

**Plasencia v Canzone**

2018 NY Slip Op 34501(U)

August 31, 2018

Supreme Court, Bronx County

Docket Number: Index No. 20320/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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ANNA PLASENCIA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 20320/2018E

RALPH CANZONE, JOEL PLASENCIA and VICENTE  
PLASENCIA,

Defendants.

-----X

John R. Higgitt, J.

Upon plaintiff’s July 2, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; the August 8, 2018 affirmation in opposition and the affidavit and exhibit submitted therewith; plaintiff’s August 11, 2018 affirmation in reply and the affidavit and exhibit submitted therewith; and due deliberation; plaintiff’s motion for summary judgment is granted in part and denied in part.

Plaintiff passenger moves for partial summary judgment on the issue of the negligence of defendant Ralph Canzone, driver of the vehicle that collided with the vehicle in which plaintiff was a passenger, in causing the subject motor vehicle accident. Plaintiff submitted an affidavit in which she avers that while her vehicle proceeded through an intersection uncontrolled for her direction of travel, she observed the Canzone vehicle fail to stop for the stop sign controlling its direction of travel and collide with her vehicle. This adequately established prima facie entitlement to summary judgment on the issue of Canzone’s liability (*see Gonzalez v Bishop*, 157 AD3d 460 [1st Dept 2018]).<sup>1</sup>

In opposition, Canzone submits an affidavit in which he avers that he did stop at the stop

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<sup>1</sup> Although she also submitted a certified police accident report, the exculpatory statements therein purportedly attributable to the drivers are not admissible evidence (*see 76th & Broadway Owner LLC v Consol. Edison Co. of N.Y. Inc.*, 160 AD3d 447 [1st Dept 2018]).

sign for a few seconds, then approached the curb and stopped for another few seconds. He looked to his left and right and, seeing no oncoming vehicles, entered the intersection, where his vehicle was struck on the passenger's side by the vehicle in which plaintiff was a passenger.

Canzone argues he had the right of way pursuant to Vehicle and Traffic Law § 1140. This provision is inapplicable, however, as it applies to uncontrolled intersections, and at least one direction of travel at the subject intersection was governed by a traffic control device (*see Crespo v N.Y.C. Hous. Auth.*, 222 AD2d 300 [1st Dept 1995]). In any event, given the lack of details regarding the size of the intersection, the width of the streets, the posted speed limits of the respective roadways or the speed of the vehicles, it cannot be determined which vehicle entered the intersection first and which would have had a duty to yield under the provision. The court notes, though, that the point of impact on the vehicle in which plaintiff was a passenger was not the side but the front corner of the vehicle and the point of impact on Canzone's vehicle was not the front but the passenger's side. These factors, and the differences in the parties' versions of the facts, militate against granting the relief sought (*see Ampofo v Brydson*, 144 AD3d 611 [1st Dept 2016]). To the extent that plaintiff seeks a finding that Canzone's actions were the sole proximate cause of her injuries, her affidavit describing what she perceived is insufficient to establish that, as a matter of law, the driver of her vehicle (defendant Joel Plasencia) exercised reasonable care, particularly in light of the content of Canzone's affidavit.

Plaintiff also moves for an order dismissing Canzone's first affirmative defense alleging plaintiff's culpable conduct. As a passenger, her proof was sufficient to establish prima facie her freedom from negligence contributing to the accident.

Accordingly, it is

ORDERED, the plaintiff's motion for partial summary judgment on the issue of the

liability of defendant Ralph Canzone and for an order dismissing that defendant's first affirmative defense is granted to the extent of striking said defendant's first affirmative defense alleging plaintiff's culpable conduct; and it is further

ORDERED, that the first affirmative defense of defendant Ralph Canzone is dismissed.

This constitutes the decision and order of the court.

Dated: August 31, 2018

  
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John R. Higgitt, A.J.S.C.