

**Mann v Rodriguez**

2019 NY Slip Op 34742(U)

February 1, 2019

Supreme Court, Orange County

Docket Number: Index No. EF007356-2016

Judge: Catherine M. Bartlett

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

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
NORMAN J. MANN, JR.,

Plaintiff,

-against-

CESAR J. RODRIGUEZ and  
KENNETH M. OHNEGIAN,

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.

Index No. EF007356-2016  
Motion Date: December 11, 2018

-----X  
The following papers numbered 1 to 13 were read on Plaintiff's motion for partial summary judgment on liability and on defendant Kenneth M. Ohnegian's motion for summary judgment dismissing all claims against him:

Notice of Motion (Plaintiff) - Affirmation / Exhibits .....	1-2
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Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is a personal injury action arising out of an accident that occurred on May 9, 2016 at the intersection of New Vernon Road and Spruce Road in the Town of New Hope, New York. Plaintiff Norman Mann was a pedestrian, walking on the shoulder of New Vernon Road away from the intersection. Defendant Kenneth Ohnegian was driving southwest on New Vernon Road, a through highway. Defendant Cesar Rodriguez was driving northwest on Spruce Road, which was governed by a stop sign at the intersection with New Vernon Road. Mr. Rodriguez stopped at the stop sign, then proceeded into the intersection and struck Mr. Ohnegian's vehicle on the driver's side door, whereupon Mr. Ohnegian's vehicle struck Mr. Mann on the shoulder of the road. Plaintiff now moves for partial summary judgment on liability against both Defendants. Defendant Ohnegian moves for summary judgment dismissing all claims against him.

**The Parties' Deposition Testimony**

Mr. Ohnegian testified that he was driving on New Vernon Road with his wife at approximately 30 miles per hour. New Vernon crests and then slopes slightly downhill as it approaches the intersection with Spruce Road. He saw Mr. Mann on the right near the corner of New Vernon and Spruce, and Mr. Rodriguez on the left stopped at the stop sign on Spruce Road. His account of the accident was as follows:

Q ...as you approached that intersection, tell me what occurred.

A We were coming down the hill. It's a bad section right there. You gotta watch out because they got that blind side on one side.

Q Which side is blind ?

A The left side, because you got that hill that comes out, the stop sign is right there at the corner, and when you come down, there's something – you don't know what's gonna be around. And I came down, I was doing about 30. I saw the car that was parked – not parked but stopped at the sign. We got down there and just

as I'm approaching that corner, I saw him coming out and I said oh, jeez, I said to my wife, he's got us. And that's when he hit.

....

Q Did you sound your horn, flash your lights, do anything at all ?

A No, because I figured it was a straight road coming through and he was coming down. We weren't that far from the intersection and he came out. And I said he's got us.

Mr. Curcio: He's asking you at the moment you saw him come out, did you sound your horn?

A Oh, no.

Q Did you flash your lights to do anything to warn him you were coming ?

A No.

Q Did you hit your brakes ?

A No.

Q Did you steer your car in any direction to try to avoid the impact between the two vehicles ?

A No. It was too sudden. I just didn't have time to do any of that the way it was.

....

Q So what's the next thing that happened ?

A Next thing I knew I saw the headlights coming at my driver's door and he hit me right at the middle of my driver's door.

Q And as a result of the impact with the other vehicle, did the direction that your car was traveling move or change in any way ?

A I didn't know if it changed or anything. I just tried to keep it into the center of the road because of the ditch over there on the right side.

Q Did you have to steer it back to get it towards the center of the road ?

A Steering, I don't know if I really held it to the side or I just -- but I just kept on pulling it to the left so I wouldn't hit nothing.

(Ohnegian Dep., pp. 19-22)

Mr. Rodriguez' account of the accident was as follows:

Q Did you come to a stop at the stop sign on Spruce ?

A Yes.

Q How long did you remain stopped at that stop sign ?

A 10, 15 seconds.

Q If you specifically remember, can you tell me what you did when you were stopped at that stop sign ?

A Looked to my right, looked to my left, started to move and saw that the young man was on the corner. And then I hesitated a second and that was it.

....

Q Was it your intention to cross New Vernon onto the other side of Spruce or were you turning onto New Vernon ?

A Crossing Spruce.

Q And you said you hesitated when you saw the pedestrian on the left side of the -

A I believe I hesitated for a second. I am not sure.

Q ....When you say you hesitated, was your car still moving forward or had you stopped ?

A Still moving forward slowly.

Q ....[W]ere you still on Spruce, had you entered into part of New Vernon ?

A Entered part of New Vernon.

Q What's the next thing that happened ? As you entered onto that part of New Vernon, what happened next ?

A I didn't see a car coming. I just felt a crash, like black. When I went like that, the other car was all the way down the road.

Q When you say you felt a crash, was it to the right side of your vehicle, to the left side, to the front or to the back ?

A To the front....

....

Q Dead center front ?

A Dead center front ?

....

Q Was your car moving at the time you felt the impact ?

A I believe so.

(Rodriguez Dep., pp. 20-24)

Plaintiff testified that he was facing away from the intersection and did not witness the collision. He heard the impact and saw Mr. Ohnegian's vehicle approaching in his peripheral vision. Without time even to turn, he tried to jump into the adjacent culvert but was struck by the corner of the vehicle and injured.

### Legal Analysis

#### **A. Defendant Rodriguez Was Negligent As A Matter Of Law**

Vehicle and Traffic Law ("VTL") §1172(a) provides in pertinent part:

...every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection...and the right to proceed shall be subject to the provisions of section 1142.

VTL §1142(a) provides in pertinent part:

...every driver of a vehicle approaching a stop sign shall stop as required by section 1172 and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

Both Plaintiff and defendant Ohnegian established *prima facie* that defendant Rodriguez was negligent as a matter of law by proving that he failed to yield the right of way to defendant Ohnegian's vehicle in violation of VTL §§ 1172(a) and 1142(a).

The failure of a motorist to yield the right of way in violation of the statute is negligence as a matter of law and cannot be disregarded by the jury [cit.om.]. A driver is entitled to partial summary judgment on the issue of liability based on defendant's violation of VTL §1142(a) [cit.om.]. A driver is entitled to anticipate that a motorist facing a stop sign will yield the right of way [cit.om.]. The fact that the view of a motorist properly stopped is obscured does not exculpate the motorist; the motorist is under a common-law duty to see what is there to be seen [cit.om.]. Further, the fact that the motorist may have initially stopped at the stop sign does not negate his liability if he subsequently fails to yield the right of way [cit.om.].

1A NY PJI 3d 2:80, at 504-505 (2019). *See, e.g., Fuertes v. City of New York*, 146 AD3d 936, 937 (2d Dept. 2017); *Maliza v. Puerto-Rican Transp. Corp.*, 50 AD3d 650 (2d Dept. 2008); *Bolta v. Lohan*, 242 AD2d 356 (2d Dept. 1997).

In opposition, defendant Rodriguez failed to demonstrate the existence of any triable issue of fact as to his negligence in failing to yield the right of way to defendant Ohnegian. On account of his violation of Sections 1172(a) and 1142(a) of the Vehicle and Traffic Law, defendant Rodriguez was negligent as a matter of law. *See, Fuertes v. City of New York, supra; Bolta v. Lohan, supra; PJI 2:26.*

**B. Plaintiff Is Entitled To Partial Summary Judgment As Against Defendant Rodriguez Regardless Of The Existence of Issues As To His Own Comparative Fault**

Defendant Rodriguez alleges that Plaintiff was at fault in this case. Though Plaintiff denies that he was negligent, he does not claim to have established the absence of comparative fault as a matter of law. Nonetheless, as the Court of Appeals held in *Rodriguez v. City of New York*, 31 NY3d 312 (2018), an injured plaintiff moving for partial summary judgment must

establish the defendant's negligence as a matter of law, but is not required to demonstrate the absence of his own comparative fault because that is not a defense to his cause of action but only grounds for apportioning damages. *Id.*, at 317-320, 324-325. Therefore, Plaintiff is entitled to partial summary judgment on the issue of liability as against defendant Rodriguez.

**C. As A Matter Of Law, Defendant Ohnegian Is Not Liable For The Accident**

Since there may be more than one proximate cause of a motor vehicle accident, Mr. Rodriguez' negligent failure to yield does not preclude as a matter of law a finding that negligence on Mr. Ohnegian's part also contributed to the accident. *See, Romano v. 202 Corp.*, 305 AD2d 576, 577 (2d Dept. 2003). *See also, Gezelter v. Pecora*, 129 AD3d 1021, 1023 (2d Dept. 2015); *Arias v. Tiao*, 123 AD3d 857, 859 (2d Dept. 2014); *Espiritu v. Shuttle Express Coach, Inc.*, 115 AD3d 787, 789 (2d Dept. 2014). Although a driver with the right of way is entitled to anticipate that the other vehicle will obey the traffic laws requiring it to yield, he may nevertheless be found to have contributed to the happening of the accident if he did not use reasonable care to avoid the accident. *See, Rabenstein v. Suffolk County Dept. of Public Works*, 131 AD3d 1145 (2d Dept. 2015); *Gezelter v. Pecora, supra*; *Arias v. Tiao, supra*; *Romano v. 202 Corp., supra*. Accordingly, Mr. Ohnegian, to obtain summary judgment, must in addition "establish his freedom from fault and that [Rodriguez'] violation was the sole proximate cause of the accident." *Gezelter v. Pecora, supra*. *See, also, Stanford v. Smart Pick, Inc.*, 134 AD3d 1096 (2d Dept. 2015); *Jones v. Pinto*, 133 Ad3d 634, 635 (2d Dept. 2015); *Arias v. Tiao, supra*; *Calderon-Scotti v. Rosenstein*, 119 AD3d 722 (2d Dept. 2014); *Espiritu v. Shuttle Express Coach, Inc., supra*.

In the Court's view, the evidence herein demonstrates as a matter of law that Mr. Ohnegian was not negligent and that Mr. Rodriguez' failure to yield was the sole proximate cause of the accident. As the Second Department has repeatedly observed, "[a]lthough a driver with the right-of-way has a duty to use reasonable care to avoid a collision,...a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision." See, *Yu Mei Liu v. Weihong Liu*, 163 AD3d 611, 612 (2d Dept. 2018); *Shashaty v. Gavitt*, 158 AD3d 830, 831 (2d Dept. 2018); *Giwa v. Bloom*, 154 AD3d 921, 921-922 (2d Dept. 2017); *Fuertes v. City of New York, supra*; *Smith v. Omanes*, 123 AD3d 691 (2d Dept. 2014); *Bennett v. Granata*, 118 AD3d 652, 653 (2d Dept. 2014); *Barbato v. Maloney*, 94 AD3d 1028, 1030 (2d Dept. 2012); *Socci v. Levy*, 90 AD3d 1020, 1021 (2d Dept. 2011). Mr. Ohnegian's testimony, which is effectively uncontroverted, establishes that (1) he was traveling at a rate of only about 30 miles per hour, (2) he was proximate to the intersection when Mr. Rodriguez proceeded past the stop sign, and (3) the failure to yield was so sudden that Mr. Ohnegian had no time to honk, brake or take evasive action before he was struck broadside by Rodriguez' vehicle.

Defense counsel, in opposition, relies heavily on testimony by Mr. Rodriguez that he "started to move and saw that the young man was on the corner" and "hesitated a second", asserting that this testimony gives rise to a triable issue of fact whether Mr. Ohnegian had timely notice of Mr. Rodriguez' intent to proceed and an opportunity to take steps to avoid the collision. However, Mr. Rodriguez immediately retracted this testimony, admitting that he was not sure whether he hesitated, and in any event that his vehicle never stopped moving. (See, Rodriguez

Dep., p. 22) Such testimony is insufficient to support any reasonable inference that Mr. Ohnegian was afforded time to implement measures to avoid the collision.

Neither does the circumstantial evidence permit an inference of negligence on Mr. Ohnegian's part. Where a vehicle with the right of way has struck a vehicle that failed to yield, the circumstances may warrant an inference that the offending vehicle was in the intersection first and that the driver with the right of way had an opportunity to react and take measures to avoid a collision. *See, e.g., Calderon-Scotti v. Rosenstein, supra*, 119 AD3d 722 (2d Dept. 2014); *Nevarez v. S.R.M. Management Corp.*, 58 AD3d 295 (1<sup>st</sup> Dept. 2008).<sup>1</sup> Here, however, it was Mr. Rodriguez who struck Mr. Ohnegian, not Mr. Ohnegian who struck Mr. Rodriguez. When as here the driver with the right of way has been broadsided by the offending vehicle, the circumstances may well be such that he had no meaningful opportunity to take action to avoid the accident and is exonerated as a matter of law. *See, e.g., Lu v. Saia*, 123 AD3d 813, 813-814 (2d Dept. 2014); *Beaumont v. Smith*, 16 AD3d 1106, 1107 (4<sup>th</sup> Dept. 2005); *Namisnak v. Martin*, 244 AD2d 258, 260 (1<sup>st</sup> Dept. 1997). *See also, Palma v. Sherman*, 55 AD3d 891, 892 (2d Dept. 2008) (where plaintiff collided with defendant's automobile near front passenger side headlight,

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<sup>1</sup>In *Calderon-Scotti v. Rosenstein, supra*, the plaintiff operator was turning left and had passed the median and the left hand lane when passenger side of her vehicle was struck by the front of the defendant's vehicle in the far right lane. The Second Department held that the defendant failed to eliminate all triable issues of fact as to "whether the plaintiff was already within the intersection as [defendant] approached and whether he should have seen the plaintiff's vehicle as it made the left turn in time to take evasive action in response." *Id.*, 119 AD3d at 724.

In *Nevarez v. S.R.M. Management Corp., supra*, similarly, the plaintiff operator was turning left when the defendant's vehicle struck the passenger side of her car. The Appellate Division concluded that since the defendant broadsided the plaintiff, there was a reasonable probability that plaintiff entered the intersection first, such that the defendant had a duty to use reasonable care to avoid the collision. *Id.*, 58 AD3d at 297-298.

defendant awarded summary judgment because “the contact occurred in such a manner that [defendant] was unable either to warn [plaintiff] or avoid the contact”).

The evidence here does indeed show that Mr. Ohnegian had no meaningful opportunity to avoid the Rodriguez vehicle when it failed to yield the right of way. *See, Riccuiti v. Porcu*, 124 AD3d 616, 617 (2d Dept. 2015). The speculative and conclusory assertion that Mr. Ohnegian could have taken effective measure to warn Mr. Rodriguez or avoid the collision is unsupported by the record and insufficient to withstand summary judgment. *See, Socci v. Levy, supra; Mateiasevici v. Daccordo*, 34 AD3d 651, 652 (2d Dept. 2006).

Plaintiff’s additional contention that Mr. Ohnegian should have sounded his horn *after* the collision with the Rodriguez’ vehicle is utterly without merit. Plaintiff invokes Vehicle and Traffic Law §1146(a), which requires drivers to exercise due care to avoid colliding with pedestrians and to give warning by sounding a horn when necessary. However, (1) Mr. Ohnegian had no reason to anticipate any danger to Plaintiff prior to his being broadsided by the Rodriguez vehicle; (2) he was consumed post-collision by the need to maintain control of his own vehicle in an emergency not of his own creation, and cannot be faulted for not sounding his horn at that juncture; and (3) Plaintiff’s own testimony establishes that he heard the impact of the collision and did not even have time to turn or to leap away before he was struck by the Ohnegian vehicle, so any purported negligence in failing to sound a horn post-collision can have borne no causal relationship to Plaintiff’s injury.

**D. Conclusion**

In view of the foregoing, Plaintiff is entitled to partial summary judgment on liability as against defendant Rodriguez, and defendant Ohnegian is entitled to summary judgment dismissing all claims against him.

It is therefore

ORDERED, that plaintiff Norman J. Mann's motion for partial summary judgment as against defendant Cesar J. Rodriguez is granted, and defendant Rodriguez is hereby deemed negligent as a matter of law, and it is further

ORDERED, that plaintiff Norman J. Mann's motion for partial summary judgment as against defendant Kenneth M. Ohnegian is denied, and it is further

ORDERED, that defendant Kenneth M. Ohnegian's motion for summary judgment is granted, and all claims asserted as against defendant Ohnegian are hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: February 1, 2019      ENTER  
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE

\* June 17, 2019 Jury Trial is now  
DAMAGES only

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