the moving defendants for an order pursuant to CPLR 3212 granting summary judgment on the issue of the liability is hereby denied and the plaintiff's cross-motion on the issue of liability is hereby granted.

Movant is directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: August 15, 2016

ENTER:

  
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J.S.C.  
**HON. BEN R. BARBATO**