

**Pena v Valladares**

2015 NY Slip Op 32571(U)

May 14, 2015

Supreme Court, Orange County

Docket Number: 0018/2013

Judge: Robert A. Onofry

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.

**ORIGINAL**

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X  
ALMA PENA, NOELIA PENA and  
ALEJANDRO PENA,

Plaintiffs,

-against-

SIDIA VALLADARES, JULIO HARREJON,  
ROBERT AIKENS and KATRINA MCCASTER

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**DECISION and ORDER**

Index No. 0018/2013  
Motion Date: April 30, 2015

-----X  
The following papers numbered 1 to 5 were read and considered on this motion by Defendants Robert Aikens and Katrina McCaster for an Order, pursuant to CPLR §3212, granting Defendants summary judgment dismissing the Plaintiffs' complaint on the ground that the Plaintiffs failed to establish any actionable negligence against the moving Defendants Aikens and McCaster arising from the motor vehicle accident of April 11, 2011.

Notice of Motion - Pawliczek Affirmation - Exhibits A-G.....1-3  
Shuttle worth Affirmation in Opposition - Exhibit A.....4-5

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied for the reasons set forth below.

**Factual Background/Procedural History**

This action was commenced by Plaintiffs by the filing of a Summons and Verified Complaint on or about January 2, 2013. Plaintiffs, Alma Pena and Noelia Pena, allege, in relevant part, that they suffered personal injuries arising from, and proximately caused by, a motor vehicle accident that occurred on April 11, 2011 on Lander Street at its intersection with Third Street in the City of

[\* 2]

Newburgh, Orange County, New York.

In relevant part, Plaintiffs allege that they were passengers in a taxi being driven by Defendant Julio Herrejon, and owned by Defendant Sidia Valladares, when Harrejon failed to stop at a stop sign and entered the intersection, striking the motor vehicle being driven by Defendant Katrina McCaster, and owned by Defendant, Robert Aikens. Based upon the foregoing, Plaintiffs seek monetary damages to compensate them for the injuries allegedly sustained from, and proximately caused by, the motor vehicle accident at issue. Plaintiff Alejandro Pena derivatively seeks damages for loss of consortium.

Issue was joined by the filing of an Answer by Defendants Robert Aiken and Katrina McCaster on January 24, 2013. Defendants Valladares and Harrejon have previously been found to be in default pursuant to Order of this Court dated October 28, 2013. Paper discovery and examinations before trial have been conducted. Defendants Aikens and McMaster now move for summary judgment, seeking to dismiss the complaint, and all causes of action asserted against them, on the ground that the Plaintiffs have failed to establish any actionable negligence against the moving Defendants. In opposition, Plaintiffs argue, in relevant part, that issues of fact exist from which a jury could reasonably conclude that the moving Defendants, while not totally responsible, were comparatively negligent. In sum, the factual record could sustain a finding that fault should be apportioned. The motion is denied.

In so moving, McCaster asserts that her vehicle was struck by Defendant Harrejon's vehicle which failed to stop at the stop sign and that the circumstances surrounding the accident are not in dispute.

In deposition testimony, Plaintiffs, who were back seat passengers in the taxi being driven

[\* 3]

by Harrejon, testified that Harrejon either failed to stop at the stop sign, or that he did not come to a complete stop prior to entering the intersection. Neither Plaintiff saw Defendant McCaster's vehicle prior to the accident.

Defendant McCaster, at her examination before trial, testified that she was traveling on Landers Street, approaching its intersection with Third Street, an intersection in which her direction of travel was not governed by a stop sign. She was traveling towards the intersection at approximately 30 miles per hour, and first observed Defendant Harrejon's vehicle when it was about four feet away from the intersection. She further testified that she continued at approximately 30 miles per hour as she approached, and ultimately entered, the intersection and that five seconds elapsed between the time she first observed Harrejon's vehicle to the time of ultimate impact.

#### **Discussion/Legal Analysis**

It is well settled that a grant of summary judgment is appropriate only where the Court determines, after a "search of the record", that there are no material or triable issues of fact. Issue identification not issue determination is controlling. Therefore, the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers. See, *Weingard v. New York University Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]; *Giammarino v. Angelo's Royal Pastry Shop, Inc.*, 168 A.D.2d 423, 562 N.Y.S.2d 547 [2<sup>nd</sup> Dept. 1990].

Correspondingly, in order to defeat such a motion, it is incumbent upon the opponent to

[\* 4]

produce evidentiary proof, in admissible form, sufficient to require a trial of material questions of fact or demonstrate [an acceptable] excuse for the failure to do so. See, *Alvarez v. Prospect Hospital* 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]; *Marine Midland Bank, N.A. v. Brown*, 115 A.D.2d 523, 496 N.Y.S.2d 53 [2<sup>nd</sup>Dept.1985]; *City of New York v. Grosfeld Realty Company*, 173 A.D.2d 436, 570 N.Y.S.2d 61 [2<sup>nd</sup>Dept.1991].

Here, the evidence is clear that Defendant Herrejon failed to stop at the stop sign; that failure constituted negligence, as a matter of law. *Klein v. Crespo*, 50 A.D.3d 745, 855 N.Y.S.2d 633 [2<sup>nd</sup> Dept.2008]; *Marcel v. Chief Energy Corp.*, 38 A.D.3d 502, 832 N.Y.S.2d 61 [2<sup>nd</sup>Dept.2007]. Based upon the same, Defendant McCaster argues that since she was traveling straight, and her right of way was not controlled by a traffic control signal, she had the right of way and was entitled to anticipate that other motorists would obey the traffic laws and the traffic devices. See, *Naminsnack v. Martin*, 244 A.D.2d 258, 664 N.Y.S.2d 435 [1stDept.1997]; *Cenovski v. Lee*, 266 A.D.2d 424, 698 N.Y.S.2d 868 [2<sup>nd</sup>Dept.1999]; *Mohammad v. Ning*, 72 A.D.3d 913, 899 N.Y.S.2d 356 [2<sup>nd</sup>Dept. 2010]. Moreover, she argues, that there is no evidence in the record from which a jury could reasonably conclude that she operated her vehicle in anything other than a prudent and reasonable manner and that the facts clearly point to the negligence of one party without any culpable conduct by the other, thus warranting summary judgment. *Brown v. City of New York*, 237 A.D.2d 398, 655 N.Y.S.2d 567 [2<sup>nd</sup>Dept. 1997]; *Morowitz v. Naughton*, 150 A.D.2d 536, 541 N.Y.S.2d 122 [2<sup>nd</sup> Dept. 1989]; *O'Callaghan v. Flitter*, 112 A.D.2d 1030, 493 N.Y.S.2d 28 [2<sup>nd</sup>Dept.1985]; *Ely v. Pierce*, 302 A.D.2d 489, 755 N.Y.S.2d 250 [2<sup>nd</sup>Dept. 2003].

In opposition, Plaintiffs contend that questions of fact exist as to whether McCaster exercised reasonable care as she drove through the intersection, without slowing down, despite observing

[\* 5]

Harrejon's vehicle for several seconds prior to the happening of the accident. Since there may be more than one proximate cause of an accident, a jury could reasonably conclude that McCaster failed to see what there was to be seen through the reasonable use of her senses and that she had the "last clear chance" to avoid the accident. See, *Goemans v. County of Suffolk*, 57 A.D.3d 478, 868 N.Y.S.2d 753 [2<sup>nd</sup> Dept. 2008]; *Romano v. 202 Corp.*, 305 A.D.2d 576, 759 N.Y.S.2d 365 [2<sup>nd</sup> Dept. 2003]; *Ostrander v. Sannicandro*, 80 A.D.3d 587, 914 N.Y.S.2d 268 [2<sup>nd</sup> Dept. 2011]. As such, Plaintiffs argue, issues of comparative negligence exist and summary judgment is inappropriate. *Nevarez v. SRM Management Corp.*, 58 A.D.3d 295, 867 N.Y.S.2d 431 [1<sup>st</sup> Dept. 2008]. The Court agrees.

Here, notwithstanding Defendants' *prima facie* showing, Plaintiff nevertheless successfully rebutted such showing at least to the extent that material issues of fact exist in determining the comparative fault of the Defendants. There is nothing in the record which suggests that the Defendants slowed down when approaching the intersection. See, Vehicle and Traffic Law §1180(d)(2)(e). Moreover, based upon Defendant's testimony the trier of fact could reasonably conclude that there was ample time to slow down or take evasive action. Thus, based upon the foregoing, Defendants' motion must be and is hereby denied.

Accordingly, and in conformity with the foregoing and for the reasons cited herein, it is hereby

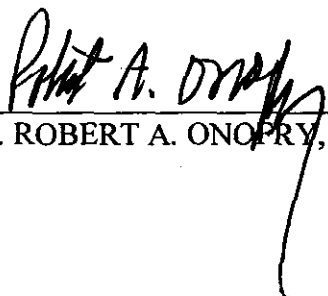
ORDERED, that Defendants Robert Aikens and Katrina McCaster's motion for summary judgment be, and the same is hereby, denied; and it is further

ORDERED, that all parties are directed to, and shall, appear, through respective counsel, for a Status Conference, on Tuesday, June 16, 2015 at 1:30 P.M., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

This constitutes the Decision and Order of the Court.

Dated: May 14, 2015  
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, ASCJ

TO: FINKELSTEIN & PARTNERS, LLP  
Attorneys for Plaintiff  
Office & P.O. Address  
1279 Route 300, P.O. Box 1111  
Newburgh, New York 12551

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP  
Attorneys for Defendant Valladares  
Office & P.O. Address  
2649 South Road  
Poughkeepsie, New York 12601

JAMES R. MCCARL & Associates  
Attorneys for Defendants Aikens and McCaster  
Office & P.O. Address  
18 Bridge Street  
Montgomery, New York 12549

JULIO HERREJON  
Defendant, *Pro Se*  
185 Dubois Street  
Newburgh, New York 12550