

**Doria v Rosa**

2011 NY Slip Op 34131(U)

May 12, 2011

Supreme Court, Bronx County

Docket Number: 307680/09

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

PART 07

- Case Disposed
- Settle Order
- Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: *PP1*

-----X  
**DORIA,ALBERT**

Index No. **0307680/2009**

-against-

Hon. WILMA GUZMAN

**ROSA,RIGOBERTO**  
-----X

**MITCHELL J. DANZIGER** Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, SUMMARY JUDGMENT LIABILITY  
Noticed on November 05 2010 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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Upon the foregoing papers this

*Motion decided in accordance with the memorandum.  
decision annexed hereto.*

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 5, 12, 11

Hon.   
\_\_\_\_\_

**WILMA GUZMAN, J.S.C.**

**MITCHELL J. DANZIGER**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART PP1

-----X  
ALBERT DORIA,

Plaintiff,

DECISION and ORDER  
Index No. 307680/09

-against-

Present: Hon. Mitchell Danziger  
JSC

RIGOBERTO ROSA, C.G. DINO'S SEAFOOD,  
INC., and DINO'S SEAFOOD,

Defendants.  
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibit.....	2
Reply Affirmation .....	3

Plaintiff, Albert Doria seeks an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff on the issue of liability.

Plaintiffs complaint alleges as follows:

That on or about August 18, 2009, the plaintiff, Albert Doria, a pedestrian, was struck by a forklift operated by the defendant, Rigoberto Rosa, and owned by the defendants, C.G. Dino's Seafood, Inc., and Dino's Seafood.

Plaintiff, Albert Doria submits an Affidavit in support of the within motion which states as follows:

On August 18, 2009 at approximately 4:30 am I was walking inside

the pedestrian walkway inside the Fulton Fish Market in Bronx, New York when I was struck from behind by a forklift.

The forklift was being operated by the defendant Rigoberto Rosa and was owned by defendant C.G. Dino's Seafood.

In further support of his motion plaintiff submits an Affidavit from Robert Lombardi who witnessed the accident as follows:

On August 18, 2009 at around 5:00 am I was inside of Unit B working, when I saw a forklift coming out of Unit E.

The front of the forklift had large blue/gray ice vats stacked one on top of the other.

The vats blocked the driver's view in a forward direction. Al Doria, a customer, was standing in the pedestrian walkway and was hit by the driver who was going forwards.

The driver of the forklift could not see in front of him due to the large ice vats stacked on his forklift.

Movant asserts that the defendant knew he should have been traveling in reverse.

The defendant, Rigoberto Rosa testified at his examination before trial as follows:

Q. If you wanted to, could you have gone in reverse?

A. Yes.

Q. Any reason why you didn't?

A. I had a little bit of pain in my neck so I couldn't - -

Q. Understood. In your training or in your operating this, Mr. Rosa,

anything in your training or what they instructed you in terms of with the boxes that you had, that you should have been going in reverse?

A. Yes.

Q. How do you know that?

A. From the training.

Rosa later testified as follows:

Q. -- Without looking side to side, if you were looking straight ahead as you were crossing the general area, was your vision straight ahead blocked by the boxes?

A. Yes, it was blocked.

In opposition to the motion defendants annexed the deposition transcript of the plaintiff, Albert Doria. Defendants' counsel argues that there is a factual issue for a jury as follows: "as to whether or not plaintiff adequately used his senses to 'see what was there to be seen'."

Plaintiff testified as follows at his examination before trial:

Q. Did you see the hi-lo at any time before your accident?

A. No, sir.

Q. Did you hear any sounds whatsoever in the five seconds before the accident occurred?

A. No, sir.

#### DISCUSSION

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to show the absence of any

material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005].)

Doria’s uncontradicted testimony that he was struck from behind by a forklift inside the Fulton Fish Market is sufficient to grant summary judgment on liability. (*See, Fernandez v Laret*, 43 AD 3d 347 (1<sup>st</sup> Dept, 2007).

Accordingly, plaintiff’s motion for summary judgment on liability is granted. The case shall continue for a trial on damages only.

This constitutes the decision and Order of this Court.

Dated: May 12, 2011

So ordered,

  
\_\_\_\_\_  
Hon. Mitchell Danziger

MITCHELL J. DANZIGER