

**Irizarry v Ortiz**

2019 NY Slip Op 30794(U)

February 21, 2019

Supreme Court, Bronx County

Docket Number: 300792/2016

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 15



NOREEN IRIZARRY, et al.

Index No. 300792/2016

-against-

Hon. MARY ANN BRIGANTTI

JESVANIA ORTIZ, et al.

Justice Supreme Court

The following papers numbered 1 to 4 were read on this motion ( Seq. No. 1 )  
for SUMMARY JUDGMENT noticed on July 24, 2018.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3
Replying Affidavit and Exhibits	No(s). 4

Upon the foregoing papers and after oral argument, the defendants Jesvania Ortiz and Jansel M. Garcia Lopez ("Lopez") (collectively, "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Noreen Irizarry, as Administrator of the Estate of Benito Guadalupe, deceased ("Plaintiff") pursuant to CPLR 3212.

*Background*

This matter arises out of an alleged motor vehicle -versus-pedestrian accident that occurred on September 7, 2014 on White Plains Road near its intersection with Watson Avenue, between a vehicle operated by Lopez, and the decedent Benito Guadalupe ("Decedent"), who was eighty-five (85) years old at the time of the accident.

Defendants' motion for summary judgment is supported by the deposition testimony of driver Lopez. Lopez testified that on the date of the accident he was operating a taxi vehicle (Lopez EBT at 10). Lopez was traveling on White Plains Road in the Bronx (*id.* at 55). White Plains Road at this location was a two-way roadway with two lanes of travel in either direction and a parking lane on each side (*id.* at 55). At the time of the accident, traffic was "normal" (*id.* at 56). Lopez made a left-hand turn onto White Plains Road from Westchester Avenue and then proceeded southbound on White Plains Road in the left-hand lane (*id.* at 56-57). Lopez never changed from this lane before the accident occurred (*id.* at 58). After passing the intersection with Gleason Avenue, Lopez proceeded toward the Watson Avenue intersection, which was controlled by a traffic signal (*id.* at 62). Nothing was obstructing his view of the parking lane or the sidewalk on the right hand side of White Plains Road and Watson Avenue (*id.* at 63). Lopez had intended to continue straight on White Plains Road through the Watson Avenue intersection, and proceed onto Bruckner (*id.* at 64). When Lopez proceeded past the Gleason

Motion is Respectfully Referred to Justice:

Dated:

Avenue intersection, he saw that the upcoming light at the Watson Avenue intersection was red (*id.* at 64-65). While he was proceeding forward, about a half a block from the Watson Avenue intersection, the traffic light turned green (*id.* at 64-65). Before he reached the intersection, Lopez observed people on the corner of Watson Avenue and White Plains Road waiting to cross the street, including Decedent (*id.* at 65). Lopez stated that he was about half a block away when he first saw these people (*id.* at 65-66), and he said that when he first saw Decedent, Decedent was “on the corner” and “he was walking to cross the street” (*id.* at 66). Decedent was allegedly on the right-hand side, “far” or “second” corner of White Plains Road and Watson Avenue (*id.* at 81-82). Lopez kept Decedent under his observation as he approached the intersection (*id.* at 66). Lopez stated that when he saw Decedent walking, the traffic signal was green in Lopez’s favor (*id.* at 66-67).

Lopez testified that when he saw Decedent beginning to cross the street, Lopez lowered his speed, and then Decedent “went back again” to the corner (*id.* at 67). Lopez continued, and then Decedent “ran” to attempt to cross the street (*id.*). Lopez explained that he saw Decedent “stopped and then all of a sudden he was walking to cross the street, not in the crosswalk, but a “little bit” outside of it (*id.* at 67-68). Lopez testified that he kept Decedent under his observation because he saw that Decedent was “thinking about crossing” (*id.* at 69). Lopez specifically testified that when he first saw Decedent, he slowed his vehicle from 25 to 15 miles per hour, “more or less” (*id.*). Lopez testified that when Decedent returned back to the corner, he “lasted a little bit standing and then he started running” (*id.* at 69). When Decedent started to run, Lopez was “already past the intersection of the light” (*id.* at 70). Lopez was “already crossing the pedestrian crosswalk when [he] braked, [Decedent] was already on top of [him]” (*id.*). Lopez stated that he was “already crossing the lines where [Decedent] was supposed to walk” (*id.* at 71) when his car struck Decedent (*id.*). Lopez testified that Decedent was “jogging” before the accident (*id.* at 72).

Lopez was in the left lane of southbound White Plains Road at the time of the impact (*id.* at 74). The contact was to the right corner/fender of his vehicle (*id.* at 77). When asked if he saw Decedent go across the right lane of southbound White Plains Road before the accident happened, Lopez responded, “[n]o, I didn’t see him because I had already passed the intersection” (*id.* at 77), and he stated that the impact occurred “in between the two lanes” (*id.* at 78). Lopez further testified that the impact happened when he “had already crossed the intersection” (*id.* at 81), and Decedent was on the far or “second” corner of the street (*id.* at 82). Lopez explained that while he was “crossing” the intersection, Decedent “ran and that’s all I saw. He ran toward me” (*id.*). Lopez testified that Decedent had to traverse past the whole right lane of travel on White Plains Road in order for the contact to occur (*id.* at 77). Lopez then testified that he did not see Decedent running across the right-hand lane before the impact (*id.* at 84). Lopez explained that he saw Decedent “from a distance that he walked to cross the street and then he went back” (*id.*). When asked if he saw Decedent come back out again onto the street, Lopez responded “I saw a reflection that was

coming back toward me” (*id.* at 84-85). Lopez testified “he came fast. I was already crossing” (*id.* at 85). The impact caused the glass of his windshield to break (*id.* at 86).

Plaintiff also appeared for an examination before trial, but she had no independent knowledge of the incident (Plaintiff EBT at 46-47).

### *Standard of Review*

"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" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal citation and quotations omitted]).

### *Applicable Law and Analysis*

Vehicle and Traffic Law §1146(a) provides in pertinent part, "[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary." In this matter, when viewing the evidence in a light most favorable to Plaintiff, Defendants have failed to eliminate all material issues of fact as to whether driver Lopez failed to exercise due care to avoid striking Decedent, "whom he admitted to seeing before the collision" (*Barracato v. SP Plus Corporation*, 2019 N.Y. Slip. Op. 00698 [1st Dept. Jan. 31, 2019]).

In this case, Lopez admitted that he observed the 85-year -old Decedent on the corner before the accident occurred, and he had an unobstructed view of the corner. Lopez also testified that he knew that Decedent was "thinking about crossing" the street. Lopez testified that Decedent began to walk across the street, then returned to the corner, and then "ran," resulting in the collision. Lopez later described Decedent's run as "jogging." However, in order to collide with Lopez's vehicle - which was in the left lane of White Plains Road - Decedent would have had to traverse from the corner all the way across the right-hand lane of southbound White Plains Road. Lopez claimed at first that he saw Decedent "run" from the corner, but later he testified that he did not see Decedent and only saw a "reflection" before the impact, which was strong enough to break the vehicle's windshield. Under the totality of the circumstances, there

are issues of fact as to whether Lopez, who fully observed Decedent well before the intersection, failed to avoid coming into contact with Decedent despite having the opportunity to do so, and issues of fact as to whether Decedent's conduct was the sole proximate cause of this accident (*see Santos-Perez v. Enterprise Leasing Co.*, 126 A.D.3d 621 [1st Dept. 2015][summary judgment to defendant should have been denied where, although plaintiff-pedestrian was outside of the crosswalk, there are triable issues of fact as to whether defendant contributed to the accident, as defendant saw plaintiff before the collision and had time to activate his horn, move his vehicle to the double-line, and reduce his speed by half]; *see also Carmen O. v. James*, 139 A.D.3d 423 [1st Dept. 2016][summary judgment properly denied to defendant-driver when infant plaintiff crossed a roadway outside of the crosswalk and stopped in the middle of the road before the impact]; *see also Sylvester v. Velez*, 146 A.D.3d 599 [1st Dept. 2017][summary judgment should have been denied as to the defendant-driver where there were fact issues as to the relative positions of plaintiff-pedestrian and defendant at the time of the accident, and whether defendant could have seen plaintiff before the accident and yet failed to exercise due care to avoid it).

This matter is distinguishable from other First Department decisions cited by Defendant in support of their motion. In those matters, it was evident that the plaintiff-pedestrians suddenly entered the roadway, and the defendant-drivers had no opportunity to avoid the collision. In *DeJesus v. Alba*, plaintiff-pedestrian entered the street without warning between two parked cars, and came into contact with the driver's side door and mirror of defendant's vehicle (63 A.D.3d 460 [1st Dept. 2009]). In *Brown v. Muniz*, the testimony from both plaintiff and the defendant-driver established that plaintiff suddenly darted out between two parked cars directly into the path of defendant's vehicle, leaving defendant-driver "unable to avoid plaintiff" (61 A.D.3d 526, 527 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 860 [2010]). Defendant-driver testified that upon seeing the infant plaintiff in the street, she hit her brakes, blew her horn, and stopped the vehicle (*id.*). It was also undisputed that the infant left the sidewalk and attempted to cross the street not at a crosswalk, and moved into the path of the defendant's vehicle. The Court noted that only seconds passed between the first time defendant saw plaintiff and the impact (*id.*). Other more recent cases continue to find summary judgment in was granted to a defendant-driver when it was determined that the driver acted prudently yet had no opportunity to avoid the collision defendant had no chance to avoid the collision (*see Fatumata B. v. Pioneer Transp. Corp.*, 118 A.D.3d 486 [1st Dept. 2014]; *Ramirez ex rel. Freytes v. Molina*, 114 A.D.3d 540, 541 [1st Dept. 2014][unrefuted testimony from defendant that he first saw infant-plaintiff 2-3 seconds before impact, when she was approximately one foot away from his vehicle]).

In this matter, as noted above, Lopez testified that he had an unobstructed view of Decedent on the corner as he approached the intersection, and he knew that Decedent was thinking about crossing the street and indeed began to walk across, before returning to the sidewalk, and then "running" or "jogging," apparently across the right lane and into Lopez's lane of travel. Lopez later testified that he in fact did not

see Decedent "run" into the street from the corner, but he only saw a "reflection" before the impact when Decedent was "on top" of his vehicle. On this record, there are unresolved issues as to what Lopez observed before the accident, whether he operated his vehicle with due care, and whether Lopez contributed to the accident by failing to avoid colliding with Decedent (*Santos-Perez v. Enterprise Leasing Co.*, 126 A.D.3d 621).

Finally, the police accident report annexed to the moving papers cannot be considered as this document recites hearsay (*see Roman v Cabrera*, 113 A.D.3d 541, 542 [1st Dept 2014], citing *Singh v Stair*, 106 A.D.3d 632, 633 [1st Dept 2013]).

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 2/21/19

Hon. Mary Ann Pizzi  
J.S.C.

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT