

**Marziano v Lupiano**

2017 NY Slip Op 33520(U)

September 13, 2017

Supreme Court, Westchester County

Docket Number: Index No. 66015/2015

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
JACK MARZIANO,

Plaintiff,

-against-

BARBARA LUPIANO,

Defendant.  
-----X

**INDEX NO. 66015/2015**

**DECISION/ORDER**

**Motion Date: 7/26/17**

**Motion Seq. 2**

**ECKER, J.**

The following papers numbered 1 through 14 were considered on the motion of Jack Marziano ("plaintiff"), made pursuant to CPLR 3212, for partial summary judgment as to liability, as against Barbara Lupiano ("defendant"), and for such other and further relief:

**PAPERS**

**NUMBERED**

Notice of Motion, Affirmation, Exhibits A-E	1 - 7 <sup>1</sup>
Affirmation in Opposition, Exhibits A-E	8 - 13
Affirmation in Reply	14

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges he was injured by the automobile operated by defendant, while a pedestrian at the Shoprite Super Market, on Tuckahoe Road, Yonkers, on July 3, 2015. The certified accident report prepared by the responding police officer states "She [defendant] believes she may have struck Mr. Marziano as she was pulling into a space. Mr. Marziano (pedestrian) related that vehicle #1 [defendant's] bumped him knocking him to the ground as he was walking in the parking lot." [Pltf Ex. C]

<sup>1</sup> Plaintiff was previously advised that court rules require a plaintiff to use numbered exhibit tabs. Plaintiff has disregarded the court's admonition.

In her affidavit in opposition, as relevant to the immediate issue before the court, namely the motion for summary judgment as to liability, defendant states "I was backing toward a parking spot that appeared open. Before starting to back up, I checked to see if the path behind me was clear. I looked around and checked my mirrors and saw no one in my path of travel. Seeing the path behind me was clear I started to back up using my mirrors and checking around the vehicle. The plaintiff was proceeding in the same direction as I was backing and was located to the left hand side of my vehicle at the time I was backing up. I then realized that the spot which I was intending to enter had a vehicle located within it so I stopped then placed my car in drive. This is when the alleged incident occurred. The plaintiff without my knowledge walked directly in front of my vehicle." [Def.'s Aff. ¶ 4-5].

Previously, by Decision/Order dated June 9, 2016, the court denied plaintiff's pre-discovery motion for partial summary judgment as to liability, while granting his motion for partial summary judgment, in that his fractured knee constituted a serious injury, as defined in Insurance Law § 5102. With discovery having been completed and a Notice of Issue having been filed on April 19, 2017, plaintiff now renews his motion for partial summary judgment as to liability, as permitted pursuant to the court's prior decision.

It is well established that the moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], quoting *LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp., supra*. On a motion for summary judgment, the court's function is to determine if a factual issue exists, and 'the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and [a]n conflict in the testimony or evidence presented merely raise(s) an issue of fact.' [internal citations omitted]. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

Further, "[t]o prevail on a motion for summary judgment on the issue of liability in an action alleging negligence, a plaintiff has the burden of establishing, *prima facie*, not only that the defendant was negligent, but that the plaintiff was free from comparative fault, since there can be more than one proximate cause of the accident." *Ramos v Bartis*, 112 AD3d 804 [2d Dept 2013]. Where the plaintiff has established her or his *prima facie* entitlement to judgment as a matter of law, the opposing party may defeat the motion by submitting sufficient evidence to raise a triable issue of fact as to the plaintiff's comparative fault." *Hollis v Marinelli*, 149 AD3d 922 [2d Dept 2017]; *Zhu v Natale*, 131 AD3d 607, 608 [2d Dept 2015].

The court now has before it the deposition transcripts of the parties, and an affidavit from plaintiff, dated December 14, 2015 [Pltf. Ex. B], the latter not submitted by him on his first motion. It is undisputed there were two impacts during the incident, the second of which allegedly resulted in plaintiff's injuries. Plaintiff had finished his shopping at Shoprite and was pushing his shopping car to his car parked 500-600 feet from the store. As he walked between rows of vehicles in the nearly full parking lot, he encountered defendant backing her vehicle into what she believed was an available parking space. In this first impact, defendant's vehicle struck the left side of plaintiff's shopping cart. Plaintiff admits at that point he approached defendant's vehicle on the driver's side, with her window down, and proceeded to curse her using "very harsh words." Thereafter, plaintiff was crossing behind defendant's vehicle when defendant struck him directly while her vehicle was once again backing up in reverse. It is as a result of this second impact that plaintiff claims defendant is responsible for his injuries.

Defendant argues that plaintiff's action in crossing the lane of traffic behind defendant's vehicle, following his having cursed at her, which upset her, constitutes factual allegations sufficient to raise an issue of fact as to whether the trier of fact may find he was comparatively negligent in the causing of the second impact. The court finds the facts as portrayed by each party in his/her deposition show, as a matter of law, that only plaintiff can be held responsible for the second impact. Defendant admits she did not see plaintiff behind her vehicle as she was traveling in reverse.

Upon review of the deposition testimony, the court finds that plaintiff has suitably demonstrated his entitlement to the relief demanded. Defendant admitted to the responding police officer, as confirmed in the certified incident report [Pltf. Ex. C] that "she believes she may have struck Mr. Marziano as she was pulling into a space." If she did not see plaintiff prior to the second impact, as she was in reverse, that is not the fault of plaintiff, who it appears was within his rights in continuing on his way following the first impact, with no expectation that defendant would thereafter back into him. To reiterate, the court finds no conduct on the part of plaintiff that warrants consideration of comparative negligence on his part. *Lesaldo v Dabas*, 140 AD3d 708 [2d Dept 2016].

In making this determination, the court is further guided by several applicable provisions of the Vehicle and Traffic Law, to wit: VTL § 1146 [Drivers to exercise due care] imposes upon a motorist the duty to exercise due care to avoid colliding with a pedestrian, and to give warning by sounding the horn when necessary; and VTL § 1211 [Limitations on backing] provides that a driver of a motor vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic. The court finds, based upon the record before it, that plaintiff has submitted evidence demonstrating that defendant was negligent in backing her vehicle into him, and that defendant has failed to offer sufficient evidence to demonstrate the existence of a triable issue of fact. *Pragay v Lavado*, 45 AD3d 828 [2d Dept 2007]; *Ortiz v Calavera*, 26 AD3d 319 [2d Dept 2006].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff Jack Marziano, made pursuant to CPLR 3212, for partial summary judgment as to liability, as against defendant Barbara R. Lupiano, is granted; and it further

ORDERED that the parties shall appear in the Settlement Conference Part of this Court, Room 1600, on October 17, 2017, at 9:15 A.M.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
September 13, 2017

ENTER,

  
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HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

Adams Law Firm, P.C.  
Attorneys for Plaintiff  
Via NYSCEF

Roe & Associates  
Attorneys for Defendant  
Via NYSCEF