

**Barreau v Avelar-Escobar**

2014 NY Slip Op 31317(U)

May 12, 2014

Supreme Court, Suffolk County

Docket Number: 9408/2013

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NO. 9408/2013

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

**HON. JERRY GARGUILO**  
 Supreme Court Justice

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 PATRICIA BARREAU,

Plaintiff,

-against-

AVELAR-ESCOBAR, A/K/A KELVIN A.  
 AVELAR-ESCOBAR & R.D. ESCOBAR  
 HERNANDEZ A/K/A R.D.  
 ESCOBARHERNANDEZ A/K/A R. ESCOBAR

Defendants.

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**ORIG. RETURN DATE: 10/3/2013**  
**FINAL SUBMISSION DATE: 5/7/2014**  
**MTN. SEQS. #001 & 002**  
**MOTION: MOTNDECD**

**PLAINTIFF'S ATTORNEY:**  
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The Court has considered the following in connection with its determination:

1. Defendants' Notice of Motion with supporting papers, inclusive of Exhibits A through D;
2. Plaintiff's Notice of Cross-Motion with supporting papers, inclusive of Exhibits A through D;
3. Defendants' Affirmation In Opposition with supporting papers inclusive of Exhibits "A"; and
4. Plaintiff's Reply Affirmation with supporting papers, inclusive of Exhibits A through D.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on October 16, 2011 at approximately 8:05 A.M. on Washington Avenue at or near its intersection with Heyward Street, Brentwood, New York (an intersection controlled by a traffic light). Washington Street is a two-lane roadway, running north and south. It is divided by a solid line. Heyward

RR

Street runs east and west. It is uncontroverted that plaintiff, the owner/operator of a 2004 G35 Infiniti Coupe, two-door sedan, was proceeding southbound on Washington Avenue in the vicinity of the intersection with Heyward Street, when the front of her vehicle collided with the vehicle operated by defendant, K. A. Avelar-Escobar and owned by defendant, R. D. Escobar Hernández. At the time of the collision, defendant Avelar-Escobar ("Escobar"), was traveling northbound on Washington Avenue and attempted to make a left turn westbound on Heyward Street when he collided into plaintiff's vehicle, then collided into a utility pole on the southwest corner of the intersection. Defendant Escobar testified that the front passenger side of his vehicle came into contact with the front, driver's side of plaintiff's vehicle.

Defendants now move for an order pursuant to CPLR §3211(a)(7) striking the claims of recklessness, gross negligence, and/or punitive damages, claimed in paragraph "7" of the Verified Complaint and articulated in paragraphs "21" and "22" of the plaintiff's Verified Bill of Particulars dated July 15, 2013, on the grounds that punitive damages are not available for ordinary negligence and where the alleged wrong was a private wrong as opposed to one aimed at the general public. Defendants also claim that "where a defendant's liability in an automobile accident case is vicarious and based solely on his or her ownership of the vehicle, an award of punitive damages is not permissible." The owner of the vehicle which collided into plaintiff's vehicle is defendant, R. D. Escobar Hernández, defendant Escobar's mother. In this case, defendant R.D. Escobar Hernandez's liability is vicarious and is based solely on her ownership of the vehicle driven by defendant Escobar. As such, defendant Hernandez cannot be held liable for punitive damages based solely upon defendant Escobar's operation of her vehicle. The claim of punitive damages against defendant Hernandez is **DISMISSED** (see *Hale v. Saltmacchia*, 28 AD3d 715, 814 NYS 2d 218 [2<sup>nd</sup> Dept. 2006]).

Plaintiff cross-moves for an order granting her summary judgment on liability on the grounds that defendant Escobar's left turn into oncoming traffic constitutes negligence per se (violation of VTL§1141). Plaintiff also claims that defendant Escobar violated VTL§1163 (a) which provides in part, "No person shall turn a vehicle... unless and until such movement can be made with reasonable safety."

Plaintiff testified at her examination before trial that prior to the accident she was traveling southbound on Washington Avenue towards the intersection at Heyward Street at approximately 30 mph. Plaintiff initially testified that she never saw defendant Escobar's vehicle (1998 brown Infiniti) prior to the collision. However, when questioned by her attorney, Mr. Ewall, plaintiff testified that she first saw Escobar's vehicle coming from her left, when it entered her lane of traffic, prior to the collision. Plaintiff further testified that

defendant Escobar was speeding before the collision, specifically she stated "... he rushed to get in front of me." In her Affidavit, plaintiff avers that at the time of the accident, the light in her direction of travel was green. She further avers that defendant Escobar entered her lane of travel, Washington Avenue, "... abruptly and quickly and without any warning in an attempt to go westbound on Heyward Street. I saw defendant begin to turn left across my lane. Within a millisecond he hit my car, the impact was very heavy. There was no opportunity to avoid the collision." Further, "There was no way to avoid an impact once the defendant turned into my lane. Only a fraction of a second elapsed between when the defendant turned into my lane and the impact."

During his examination before trial, defendant Escobar testified that he was traveling northbound on Washington Avenue, that the traffic control device for Washington Avenue was green when he made the left turn onto Heyward Street. Defendant testified that before he made the left turn he stopped to let a car traveling southbound on Washington Avenue pass. He then saw another oncoming car, about two car lengths away from defendant, traveling at a speed, defendant estimated to be 50 mph. Defendant claims this was plaintiff's speed when he first saw her vehicle, at two car lengths away. Defendant testified that he made the left turn while noting the speed of plaintiff's vehicle as well as the distance between the two vehicles. He estimated an elapsed time of 10 to 15 seconds after he made the left turn that the impact with plaintiff's vehicle occurred and that he traveled less than 10 feet into the turn before the impact. He estimated his speed at 10 to 15 mph upon impact. Defendant claims that his foot was on the accelerator through the impact. The impact is described as "heavy." After the impact with plaintiff's vehicle, defendant Escobar's vehicle hit a utility pole. A certified copy of Escobar's DMV record indicates that Escobar was unlicensed at the time of the accident.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d

636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

Vehicle and Traffic Law § 1141 provides that “[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.” Here, plaintiff has demonstrated her *prima facie* entitlement to judgment as a matter of law by demonstrating that defendant Escobar violated Vehicle and Traffic Law § 1141 by making a left turn directly into the path of plaintiff’s vehicle when it was not reasonably safe to do so, as the plaintiff’s vehicle was legally proceeding along Washington Avenue with the right-of-way (*see Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]). In addition, inasmuch as plaintiff had the right-of-way, she was entitled to anticipate that defendant Escobar would obey those traffic laws which required him to yield to the plaintiff’s vehicle (*see Ahern v Lanaia, supra*).

The testimony of the parties during their pretrial depositions clearly indicate that defendant Escobar entered the intersection to make a left turn in front of plaintiff without regard for the limited distance between Escobar’s and plaintiff’s vehicle (two car lengths) and plaintiff’s rate of speed while at the intersection. Escobar’s own testimony is that he observed plaintiff’s car at a two car lengths distance and thereafter accelerated into the intersection. Plaintiff testified that she did not have the opportunity to stop her vehicle in order to avoid the collision. The sole proximate cause of the subject accident was defendant Escobar’s failure to yield the right of way as required by VTL § 1141 (*see Ahern v. Lanaia, supra; Agati v. Wandel*, 49 AD3d 572, 854 NYS2d 445 [2nd Dept. 2008]).

Further, inasmuch as defendant Escobar admitted that prior to commencing his left turn, he saw plaintiff’s oncoming vehicle, two car lengths away, traveling at his estimated guess, 50 mph, Escobar was negligent as a matter of law in failing to see that which, through the proper use of his senses, he should have seen, and acted accordingly. Escobar should have realized that he did not have the time necessary to navigate the left turn prior to plaintiff’s approach to the intersection. He left plaintiff with no time to avoid the collision. Defendant Escobar violated VTL § 1163 which prohibits a turn which cannot be made safely.

As plaintiff has established *prima facie* her entitlement to summary judgment on the

issue of liability the burden, therefore, shifted to defendant to raise a triable issue of fact as to whether plaintiff was negligent and, if so, whether such negligence was a proximate cause of the accident (*see Maliza v Puerto-Rican Transp. Corp., supra; McNamara v Fishkowitz*, 18 AD3d 721, 795 NYS2d 714 [2d Dept 2005]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Defendant failed to present proof raising a triable issue of fact. Since defendant was under an obligation to yield the right of way to oncoming vehicles. Accordingly, as the undisputed evidence shows defendant failed to yield the right of way to the approaching vehicle driven by plaintiff, plaintiff's motion for partial summary judgment on the issue of liability as against each defendant is **GRANTED**. *See, Loch v. Garber*, 69 AD3d 814, 815 (2<sup>nd</sup> Dept. 2010). Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part Calendar for the next available trial date on damages.

Defendants seeks an order dismissing any claims by plaintiff for punitive damages in this action.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). In opposition to a motion to dismiss for failure to state a cause of action, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded but potentially meritorious claims (*Ray v Ray*, 108 AD3d 449, 970 NYS2d 9 [1st Dept 2013]; *Mills V Gardner*, 106 AD3d 885, 965 NYS2d 580 [2d Dept 2013]; *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 670 NYS2d 973 [1998]).

On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez, supra; Ofman v Katz*, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*AGS Marine Insurance Company v Scottsdale Insurance Company*, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; *Chan Ming v Chui Pak Hoi et al*, 163 AD2d

268, 558 NYS2d 546 [1st Dept 1990]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2D 170 [2005]; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976]).

Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes wilful or wanton negligence or recklessness (*Lee v Health Force, Inc.*, 268 AD2d 564, 702 NYS2d 108 [2d Dept 20008]; *Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307, 673 NYS2d 1006 [2d Dept 1998]). Punitive damages may be awarded when defendant’s conduct has a high degree of moral culpability. Such conduct need not be intentional and it is sufficient if it is reckless and wantonly negligent as to be the equivalent of a conscious disregard for the rights of others (*Rinaldo v Mashayekhi*, 185 AD2d 435, 585 NYS2d 615 [3d Dept 1992]).

The allegations before the Court are that defendant Escobar approached the intersection at Washington Avenue onto Heyward Street while the traffic control device was green for traffic traveling on Washington Avenue. That at the intersection, defendant stopped for an oncoming vehicle, then proceeded to turn left as he observed plaintiff’s vehicle approaching the intersection at approximately 50 mph, and while the vehicle was two car lengths away, defendant Escobar accelerated into the intersection, colliding with plaintiff’s oncoming vehicle.

In light of these allegations, along with the proof that Escobar was unlicensed at the time of the collision, it is premature to conclude that the allegations in the complaint, are insufficient to support a claim that the defendant Escobar acted so recklessly or wantonly as to warrant an award of punitive damages (see *Felton v Tourtoulis*, 87 AD3d983, 929 NYS2d 493 [2d Dept 2011]; *Kaplan v Sparks*, 192 AD2d 1119, 596 NYS2d 279 [2d Dept 1993]).

Accordingly, the motion by defendant Escobar to dismiss pursuant to CPLR § 3211(a)(7), any claim for punitive damages by the plaintiff is **DENIED**. Any matter not herein addressed is deemed **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: May 12, 2014

  
**HON. JERRY GARGUILO**