

**Barinas v Bove**

2010 NY Slip Op 32732(U)

September 27, 2010

Supreme Court, Richmond County

Docket Number: 104836/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:104836/08  
Motion No.:002,002**

**HUGO BARINAS and  
MARIA BARINAS,**

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**ANNEMARIE BOVE,  
JEFFERY S. LOMBARDI, and  
LISA A. LOMBARDI,**

*Defendants*

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**The following items were considered in the review of the following motions for summary judgment.**

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Notice of Cross Motion and Affidavits Annexed</b>	<b>2</b>
<b>Answering Affidavits</b>	<b>3, 4</b>
<b>Replying Affidavits</b>	<b>5, 6</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

**Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:**

The defendant, Annemarie Bove, moves for summary judgment dismissing the plaintiff's complaint arguing that the plaintiff failed prove a prima facie case of liability against her. The co-defendants Jeffrey S. Lombardi and Lisa A. Lombardi, cross-move for summary judgment dismissing the plaintiffs' complaint arguing that their vehicle was struck in the rear. The defendant's motion for summary judgment is denied, while the co-defendants' cross motion is granted.

**Facts**

This is an action to recover for personal injuries allegedly sustained as a result of a three car motor vehicle accident that occurred on October 18, 2007 at the intersection of New Dorp Lane and Edison Street in Staten Island, New York. The defendant, Annmarie Bove testified that New Dorp Lane consists of three lanes, “two going up and one down.” She further testified that she was moving in the direction with two lanes. She further testified that the right lane was designated to travel straight and the left lane was designated as a turn lane for 10<sup>th</sup> Street. Bove testified that she turned right from Edison onto New Dorp Lane and proceeded to the left lane to eventually turn onto 10<sup>th</sup> Street. Bove’s testimony was that “the accident happened and then I stopped.”

Bove testified that at the time of the accident her car was moving on New Dorp Lane when the accident occurred between her vehicle and the plaintiffs’ vehicle. However, the non-party witness Rosalie Scala that happens to work at the same location as Bove, testified that Bove’s vehicle was stopped at a red light when the Lincoln operated by the plaintiff struck Bove’s vehicle. Scala testified as follows:

- Q. At the moment that the accident occurred involving the Lexus [Bove’s vehicle], was the Lexus moving or stopped?  
A. Stopped.

Scala further testified that the Lombardi vehicle was stopped in the right most lane at the time of the accident. The plaintiff testified that his vehicle was stopped and Bove’s vehicle was moving when it struck his vehicle.

### **Discussion**

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.<sup>1</sup> It is well established that

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<sup>1</sup> *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.<sup>2</sup>

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.<sup>3</sup> If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant's motion should be denied without regard to the sufficiency of the opposition papers.

Here, the plaintiff offers no opposition to defendants Jeffrey S. Lombardi and Lisa A. Lombardi's cross motion for summary judgment dismissing the plaintiff's complaint.

"A rear end collision with a stationary vehicle creates a prima facie case of liability in favor of the operator of the stationary vehicle unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident"<sup>4</sup> Moreover, the Appellate Division, Second Department has held that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability against the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision."<sup>5</sup>

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<sup>2</sup> *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

<sup>3</sup> *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

<sup>4</sup> *Ramrattan v. Pondfield Trip Service, Inc.*, 269 AD2d 513 [2d Dept 2000], citing *Mundo v. City of Yonkers*, 249 AD2d 522, 523 [2d Dept 1998]

<sup>5</sup> *Argiro v. Norfolk Contract Carrier, Inc.*, 275 AD2d 384 [2d Dept 2000]

The defendant Bove argues that the co-defendants cross-motion must be denied because the deposition transcripts were not signed. However, the co-defendants submit a letter directed to the non-party witness, Scala, dated March 25, 2009 directing her to sign the deposition transcript and return it to the co-defendants' attorney's office. Such a letter satisfied the co-defendants' obligation to present the deposition transcript as part of their motion for summary judgment.<sup>6</sup>

The defendant failed to meet her prima facie burden demonstrating an entitlement to judgment dismissing the plaintiff's complaint as a matter of law. The differing accounts of the accident by the parties and the non-party witness constitute a triable issue of fact.<sup>7</sup> As such, Bove's motion for summary judgment is denied.

Accordingly, it is hereby:

ORDERED, that Annmarie Bove's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that Jeffery S. Lombardi and Lisa A. Lombardi's motion for summary judgment is granted and the complaint is dismissed as to them and the Clerk shall enter judgment accordingly; and it is further

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<sup>6</sup> *Pina v. Flik Intern, Corp.*, 25 AD3d 772, [2d Dept 2006]; CPLR § 3116.

<sup>7</sup> *Parra v. Jones*, 40 AD3d 326, [1<sup>st</sup> Dept 2007].

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ORDERED, that the caption shall be amended to read as follows:

**HUGO BARINAS and  
MARIA BARINAS,**

*Plaintiffs*

*against*

**ANNEMARIE BOVE,**

*Defendant*

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and it is further,

ORDERED, that the remaining parties shall return to DCM Part 3 on **Monday, October 25, 2010 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: September 27, 2010

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Joseph J. Maltese  
Justice of the Supreme Court