

<b>Johnson v Rodriguez</b>
2016 NY Slip Op 32127(U)
September 6, 2016
Supreme Court, Queens County
Docket Number: 709484/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

GRETEL JOHNSON,  
  
Plaintiff,

Index No.: 709484/2014  
Action No. 2

- against -

Motion Date: 8/10/16

JORGE L. RODRIGUEZ and ULRICK N.  
ANTOINE,

Motion No.: 60

Motion Seq.: 3

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendant JORGE L. RODRIGUEZ for an Order pursuant to CPLR 3212, granting summary judgment to Rodriguez, dismissing the complaint and all cross-claims in Action No. 2 as against him on the ground that no triable issues of fact exist; on this cross-motion by plaintiff GRETEL JOHNSON for an Order pursuant to CPLR 3126, striking the answer of defendant Antoine for his failure to be produced for a deposition in Action No. 2 and precluding Antoine from giving or adducing evidence opposing the allegations contained in the complaint; on this cross-motion by defendant ULRICK N. ANTOINE for an Order pursuant to CPLR 3212, granting summary judgment to Antoine, dismissing the complaint and all cross-claims in Action No. 2 as against him on the ground that no triable issues of fact exist, and/or pursuant to CPLR 3211(a)(7) dismissing the complaint and all cross-claims, pursuant to CPLR 3212, granting summary judgment to Antoine on the ground that plaintiff Johnson did not sustain a serious injury pursuant to Insurance Law Section 5102(d), and denying plaintiff Johnson's cross-motion to strike Antoine's answer; and on this cross-motion by JORGE L. RODRIGUEZ for an Order pursuant to CPLR 3212, granting summary judgment to Rodriguez on the ground that plaintiff Johnson did not sustain a serious injury pursuant to Insurance Law Section 5102(d):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 20 - 36
Johnson's Notice of Cross-Motion-Affidavits-Exhibits..	EF 38 - 45
Antoine's Notice of Cross-Motion-Affirmation-Exhibits.EF	46 - 53
Rodriguez's Notice of Cross-Motion-Affidavit-Exhibits.EF	54 - 66
Johnson's Opposition-Exhibits.....	EF 70 - 76
Rodriguez's Reply Affirmation-Exhibits.....	EF 77 - 80
Antoine's Reply Affirmation.....	EF 81 - 82

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This is a personal injury action in which plaintiff Johnson seeks to recover damages for injuries she allegedly sustained as a result of a three car accident that occurred on August 8, 2013, on Linden Boulevard at its intersection with the entrance to the Cross Island Parkway in Queens County, New York.

Antoine first commenced an action, Action No. 1, by filing a summons and verified complaint on September 17, 2014. Rodriguez and Johnson each served verified answers with cross-claims. This action, Action No. 2, was commenced by Johnson filing a summons and complaint on December 11, 2014. Rodriguez appeared in Action No. 2 by serving a verified answer with cross-claim dated March 6, 2015. Antoine appeared in Action No. 2 by serving a verified answer with cross-claim dated February 6, 2015. A third action was commenced on September 19, 2014 by Nationwide Affinity Insurance Company a/s/o Ulrick N. Antoine, seeking reimbursement for property damages paid to Antoine. Rodriguez and Johnson each served answers in Action No. 3. The three actions are to be tried jointly.

On December 16, 2015, Rodriguez appeared for an examination before trial. He testified that on August 8, 2013 he was involved in a motor vehicle accident on Linden Boulevard at its intersection with the entrance to the Cross Island Parkway. The intersection was governed by a traffic light with a left turn arrow. Linden Boulevard is a two-way roadway with two lanes of travel and a left turning lane. He was intending to take Linden Boulevard to the Cross Island Parkway towards Long Island. As he approached the intersection of Linden Boulevard and the entrance ramp to the Cross Island Parkway, the traffic light was red. He entered the left turn lane. He brought his vehicle to a stop at the intersection and there was one vehicle in front of him. The vehicle in front of him, Johnson's vehicle, began to move left onto the Cross Island Parkway. His vehicle never moved from the stopped position prior to the accident. When Johnson's vehicle began to make its left turn, the left turn arrow was red, but the

traffic light to go straight was green. While his vehicle was stopped, it was struck by Antoine's vehicle, which was coming from the opposite direction on Linden Boulevard in the right lane. His vehicle was struck on the driver's side door and fender. Prior to the impact to his vehicle, Antoine's vehicle impacted Johnson's vehicle, which had been turning left. After that impact, Antoine's vehicle veered towards his vehicle. After the accident, he told the police that he "was stopped at the light. The car in front of [him] passed the red light (Johnson's vehicle) and impacted another car (Antoine's vehicle), and that car (Antoine's vehicle) impacted [him]."

At her deposition taken on August 7, 2015, plaintiff Johnson testified that she was involved in the subject accident. Prior to the accident, she was traveling eastbound on Linden Boulevard. She intended to make a left onto the Cross Island Parkway. She entered the left turn lane and brought her vehicle to a complete stop. She was stopped for approximately 30 seconds when the left turn arrow came on. As soon as she saw the left turn arrow turn green, she began to make her left turn. Before she proceeded into the intersection, she looked at the traffic traveling westbound and did not observe any cars coming. As soon as she proceeded forward into the intersection, the accident occurred. The impact was to the driver's side near the lights of her vehicle. She did not see Antoine's vehicle until after the accident.

Antoine appeared for a deposition in Action No. 1 on August 26, 2014. He testified that he was involved in the subject accident. He was traveling in the right westbound lane of Linden Boulevard at the time of the accident. When he reached the intersection of Linden Boulevard and the Cross Island Parkway, he proceeded through the intersection in the face of a green traffic light at a rate of 25 to 30 mph. He intended to continue straight on Linden Boulevard. However, as he proceeded through the intersection, his vehicle was struck by Johnson's vehicle. Then his vehicle struck Rodriguez's vehicle. Prior to the first impact, he did not hear the sound of any horns or tires screeching. The first impact to his vehicle was to the driver's side in the middle towards the back. After the first impact to his car, his car spun to the left and ended up facing south. The left side of his car struck Rodriguez's vehicle on the driver's side, which was on the opposite side of Linden Boulevard in the left eastbound lane. Antoine tried to turn the steering wheel to avoid hitting Rodriguez's car.

Based on the deposition testimony of all of the parties, counsel for Rodriguez, Nancy S. Goodman, Esq., contends that Rodriguez is free from culpable conduct, and thus, cannot be found liable for the subject accident nor the alleged injuries.

Counsel argues that Rodriguez did not have a duty to anticipate that Antoine's vehicle would cross over from the westbound lane of travel into his eastbound lane of travel and strike his vehicle (citing Pawlukiewicz v Boisson, 2675 AD2d 445 [2d Dept. 2000]; Salazar v Ospina, 253 AD2d 550 [2d Dept. 1998]; Koch v Levenson, 225 AD2d 592 [2d Dept. 1996]; Williams v Econ, 221 AD2d 429 [2d Dept. 1995]; Greifer v Schneider, 215 AD2d 354 [2d Dept. 1995]). Counsel further argues that Rodriguez is entitled to an emergency doctrine charge.

No opposition has been filed as to Rodriguez's summary judgment motion. Thus, neither Johnson nor Antoine came forward with any facts to raise a triable issue of fact as to any negligent conduct on the part of Rodriguez. Accordingly, Rodriguez is entitled to summary judgment (see Escobar v MIR, 243 AD2d 676 [2d Dept. 1997]; Barba v Best Sec. Corp., 235 AD2d 381 [2d Dept. 1997]). As the complaint and all cross-claims are dismissed as against Rodriguez, Rodriguez's cross-motion for summary judgment on the ground that plaintiff Johnson's injuries do not satisfy the serious injury threshold requirement is denied as moot.

Antoine also moves for summary judgment on the ground that no triable issues of fact exist. Counsel for Antoine, Michael Buffa, Esq., contends that regardless of whether the left turn arrow facing Johnson was green or red, she was negligent at the time of the accident and the sole cause of the accident. Specifically, counsel argues that if the left turn arrow was green, as Johnson testified, Johnson violated VTL 1111(a)(2) by failing to cautiously enter the intersection and yield the right of way to Antoine's vehicle. If the left turn arrow was red, as Rodriguez testified, then Johnson violated VTL 1111(d)(3). Counsel further argues that Antoine was faced with an emergency situation when his vehicle was hit by Johnson's vehicle, causing his vehicle to in turn hit Rodriguez's vehicle

In opposition to Antoine's motion for summary judgment on the ground that Antoine was not responsible for the happening of the accident, counsel for plaintiff Johnson, Linda Simmons, Esq., contends that issues of fact exist since Antoine has failed to appear for a deposition in this action. Antoine only appeared for a deposition in his own action, Action No. 1. Counsel contends that Antoine's testimony is insufficient as there was no testimony regarding where he was looking prior to and at the time of the first collision, when he first observed the traffic light at the location where the accident occurred, at which point he observed the traffic light green and for how long the light was green for traffic traveling in his direction, if he ever observed

the subject traffic light red at any time prior to or at the time of the collision, and if he was aware of a left turn signal at the accident location. Counsel contends that such information is material and necessary to ascertain liability, and as such, precludes the granting of summary judgment. Counsel further argues that Antoine failed to observe the conditions of the road and failed to see what there was to be seen (citing DeAngelis v Kirschner, 171 AD2d 593 [1st Dept. 1991]).

In reply, counsel for Antoine states that an attorney representing Johnson was present at Antoine's deposition. Counsel contends that plaintiff's counsel's speculation that Antoine could have somehow been negligent, and that such negligence may have caused the subject accident, is insufficient to deny a summary judgment motion (citing Hongach v City of New York, 8 AD3d 622 [2d Dept. 2004]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Here, Antoine established his prima facie entitlement to judgment as a matter of law by demonstrating that Johnson violated Vehicle and Traffic Law § 1111 when she made a left turn and failed to yield to Antoine's vehicle which was proceeding straight, and that this violation was the sole proximate cause of the accident (see Choi v Schwabenbauer, 124 AD3d 574 [2d Dept. 2015]; Farris v Reyes, 119 AD3d 734 [2d Dept. 2014]; Simeone v Cianciolo, 118 AD3d 864 [2d Dept. 2014]; Mazzullo v Loots, 116 AD3d 677 [2d Dept. 2014]; Ahern v Lanaia, 85 AD3d 696 [2d Dept. 2011]).

In opposition, Johnson failed to raise a material question of fact as to the causation of the accident and whether Antoine was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Moreno v Gomez, 58 AD3d 611 [2d Dept. 2009]; Pitt v Alpert, 51 AD3d 650 [2d Dept. 2008]; Gorelik v Laidlaw Tr. Inc., 50 AD3d 739 [2d Dept. 2008]; Moreback v Mesquita, 17 AD3d 420 [2d Dept. 2005]). Antoine, as the driver with the right-of-way, was entitled to anticipate that Johnson would obey traffic laws which require her to stop at the red traffic signal and yield at a green traffic signal prior to making a left turn (see Figueroa v Diaz, 107 AD3d 754 [2d Dept. 2013]; Williams v Hayes, 103 AD3d 713 [2d Dept. 2013]; Kann v Maggies Paratransit Corp.,

63 AD3d 792 [2d Dept. 2009]). Further, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively at fault for failing to avoid the collision (see Barbato v Maloney, 94 AD3d 1028 [2d Dept. 2012]).

As Antoine's cross-motion for summary judgment is granted, that branch of his cross-motion for summary judgment on the ground that Johnson's injuries do not satisfy the serious injury threshold requirement is denied as moot.

Lastly, plaintiff Johnson's cross-motion to strike Antoine's answer is denied as moot as the complaint in this action has been dismissed as set forth above.

Accordingly, and based on the above reasons, it is hereby

ORDERED, that the summary judgment motion by JORGE L. RODRIGUEZ is granted and the complaint and all cross-claims in Action No. 2 are dismissed as against defendant JORGE L. RODRIGUEZ; and it is further

ORDERED, that the cross-motion by plaintiff GRETTEL JOHNSON for an Order pursuant to CPLR 3126, striking the answer of defendant Ulrick N. Antoine for his failure to be produced for a deposition in Action No. 2 is denied as moot; and it is further

ORDERED, that the cross-motion by defendant ULRICK N. ANTOINE is granted to the extent that the complaint and all cross-claims in Action No. 2 are dismissed as against ULRICK N. ANTOINE on the ground that no triable issues of fact exist. The remainder of his cross-motion is denied as moot; and it is further

ORDERED, that the cross-motion by JORGE L. RODRIGUEZ for an Order pursuant to CPLR 3212, granting summary judgment on the ground that plaintiff did not sustain a serious injury is denied as moot.

Dated: September 6, 2016  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**