

<b>Mazzeo v Rodriguez</b>
2014 NY Slip Op 33311(U)
July 9, 2014
Supreme Court, Bronx County
Docket Number: 308317/2011
Judge: Sharon A.M. Aarons
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX Part 24

---

ARTURO MAZZEO and JEANINNE MAZZEO,

Plaintiff,

-against-

RAUL RODRIGUEZ, MARIBEL RODRIGUEZ,  
and ISRAEL WESTON,

Defendants

---

Index No. 308317/2011

Present: Hon. Sharon A. M. Aarons

**DECISION and ORDER**

**Hon. Sharon A. M. Aarons:**

Defendant ISRAEL WESTON (“Weston”) moves for summary judgment pursuant to CPLR 3212 dismissing all claims and cross claims against him. Plaintiffs ARTURO MAZZEO and JEANINNE MAZZEO and defendants RAUL RODRIGUEZ and MARIBEL RODRIGUEZ file written opposition. The motion is granted.

Plaintiff commenced this action for personal injuries allegedly sustained as a result of a three-vehicle collision that occurred on August 4, 2011, on the I-95 South (also referred to as the “Southbound Bruckner Expressway”), where it divides into the Bruckner Expressway and the Throgs Neck Expressway, in Bronx County.

In support of the motion, defendant Weston submits the pleadings, defendant Weston’s unsigned but certified deposition testimony,<sup>1</sup> the unsigned and uncertified deposition testimony of plaintiff Arturo Mazzeo, and the unsigned and uncertified deposition testimony of defendant Raul

---

<sup>1</sup> The Court will consider the full deposition testimony of defendant Weston, as a certified, unsigned deposition transcript submitted by the party deponent is deemed to be adopted as accurate by the deponent, and is admissible. (*Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543, 962 N.Y.S.2d 54 [1st Dept. 2013]; *Pavane v. Marte*, 109 A.D.3d 970, 971 N.Y.S.2d 562 [2d Dept. 2013]; *Vetrano v. J. Kokolakis Contr., Inc.*, 100 A.D.3d 984, 986, 954 N.Y.S.2d 646 [2d Dept. 2012]; *Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d 935, 936, 937 N.Y.S.2d 602 [2d Dept. 2012]).

Rodriguez.<sup>2</sup> Defendant Weston, in his deposition states that at prior to the collision, he was traveling along “95 South,” at or around 6:30 a.m., and approaching the point at which the road splits- by “Bruckner and Throgs Neck Exchange” - and the traffic in two lanes continue to the right and the other two lanes continue to the left. At the moment of contact, he was traveling in the “third lane,” i.e., the lane that was the second lane from the divider that separated the north-bound and south-bound lanes of travel. He intended to continue “straight south,” to the right of the split. The weather was clear and dry, and traffic was moderate. Prior to the accident, he observed a “silver Chrysler,” traveling approximately one half of a car length ahead of him, in the lane to his right, i.e., the “second lane.” Approximately one minute elapsed between when he first observed the silver Chrysler and the time of the collision. The silver Chrysler “merged” from the second lane, into the lane in which he was traveling, and hit his vehicle. The middle of the driver’s side of the silver vehicle, came into contact with the right passenger fender of his. He pressed the brake pedal “as soon as the vehicle made contact.” As a result of the collision, his car was pushed to the left and “turned around 360,” and the driver’s side of his vehicle in the front “got hit head on into the wall.” When his vehicle came to a stop, it was facing north and was parallel to the divider.

Plaintiff Arturo Mazzeo in his deposition stated that he was traveling along I-95 in the southbound direction. The weather conditions were clear and dry, and there was light traffic. He entered from the right lane, and immediately switched from the right lane, to the far left lane. He continued in the far left lane, abutting the divider separating northbound and southbound traffic, up until the time

---

<sup>2</sup> The various depositions submitted were unsworn and at times uncertified. However, no party has challenged the accuracy of any of the transcripts, nor challenged the failure to submit the certification of any of the depositions. Under these circumstances these deficiencies are deemed waived by the parties. (*See Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 [2d Dept. 2014]) (failure to submit to the Supreme Court a certified copy of the plaintiff’s deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect); (*Gomez v. Shop-Rite of New Greenway*, 110 A.D.3d 483, 973 N.Y.S.2d 65, 2013 N.Y. App. Div. LEXIS 6489 [1st Dept. 2013]). Moreover, the unsigned and uncertified depositions of Arturo Mazzeo and Raul Rodriguez were adopted as accurate by those parties in their respective Affirmations in Opposition in which they relied on, and referred the Court to, the depositions as attached to defendant Weston’s moving papers. (*See Franco*, 103 A.D.3d at 543, 962 N.Y.S.2d at 55).

of the accident. There were no vehicles in his lane ahead of him, or directly beside him in the moments leading up to the accident. He was approximately fifteen feet behind the vehicle closest to him that was involved in the instant collision. At the time of the collision, all vehicles were traveling at approximately fifty miles per hour. At or around the area where the expressway splits, he observed the "caravan," which had been traveling in the third lane from the left, cut across the "divider," i.e., the painted white solid line that was "like a V, with stripes within the V." As a result, the driver's side part of the "caravan," hit the passenger side, near the front, of the "SUV" that had been traveling in the second lane from the left. He pressed his brakes, and attempted to veer to the right to avoid the two vehicles, however, his vehicle was struck. Two to three seconds elapsed between the collision between the "caravan" and the "SUV," and the collision between the "SUV" and his vehicle. The "SUV" and the "caravan" were "stuck together" after the impact between them. The "SUV" was perpendicular in his lane at the time of contact with his vehicle. The front left end of his car came into contact with the rear half of the driver's side of the "SUV." He observed the "SUV," hit the guardrail (also referred to as the "divider") that separated the northbound and southbound traffic. After the impact, his vehicle traveled approximately one hundred feet and came to rest beneath an overpass. The front of his vehicle was "completely smashed," rendering his vehicle "undrivable."

Defendant Raul Rodriguez, in his deposition, stated that he was traveling along the I-95, on a clear and dry day. Traffic was light. The accident occurred at or around 6:30 a.m., at the area where the I-95 splits into the Throgs Neck Bridge and I-95. He had entered the highway via a ramp, approximately thirty seconds before the collision. He was traveling at about fifty miles per hour at the time of the accident. Within ten seconds of entering the highway, he switched from the "right" lane, to the second lane from the right. Prior to the collision, he observed vehicles ahead of him in his lane of travel, but did not see any vehicles in the third lane from the right. He traveled another twenty seconds, and then attempted to change lanes, and move into the third lane from the right. Before changing lanes he

activated his turn signal, and checked the side view and rear view mirrors and ascertained that the way was clear. While he initially testified that his vehicle was struck, after he had been traveling in the third lane from the right for three seconds, he later testified that it was approximately three seconds after he began to merge, and "three quarters" of his vehicle had entered the third lane from the right, the left quarter panel up to the left front fender of his vehicle was struck by a "dark blue truck." One quarter of his vehicle was still in the second lane from the right at the time of the accident. He observed the "dark blue" vehicle in his rear view mirror approximately two seconds prior to the collision, after he had begun changing lanes. At the time of the collision, he was traveling at or around forty-five miles per hour. As a result of the collision, his vehicle moved forward approximately one hundred feet, moving slightly to the right. His vehicle came to rest after he pulled over, and stopped his vehicle on "the shoulder." Other than the "dark blue" vehicle, his vehicle did not make contact with any other vehicle. The left quarter panel, driver's side door, driver's side passenger section, and the left front fender of his vehicle were damaged as a result of the collision. He did not observe the third vehicle involved in the accident the "white car," until after the collision when the white vehicle stopped behind his. He did not see a collision between the "white car," and the "dark blue" vehicle.

In opposition, defendants Raul Rodriguez and Maribel Rodriguez submit an attorney's affirmation, and rely on "the deposition testimony of the parties, herein which are annexed to the moving papers." Through counsel's affirmation, and in reliance on defendant Raul Rodriguez and defendant Israel Weston's deposition testimony, defendants argue, *inter alia*, that (I) defendant Weston was traveling at an unsafe speed and failed to yield to defendant Rodriguez, (ii) defendant Weston testified to doing nothing to avoid the accident, and (iii) defendant Weston intended to take the "right fork," and was thus merging into defendant Raul Rodriguez's path.

In opposition, plaintiffs submit an attorney's affirmation, the verified bill of particulars, a photograph and an affidavit of plaintiff Arturo Mazzeo stating that the photograph accurately depicts

the scene of the instant accident,<sup>3</sup> and excerpts from the depositions of plaintiff Arturo Mazzeo, defendant Israel Weston, and defendant Raul Rodriguez. Plaintiffs also direct the Court to defendant Weston's moving papers for "complete copies of the transcripts" of plaintiff Arturo Mazzeo, defendant Weston, and defendant Raul Rodriguez. Plaintiff argues that there are questions of fact as to defendant Weston's negligence based on, *inter alia*, his admissions that he did not observe Raul Rodriguez's turn signal, and his failure to take evasive action once he observed defendant Rodriguez's vehicle entering his lane of travel.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 320 [1986]). The moving party must tender<sup>4</sup> sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in *admissible form* to establish the existence of a triable issue of fact. The *burden of persuasion*, however, always remains where it began, i.e., with the proponent of the issue. Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*300 East 34th Street Co. v. Habeeb*, 248 A.D.2d 50, 683 N.Y.S.2d 175 [1st Dept. 1997]).

---

<sup>3</sup> "A photograph is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph accurately represents that which it purports to depict." (*Corsi v. Town of Bedford*, 58 A.D.3d 225, 228, 868 N.Y.S.2d 258, 261 [2d Dept. 2008]). Here, however, plaintiff Arturo Mazzeo's affidavit did not identify that the photograph which he reviewed was plaintiffs' Exhibit "B." Moreover, "[c]ounsel's affirmation does not state when, by whom, or the circumstances under which, the attached photo was taken." (*Jordan v. Mediate*, 24 Misc. 3d 1212(A), 890 N.Y.S.2d 369 [Sup. Ct., Kings County 2009]). Finally, the roadway depicted in the photograph shows 5 lanes of travel whereas all the deponents in the deposition testimony submitted to the Court, stated that there were four lanes of travel. Accordingly, the Court considers the photograph submitted to be inadmissible, and will not consider it in making a determination on the motion for summary judgment.

<sup>4</sup> There is no requirement that proof be submitted in the form of affidavit, as opposed to other acceptable forms, such as deposition testimony. (*Muniz v. Bacchus*, 282 A.D.2d 387, 724 N.Y.S.2d 46 [1st Dept. 2001]).

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, which should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Consequently, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 165).

Here, defendant Weston alleges that he is not liable because he was proceeding in his lane of travel when defendant Raul Rodriguez's vehicle entered his lane of travel, thereby causing a collision between the two vehicles. In opposition, defendants Raul Rodriguez and Maribel Rodriguez argue that the defendant failed to observe the Rodriguez vehicle changing lanes, and caused the collision, and that this is evidenced by the fact that most of defendant Rodriguez's vehicle was in defendant Weston's lane, prior to the collision. In opposition, the plaintiffs argue that while plaintiff Arturo Mazzeo observed defendant Rodriguez's vehicle change lanes, thereby colliding with defendant Weston's vehicle, based on defendant Weston and Raul Rodriguez's deposition testimony, there is an issue of whether defendant Weston failed to properly observe the Rodriguez vehicle, so as to avoid the collision, and whether defendant Weston failed to take evasive action.

Plaintiffs' argument that defendant Weston may have been merging or changing lanes prior to the collision is a "feigned issue of fact," as plaintiff Arturo Mazzeo testified that he observed the vehicle in the third lane from the left cut across the "V" denoting where the traffic splits, and collide with defendant Weston's vehicle. (*Machado v. Henry*, 96 A.D.3d 437, 945 N.Y.S.2d 552 [1st Dept. 2012] [plaintiff failed to raise a triable issue of fact where "[p]laintiff's argument that [defendant] may have been changing lanes or merging at the moment of the accident . . . is a feigned issue of fact, insufficient to defeat the motion]). Plaintiff testified that [defendant 1] did not cut off [defendant 2], was

not merging at the moment of the accident, and that it was [defendant 2] who hit [defendant 1]). In addition, despite counsel's assertions, there is no evidence that defendant Weston was not keeping a proper lookout, or that he could reasonably have taken any evasive action to prevent the collision.

Defendant Raul Rodriguez's testimony does not raise an issue of fact as to whether defendant Weston should have observed the Rodriguez vehicle changing lanes. The testimony establishes that defendant Rodriguez was negligent as a matter of law in making an unsafe lane change. (VTL 1128[a]; *cf.*, *Fogel v. Rizzo*, 91 A.D.3d 706 [2d Dept. 2014].) Defendant Rodriguez admitted that at no time prior to the impact did he ever observe co-defendant Weston's vehicle, and in failing to see that which he should have seen through the use of his senses, he conceded that he was negligent as a matter of law. (*Allen v. Echols*, 88 A.d.3d 926, 931 N.Y.S.2d 402 [2d Dept. 2011].) Moreover, the testimony established that defendant Rodriguez either crossed over the solid white lines separating the lanes of travel, or made his lane change immediately before the solid white lines, such that co-defendant Weston had no opportunity to take evasive measures as a matter of law.

Accordingly, defendant Israel Weston's motion for summary judgment dismissing all claims and cross-claims against him is granted. It is hereby

**ORDERED** that all claims in the complaint and cross-claims against defendant ISRAEL WESTON are dismissed, and it is

**ORDERED** that defendant ISRAEL WESTON serve a copy of this Order on all parties with notice of entry thereon.

Dated: July 9, 2014

  
\_\_\_\_\_  
SHARON A. M. AARONS, J.S.C.