

**Martinez v Johnson**

2015 NY Slip Op 31027(U)

May 7, 2015

Supreme Court, Bronx County

Docket Number: 304424/13

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 THE BRONX

-----x  
**Eduardo Martinez**

*Plaintiff*

Index No. 304424/13

-against-

*Decision and Order*

**Naomi Johnson and  
Rahniqye Pinckney**

*Defendants*

Howard H. Sherman  
J.S.C.

-----x  
*Facts and Procedural Background*

Plaintiff Eduardo Martinez ("Martinez") seeks recovery for injuries alleged to have been sustained in a two-vehicle collision that occurred on March 18, , 2013 on the E.L. Grant Highway , Bronx, New York. At the time Martinez alleges he was the operator of his motor vehicle <sup>1</sup>, and that a vehicle then being operated by defendant Rahniqye Pinckney ("Pinckney") that was owned by defendant Naomi Johnson ("Johnson") collided with his .

This action was commenced in July 2013, and issue was joined in the following month with the service of defendants' answer consisting of a denial of the allegations of the complaint and the assertion of four affirmative defenses.

The Note of Issue was filed on August 25, 2014.

\_\_\_\_\_  
<sup>1</sup> Verified Complaint ¶ 28, 32 The motion is not supported by plaintiff's affidavit or by his deposition testimony.

Motion

Plaintiff now moves for an order awarding summary judgment on the issue of liability as against defendants arguing that there is no triable issue of fact that the collision was caused solely by the culpable conduct of the defendant driver. The motion is supported by a copy of the pleadings, and Pinckney's deposition testimony, as certified by the court reporter.

**Discussion and Conclusions**

It is by now well settled that 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 demonstrate the absence of a material issues of fact ( Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980] ). To support the granting of such a motion, it must clearly appear that no material and triable issue of fact is presented, as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof, but must affirmatively

demonstrate the merit of its claim or defense” (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1<sup>st</sup> Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition ( Alvarez v. Prospect Hospital, 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885 ).

Upon a review of the moving papers, it is the finding of this court that plaintiff has failed to demonstrate his entitlement to the relief requested. Plaintiff comes forward with no probative proof, by affidavit, or testimony, or documentary evidence, to demonstrate as a matter of law that the contact to the rear bumper of a car in the parking lane, which Pinckney acknowledged to have been caused by her car’s sliding on the snowy road, was in fact a collision to his vehicle . Pinckney testified that she had a conversation with the “guy “ who emerged from the other vehicle, however, she does not identify that individual. Nor does plaintiff come forward with any evidence of co-defendant Johnson’s ownership of the vehicle being operated by Pinckney , another allegation denied in the answer, and as such, the claim for vicarious liability (see, Vehicle and Traffic Law § 388) as against Johnson has not been dispositively demonstrated.

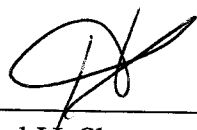
In light of this finding, the court need not consider the sufficiency of defendants' papers in(see, Alvarez supra, at 324 ).

Accordingly, it is

ORDERED that the motion of the plaintiff for an order awarding summary judgment on the issue of liability, is denied.

This constitutes the decision and order of this court.

Dated: May 7, 2015

  
\_\_\_\_\_  
Howard H. Sherman