

**Morales v Boord**

2010 NY Slip Op 33390(U)

November 29, 2010

Supreme Court, Nassau County

Docket Number: 8775/09

Judge: Daniel Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**JUAN MORALES,**

**Plaintiff,**

**-against-**

**LAWRENCE N. BOORD,**

**Defendant.**

-----X

**TRIAL TERM PART: 45**

**INDEX NO.:8775/09**

**MOTION DATE:11-5-10**

**SUBMIT DATE:11-5-10**

**SEQ. NUMBER - 001**

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

- Notice of Motion, dated 10-4-10.....1**
- Affirmation in Opposition, dated 10-27-10.....2**
- Reply Affirmation, dated 11-4-10.....3**

The motion by the defendant for summary judgment pursuant to CPLR 3212 is granted and the action is dismissed.

This is an action for personal injuries arising as a result of an automobile - bicycle accident that occurred on October 8, 2008, at an exit from a parking lot on Stewart Avenue in Nassau County. Defendant was exiting from a parking lot on Stewart intending to go right (west) on Stewart, when, after having been stopped for 10 seconds and having looked both ways, was struck on the passenger side by plaintiff's bicycle that was proceeding east on the westbound sidewalk of Stewart intending to continue in the same direction, which required him to cross over the sidewalk that traversed the driveway where defendant was situated. In

his examination before trial, which is attached to the moving papers, the defendant testified as noted above. The plaintiff also testified in his deposition that he remembers riding eastbound on the west bound sidewalk, never saw the defendant's vehicle and that he has no other memory of the incident.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief, *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the

non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgriditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*,

187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

When a movant's submission in support of the motion establishes entitlement to summary judgment, the burden is shifted to the opposing party to rebut the case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). In this instance, defendant has made a *prima facie* showing of entitlement to relief, and plaintiff has not demonstrated that there are any issues of fact.

As there were no traffic control devices governing his movement, defendant was required to comply with VTL §1143 and VTL § 1146:

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway, shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

... every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist ... and shall give warning by sounding the horn when necessary.

A driver exiting a driveway and entering into traffic without yielding, violates the foregoing statute and is negligent. A driver is negligent when an accident occurs because he or she has failed to see that which, through the proper use of her senses he or she should have seen. *Ferrara v. Castro*, 283 AD2d 392, 393 (2d Dept. 2001); *Palumbo v. Holtzer*, 235 AD2d 409 (2d Dept. 1997).

A person riding a bicycle is entitled to all of the rights and bears all of the responsibility of a driver of a motor vehicle and must use reasonable care for his or her own safety, keep a reasonable vigilant lookout for vehicles and avoid placing himself or herself in a dangerous position. *Palma v. Sherman*, 55 AD3d 891 (2d Dept. 2008).

Here, it is quite clear that defendant was stopped for a time, looked both ways and was struck while standing still. Plaintiff was required to see what was to be seen, namely defendant's vehicle and avoid crashing into it. Under these circumstances, the sole and only cause of the accident was the conduct of the plaintiff and there is no basis, other than speculation for finding any fault on the part of the defendant. *Dobrovinskaya v. Dembitzer*, 77 AD3d 609 (2d Dept. 2010).

Defendant has submitted the police accident report. CPLR §4518(a) allows records made in the regular course of any business to be introduced into evidence when it was in the regular course of such business to make them. However, the Court of Appeals in *Johnson v. Lutz*, 253 NY 124 (1930) read into this rule a requirement that the person making the police report be the witness or that the person supplying the information to the entrant be under a business duty to do so (p. 128). In effect, each participant in the chain producing the

record must be acting within the course of regular business conduct. *See St. Lawrence County Dept. of Social Services v. Leon RR*, 48 NY2d 117 (1979).

Here, the accident not having been witnessed by the police officer and there being no business duty for either plaintiff or defendant to report to the police officer, *see Cover v. Cohen*, 61 NY2d 274 (1984), the accident report as a whole is not admissible as a business record. In the alternative, the statements of the parties in a police report are admissible as admissions of a party and may be considered. *Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 AD2d 556 (3<sup>rd</sup> Dept. 1964); *Kelly v. Wasserman*, 5 NY2d 425 (1959); *Toll v. State*, 32 AD2d 47 (3<sup>rd</sup> Dept. 1969). Here, there are no statements contained in the police report, hence it is not competent evidence of its contents.

The motion is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 29, 2010



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**

DEC 03 2010

**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**