

**Bosco v Kaye**

2008 NY Slip Op 30543(U)

February 19, 2008

Supreme Court, Nassau County

Docket Number: 1213-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17

*Scan*

Present: HON. WILLIAM R. LaMARCA  
Justice

JOSEPH BOSCO and CATHY BOSCO,  
Plaintiffs,

Motion Sequence #2  
Submitted November 28, 2007

-against-

INDEX NO: 11213/06

JILL R. KAYE, TOMMY HERBER and  
MICHAEL HERBER,

Defendants.

The following papers were read on these motions:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Requested Relief

Plaintiffs, JOSEPH BOSCO and CATHY BOSCO, move for an order, pursuant to CPLR §3212, granting summary judgment to the plaintiff and against defendant, JILL R. KAYE, on the issue of liability. The Court is advised that the plaintiffs' claims against defendants, TOMMY HERBER and MICHAEL HERBER, have been resolved. Defendant KAYE opposes the motion, which is determined as follows:

### Background

This action arises from an accident that occurred on January 28, 2005, at approximately 7:30 A.M., when plaintiff, JOSEPH BOSCO, was a seat-belted front seat passenger in a 1986 Chevy, owned by TOMMY HERBER and driven by his brother MICHAEL HERBER. Deposition testimony reflects that the HERBER vehicle was proceeding southbound on Franklin Avenue in Franklin Square, New York, approaching the intersection of Arlington Avenue, which is controlled by a traffic light that was green for the BOSCO host vehicle. Defendant testified at her deposition that she was traveling northbound on Franklin Avenue and approached the intersection with Arlington Avenue intending to make a left turn and observed a 4X4 vehicle traveling in the opposite direction, also intending to make a left hand turn. It appears that Franklin Avenue is a four (4) lane road, with two (2) lanes in each direction separated by a double yellow line, and KAYE testified that both vehicles were stopped at the intersection intending to make a left turn. She stated that the traffic light was green, that she was able to see the right-hand lane of Franklin Avenue in the southbound direction but that she saw no other cars. She testified that, when she began her left-hand turn across the southbound lanes of traffic, she came in contact with the defendants' vehicle but that she never saw the BOSCO host vehicle until impact.

Counsel for plaintiffs contend that KAYE made a left-hand turn across opposing lanes of traffic, directly in front of the BOSCO host vehicle that had the right of way, and that plaintiffs are entitled to summary judgment on the issue of liability. Counsel points out that the host driver was going straight through a traffic light controlled intersection and was entitled to anticipate that the left turning vehicle would yield the right of way. Counsel cites

the case of *Gabler v Marly Building Supply Corp.*, 27 AD3d 519, 813 NYS2d 120 (2<sup>nd</sup> Dept. 2006), in which the Court granted summary judgment to the vehicle proceeding straight through the intersection on facts comparable to the case at bar. The Court found that the turning vehicle violated Vehicle and Traffic Law §1141 by making a turn directly into the path of oncoming traffic with the right of way, and was negligent, as a matter of law, by failing to see that which should have been seen through the proper use of her senses. *Gabler v Marly Building Supply Corp.*, *supra*. Based on the deposition testimony of the parties, counsel for plaintiffs urges that there are no questions of fact to be determined on the issue of liability and that summary judgment is warranted.

In opposition to the motion, counsel for defendant states that there are questions of fact as to who is responsible for the accident that requires a trial. Counsel claims that defendant, MICHAEL HERBER, settled this matter prior to his deposition and counsel expects to serve a further subpoena upon him to obtain testimony that he believes will elicit information crucial to the defense of this matter. He claims that plaintiff BOSCO's testimony is not sufficient to support a motion for summary judgment because he did not see the KAYE vehicle prior to impact and because the driver of the BOSCO host vehicle was under an obligation to use reasonable care not to hit a car turning left if same could be avoided. No affidavit of the defendant KAYE is submitted in opposition to the motion, but her deposition transcript confirms the facts set forth above.

### The Law

The Second Department has repeatedly held that a party who makes a left hand turn directly into the path of another vehicle as that vehicle legally proceeds through an

intersection is negligent as a matter of law, citing, *inter alia*, *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 (2<sup>nd</sup> Dept. 2006); *Lubitz v Village of Scarsdale*, 31 AD3d 618, 819 NYS2d 92 (2<sup>nd</sup> Dept. 2006); *Pryor v Reichert*, 265 AD2d 470, 696 NYS2d 525 (2<sup>nd</sup> Dept. 1999) and *Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 (2<sup>nd</sup> Dept. 2002). In *Russo*, the Court held that plaintiffs demonstrated their entitlement to judgment as a matter of law by establishing that defendant violated VTL §1141, when she made a left hand turn directly into the path of plaintiff's vehicle, and further found that plaintiff, who had the right of way, had the right to anticipate that the defendant would obey the traffic laws which required her to yield.

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2<sup>nd</sup> Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2<sup>nd</sup> Dept. 2002]). As is often stated, the facts must be viewed in a light

most favorable to the non-moving party. (See, *Mosheyev v Pilevsky, supra*).

### Conclusion

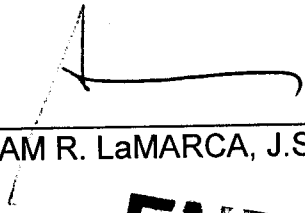
After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs have established their right to judgment as a matter of law on the issue of liability. Conclusory and speculative assertions concerning the possible negligence of the host driver is unsupported by any competent evidence and is insufficient to defeat a motion for summary judgment. See, *Berner v Koegel, supra*. The competent evidence herein, the depositions of plaintiff BOSCO and defendant KAYE, does not support defendant's contention that there is a triable issue of fact. "As the plaintiff's host vehicle had the right of way, [he] was entitled to anticipate that defendant would obey the traffic laws which required the defendant to yield to plaintiff's vehicle". *Berner v Koegel, supra*; see also, *Almonte v Tobias*, 2007 N.Y. Slip OP 00247.(2nd Dept. 2007). However, as the plaintiff has not submitted proof of "serious injury" in admissible form, the Court grants judgment as to fault only, which does not include any finding that the plaintiff has satisfied the "threshold" serious injury requirements. *Shafareko v Fu Cheng*, 5 AD3d 585, 772 NYS2d 862 (2<sup>nd</sup> Dept. 2003); *Reid v Brown*, 308 AD2d 331, 764 NYS2d 260 (1<sup>st</sup> Dept. 2003). Accordingly, it is hereby

**ORDERED**, that plaintiffs' motion is granted to the extent that plaintiffs are granted summary judgment as to liability against defendant, JILL R. KAYE, on the issue of fault, only.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 19, 2008

  
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**ENTERED**  
FEB 22 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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