

**Bohorquez v MTA Bus Co.**

2019 NY Slip Op 32912(U)

October 2, 2019

Supreme Court, New York County

Docket Number: 150132/2016

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ADAM SILVERA** PART IAS MOTION 22

*Justice*

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INDEX NO. 150132/2016

LAURA BOHORQUEZ,

MOTION DATE 06/13/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

MTA BUS COMPANY, NEW YORK CITY TRANSIT  
AUTHORITY, METROPOLITAN TRANSPORTATION  
AUTHORITY, MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, PETER MADDEN

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, on the issue of liability against defendants MTA Bus Company, New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority, and Peter Madden and to dismiss any affirmative defense related to comparative negligence is granted. Laura Bohorquez's motion contends that on February 6, 2015, at the intersection of 34th Street and Second Avenue in the City, County, and State of New York, a vehicle operated by defendant Peter Madden and owned and maintained by defendants MTA Bus Company, New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority, struck and seriously injured plaintiff, when it made a right turn and entered into the crosswalk where plaintiff was a lawful pedestrian. Defendants' oppose the motion.

“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 New York University Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]). Plaintiffs have made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact.

A plaintiff makes a prima facie showing of entitlement to summary judgment by offering evidence that they were a pedestrian within a crosswalk, with the light in their favor, when they were struck by a defendant’s vehicle (Beamud v Gray 45 AD3d 257 [1st Dep’t] [finding that a lawful pedestrian in a crosswalk who was struck by a turning vehicle was entitled to summary judgment as a matter of law on the issue of liability]). Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (See Flores v City of New York, 66 AD3d 599 [1st Dep’t 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

In support of her motion plaintiff attaches the deposition of plaintiff, deposition of defendant driver and the MTA accident report from the incident (Mot, Exh D-F). Defendant driver reported to defendant MTA that he did not sound his horn while turning into the intersection and did not see or hear plaintiff until he struck her (Mot, Exh F). Plaintiff testified that she had the pedestrian walk symbol in her favor when she began to cross the street and saw bus as it struck her while in the intersection (Exh D at 28, 30,31,34-36, 38). Defendant driver

testified that as he turned the bus, he did not see the plaintiff and learned that something had occurred when he heard a loud bang (Exh E at 45-49). Thus, plaintiff has made a prima facie showing of defendants' negligence and the burden shifts to defendant to raise an issue of fact.

In opposition, defendants allege that an issue of fact exists as to whether plaintiff is comparatively negligent in not noticing the bus prior to being struck. Defendants allege "that plaintiff was wearing large ear-muff style headphones at the time of the accident, which reasonably could have limited her ability to notice the vehicle approaching" (Aff in Op at 3). Defendant driver testified that he did not honk his horn while turning, regardless of whether plaintiff was wearing headphones or not she had the right of way. Defendant driver had a duty, pursuant to VTL 1146 to exercise due care in the operation of his vehicle and avoid colliding into plaintiff. Thus, defendants have failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted as to defendants' liability.

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted. While pursuant to *Rodriguez v City of New York*, 31 NY3d 312, 330 [2018], a plaintiff is not obliged to demonstrate whether or not it was comparatively negligent in order to be entitled to partial summary judgment on the issue of defendant's liability, plaintiff's comparative negligence may be determined in a motion for summary judgment when plaintiff has moved for summary judgment to dismiss a defendants' affirmative defense of comparative negligence.

Defendants have failed to proffer any evidence as to plaintiff's alleged negligence. Here, plaintiff has met her burden and demonstrated that, as a lawful pedestrian, crossing the street within the crosswalk with the light in her favor, she was free from any contributory negligence and in no way caused the accident. Defendants' speculative assertion that plaintiff could have

been contributorily negligent for the accident at issue is insufficient to raise a triable issue of fact. Thus, the affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff are dismissed.

Accordingly, it is


ORDERED that plaintiff's motion for summary judgment on the issue of is granted; and it is further

ORDERED that the branch of plaintiff's motion to dismiss defendants' affirmative defenses related to comparative negligence of plaintiff is granted; and it is further

ORDERED that an immediate trial as to the amount of damages to which plaintiff is entitled shall be had before the Court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this Order, serve a copy of this Oder with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a Note of Issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision/Order of the Court.

<u>10/2/2019</u> DATE					 ADAM SILVERA, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE