

**Morejon v Lang**

2010 NY Slip Op 30929(U)

March 19, 2010

Sup Ct, Nassau County

Docket Number: 8815/09

Judge: F. Dana Winslow

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SCAW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 5**

**NASSAU COUNTY**

**NICO MOREJON, an infant by his mother and natural guardian, NANCY MOREJON, and NANCY MOREJON, individually,**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 001, 002  
MOTION DATE: 1/12/10**

**DONALD KOK LANG and JOHN F. CARDIS,**

**INDEX NO.: 8815/09**

**Defendants.**

**The following papers having been read on the motion (numbered 1-4):**

<b>Notice of Motion for Summary Judgment.....</b>	<b>1</b>
<b>Notice of Motion for Summary Judgment.....</b>	<b>2</b>
<b>Affirmation in Opposition.....</b>	<b>3</b>
<b>Reply Affirmation.....</b>	<b>4</b>

Motion in a personal injury action by defendants, Donald Kok Lang (“Lang”) and John F. Cardis (“Cardis”) for an Order pursuant to CPLR §3212 granting summary judgment dismissing the complaint of the plaintiffs, Nico Morejon and his mother, Nancy Morejon, for injuries sustained by Nico after being struck while riding his bicycle by defendants’ respective vehicles. Motion is **denied.**

**FACTS**

On or about September 13, 2007 at about 5:30 p.m., Cardis was progressing eastbound on Merrick Road’s left lane in Lynbrook, NY in his 1996 Honda sedan. About the same time, Lang was progressing eastbound in the right lane of Merrick Road in a 2005 Mercedes Benz sedan. Both motorists were approaching the intersection of Merrick Road and Earle Avenue where the traffic signal reportedly

indicated a steady green lamp. Nico, age 12 at the time of the subject accident, entered into the flow of traffic on his bicycle from Earle Avenue's southbound direction. Lang's vehicle struck Nico which caused him to be propelled into the air and when he landed, he was allegedly struck by Cardis' vehicle. Nico was able to get up and leave the scene. He later received treatment in the Winthrop University Hospital Emergency Room where he was treated for cuts and bruises and pain in his back and neck. Nico testified that he sustained a hairline fracture. He did not miss school as a result of this accident and the record does not indicate his course of medical treatment, if any, for his injuries.

## DISCUSSION

### SUMMARY JUDGMENT MOTION

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2<sup>nd</sup> Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*; *Miceli v Purex*, 84 AD2d 562 [2<sup>nd</sup> Dept. 1981]).

Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are sufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hospital*, 68 NY2d 320 supra; *Aghabi v Serbo*, 256 AD2d 287 [2<sup>nd</sup> Dept. 1998]).

Both defendants argue that Nico failed to adhere to the New York State statutes as codified in the Vehicle and Traffic Law; therefore, that they are not liable for the accident. Although Cardis refers to several provisions of the Vehicular and Traffic law to support his position, the relevant provisions are cited herein. Section 1231 provides: “. . .[e]very person riding a bicycle . . .upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle. . .” In addition, §1110(a) states: “[e]very person shall obey the instructions of any official traffic-control device applicable to him . . . unless otherwise directed by a traffic or police officer.” Further, §1111(d)(1) provides that red traffic light indications require “. . .[t]raffic . . . facing a steady circular red signal, . . . shall stop at a clearly marked stop line, but if not, then shall stop before entering the crosswalk . . . in the event there is no crosswalk, at the nearest intersecting roadway before entering the intersection and shall remain standing until an indication to proceed is shown . . .”

Cardis and Lang, in separate depositions, state that the traffic signal was a steady green with no indication of changing to red. As neither motorist saw Nico until he was already in their line of traffic, it is argued that there was no way that they could have avoided striking him. The drivers who had right of way were entitled to anticipate that a bicyclist would obey traffic laws requiring him to yield (*Rosenberg v Kotsek*, 41 AD3d 573 [2<sup>nd</sup> Dept. 2007]; see also *Palma v Sherman*, 55 AD3d 89 [2<sup>nd</sup> Dept. 2008]; *Cenovski v Lee*, 266 AD2d 424 [2<sup>nd</sup> Dept. 1999];

*Moreback v Mesquita*, 17 AD3d 420 [2<sup>nd</sup> Dept. 2005]). Further, a driver should no more be required to anticipate a vehicle being driven through a red light than he is required to anticipate an automobile crossing over a yellow line and into oncoming traffic (*Alamo v McDaniel*, 44 AD3d 149 [1<sup>st</sup> Dept. 2007]).

In sum, the defendants established their *prima facie* entitlement to summary judgment by tendering evidence demonstrating that the plaintiff was negligent as a matter of law in failing to obey the traffic signal by crossing an intersection against a red traffic light into the paths of the two vehicles operated by Lang and Cardis, which were legally proceeding through a green traffic light (*see* Vehicle and Traffic Law §1111(a)(1) and (d)(1); *Sharpiro v Munoz*, 28 AD3d 638 [2<sup>nd</sup> Dept. 2006]).

In response, the plaintiff raises a triable issue of fact as to whether Nico was in any way at fault for this accident and if he was, whether Lang or Cardis could have done anything to avoid the collision. Although defendants both argue that the traffic signal was steady green in their favor, Nico testified that when he reached the intersection of Earle and Merrick the traffic signal was a steady green for him.

Vehicle and Traffic Law §1146 provides that every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist. A driver with the right-of-way has a duty to use reasonable care to avoid a collision. (*see Cox v Nunz*, 23 AD3d 427 [2005]; *Tapia v Royal Tours Service*, 67 AD3d 894 [2<sup>nd</sup> Dept. 2009]; *Siegel v Sweeney*, 266 AD2d 200 [1991]).

In the instant case, Nico testified that he saw Lang's car about ten feet away from him, he looked the other way and then progressed into the intersection where he was hit by Lang and then by Cardis:

“Q. Prior to leaving the sidewalk, did you look down Merrick?

A. Yes.

Q. How far down could you see?

....

A. About two blocks, three.

Q. When you looked down Merrick, did you look to the left or to the right?

A. The left.

Q. What did you see in that distance?

A. Cars.

Q. Were the cars moving or standing still?

A. They were moving

....

Q. The time you first saw this [Lang's car], had you left the sidewalk?

A. No, I was looking down the other way before I turned.

Q. You were still on the sidewalk?"

A. Yes.

....

Q. ....[w]hen you first saw the car, did you continue operating your bike into the street?

A. No, I looked the other way and then after that I went into the street (Morejon, Tr. p. 31, 32)"

Plaintiff argues that if Nico was able to see Lang's vehicle prior to entering the intersection, Lang and Cardis should have seen him as well. Consequently, it could be argued that Cardis and Lang's failure to see Nico constituted negligence and such negligence contributed to the accident (*Tapia v Royal Tours Service*, 67 AD3d 894 [2<sup>nd</sup> Sept. 2009]).

Viewing the evidence in the light most favorable to the parties opposing the

motion for summary judgment, plaintiff sufficiently created a triable issue of fact as to whether Lang and/or Cardis disregarded the traffic signal at the intersection where the actual impact occurred, and failed to see what was there to be seen. (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *Santiago v Frito-Lay, Inc.* 235 AD2d 528 [2<sup>nd</sup> Dept. 1999]).

Accordingly, defendants' motion for an Order granting summary judgment is **denied**.

This Constitutes the Order of the Court.

Dated: 3/19/03

ENTER:



J.S.C.

**ENTERED**  
APR 14 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE