

**Aldana v Westbury Paper Stock Corp.**

2007 NY Slip Op 33149(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 5348-04/

Judge: Daniel Martin

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**SHORT FORM ORDER****SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 31**  
**NASSAU COUNTY**

\_\_\_\_\_  
**PEDRO ALDANA.**

**Plaintiff.**

*- against -*

**Sequence No.: 002 & 003**  
**Index No.: 015348/04**

**WESTBURY PAPER STOCK CORP. And**  
**ISMAEL VASQUEZ.**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Notice of Cross-Motion and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Defendants move for summary judgment dismissing the complaint. Plaintiff cross-moves for 1) an order quashing the non-party deposition notice of Police Officer Michael Holley; 2) a protective order prohibiting the defendants from deposing officer Michael Holley at this stage of the proceedings; and 3) sanctioning defendants for engaging in frivolous conduct.

Plaintiff in the instant action alleges to have suffered serious physical injuries as a result of the September 18, 2004 collision between the sanitation truck owned by defendant Westbury Paper Stock Corp. (hereinafter "Westbury Paper") and operated by its employee, defendant Ismael Vasquez and the bicycle operated by plaintiff. Said accident occurred at the intersection of Peninsula Boulevard and Greenwich Street in the County of Nassau. Plaintiff commenced this action asserting claims of negligence against defendants. Defendants herein move for summary judgment dismissing the complaint on the basis that there is no issue of fact as to the negligence of defendant Vasquez. Plaintiff cross-moves for an order quashing a subpoena dated June 15, 2007 to take the non-party deposition of Officer Holley, a protective order prohibiting such a deposition and for sanctions based upon defendants' allegedly frivolous conduct.

Summary Judgment

In moving for summary judgment defendants must demonstrate that there are no issues of

fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion, plaintiff must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

In moving for summary judgment, defendants rely upon the deposition testimony of defendant Vasquez wherein he testifies:

- 1) prior to the accident he was driving his garbage truck eastbound on Penninsula Boulevard;
- 2) he first observed the traffic light at the intersection of Penninsula Boulevard and Greenwich Street when he was approximately fifty feet from the intersection;
- 3) when he observed the traffic light at that time it was green;
- 4) when he was half a block from the intersection, Mr. Vasquez observed plaintiff and slowed to between 5 and 10 miles-per-hour;
- 5) plaintiff was crossing Penninsula on Greenwich Street from south to north on a bicycle;
- 6) he sounded his horn and moved his vehicle to the left in order to avoid hitting plaintiff when he saw that plaintiff failed to stop; and
- 7) the light was green for direction in which Mr. Vasquez was traveling at the time of the collision.

(See, deposition transcript of Ismael Vasquez, pp. 21, 25, 26, 40).

Defendants also annex the affidavits of non-party witnesses Ralph Earle and Jasmine Francis. In his affidavit, Mr. Earle avers that he was stopped at the intersection of Penninsula and Greenwich on Greenwich in the left turn lane when he observed the accident. Mr. Earle further avers that he observed the bicycle make contact with the truck's right front side and that the traffic light in the direction in which the bicycle was riding was red.

Ms. Francis avers that she was driving toward the intersection on Penninsula when she observed the truck in front of her swerve to the left as it entered the intersection. She also observed that the light was still green in the direction in which she (and therefore the truck) was traveling. Ms. Francis then observed the back tire of the truck run over a bicycle and the truck came to a stop.

The operator of a vehicle is prohibited from entering an intersection against a red traffic signal. Vehicle and Traffic Law §1111(d). Where defendants demonstrate that they were lawfully in an intersection and plaintiff entered that intersection against a red light and struck defendants' vehicle, defendants have met their *prima facie* burden of demonstrating entitlement to summary judgment dismissing the complaint. See, Cassanova v. New York City Transit Authority, 279 A.D.2d 495 (2<sup>nd</sup> Dep't 2001); Hines v. New York City Transit Authority, 264 A.D.2d 506 (2<sup>nd</sup> Dep't 1999).

Defendants having demonstrated *prima facie* entitlement to summary judgment, the

burden shifts to plaintiff to demonstrate an issue of fact which preclude summary judgment. Zuckerman v. City of New York, supra.

In opposition to the motion, plaintiff first relies upon his deposition testimony in which he testified that the light was green in his direction and red in Mr. Vasquez's at the time he proceeded into the intersection. (See, deposition transcript of Pedro Aldana, pp.14-15, 28-29). The parties have submitted contradictory deposition testimony on the issue of which vehicle operator had the right-of-way at the time of this accident. The fact that defendants have submitted affidavits from two non-party witnesses who support defendants' position is unavailing. While the parties both bear the responsibility of proving their claims or defenses by a preponderance of the evidence, such does not mean that simply because one side submits more evidence than the other that that party has met its burden and is entitled to judgment in his favor. PJI 1:60. Such would require the court to engage in determining the credibility of the proof offered from four different witnesses which is improper in deciding a summary judgment motion. See, e.g., Auble v. Doyle, 38 A.D.3d 1264 (4<sup>th</sup> Dep't 2007).

Accordingly, the court finds that an issue of fact exists which precludes summary judgment and defendants' motion is denied.

#### Plaintiff's Cross-Motion

Plaintiff first cross-moves for an order quashing the notice to take the non-party deposition of Officer Holley and for a protective order prohibiting defendants from taking said deposition on the grounds that this matter has been certified, the note of issue filed and that defendants are unable to demonstrate unusual or unanticipated circumstances entitling them to additional discovery as provided in 22 NYCRR 202.21(e).

In opposition defendants assert that unusual or unanticipated circumstances have arisen in that plaintiff was not produced for deposition until May, 2007 or approximately two months after plaintiff filed the note of issue. At the deposition defendants assert that plaintiff's recollection of the accident was incomplete in that he testified that he did not recall the points of impact in the accident and that he was struck while on the sidewalk instead of the intersection. As a result of the accident, plaintiff claims to have suffered acute memory loss. (See, report of plaintiff's expert, Laurence W. Shields, M.D.). Mr. Aldana apparently further informed his guardian that he does not recall how the accident occurred. (See, deposition transcript of Jose Nefali Orellana). Thus, defendants assert that the deposition of the police officer is necessary on the basis that plaintiff's recollection of the accident is so flawed. Further, defendants assert they have met the standard of unanticipated or unusual circumstances which entitle them to such discovery in that the deposition of plaintiff was not conducted until after the note of issue was filed and it was there that defendants ascertained plaintiff's lack of recollection of the accident.

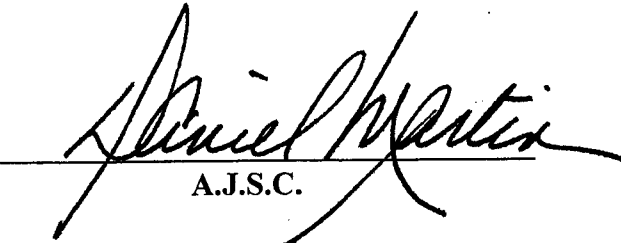
Defendants may seek additional discovery after the filing of the note of issue where they determine that unusual or unanticipated circumstances arose which required additional discovery. 22 NYCRR 202.21(e).

At the outset, defendants initially sought Officer Holley's deposition on notice but later served a subpoena for the deposition. The court shall therefore treat this motion as one to quash both the notice and subpoena.

Even accepting defendants' position as true, defendants make no demonstration that Officer Holley, who prepared the accident report observed the occurrence of the accident. At his deposition, defendant Vasquez testified that after the accident the police were called to the scene and took statements from the parties and witnesses. (See, Vasquez deposition transcript, pp. 38-40). Thus, the court finds that defendants are not entitled to the deposition of Officer Holley and the notice and subpoena to take his deposition are both hereby quashed. Further, the court hereby directs that Officer Holley is not to be deposed in connection with this action by any party hereto.

That branch of the cross-motion seeking sanctions is denied. The court views none of defendants' conduct to be so frivolous as to merit the imposition of sanctions. See, 22 NYCRR 130-1.1.

So Ordered.

  
A.J.S.C.

**Dated:** September 26, 2007

**ENTERED**  
OCT 03 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE