

**Bellestine v Rosato**

2019 NY Slip Op 35206(U)

January 31, 2019

Supreme Court, Queens County

Docket Number: Index No. 709154/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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MICHELLE BELLESTINE

Index No. 709154/2018

Plaintiff,

Motion

-against-

Date: December 5, 2018

Motion Cal. No.: 4

ALEXANDRA M. ROSATO, PENGUANG  
WENG, ALBERT J. SANTORO and HOME BAY  
TRADING CORP.,

Motion Sequence No.: 1

Defendants.

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The following e-file papers numbered 17-42 submitted and considered on this motion by defendants Penguang Weng and Home Bay Trading Corp. (collectively referred to as "HBTC") and cross motion by defendants Albert J. Santoro (hereinafter referred to as "Santoro") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment on the issue of liability to plaintiff (hereinafter referred to as "Plaintiff"). Also, this cross motion by Plaintiff seeking an Order pursuant to CPLR 3212 for summary judgment on the issue of liability against all defendants.

	Papers <u>Numbered</u>
Notice of Motion- Affirmation in Support .....	EF 17-22
Cross Motion- Exhibits.....	EF 23-30
Reply Affirmation.....	EF 31
Cross Motion- Exhibits.....	EF 32-35
Affirmation in Opp- Exhibits.....	EF 36-37
Reply Affirmation.....	EF 38
Reply Affirmation.....	EF 39-40
Reply Affirmation.....	EF 41-42

**FILED**  
FEB - 6 2019  
COUNTY CLERK  
QUEENS COUNTY

This is a negligence action arising out of a four-car collision that occurred September 28, 2016 on the Long Island Expressway near Exit 37 in Nassau County. The parties do not dispute that they were all in the midst of traffic. Preceding the accident, Santoro was stopped and HBTC was stopped behind Santoro. Plaintiff's car (directly behind HBTC's) came into contact with HBTC's stopped car causing HBTC's car to come into contact with Santoro's vehicle. The parties have offered no conflicting evidence to disprove Santoro and HBTC's positions that they were both stopped in traffic before any impact occurred. However, there is conflicting evidence as to whether Plaintiff came into contact with HBTC's car after being hit by defendant Alexandra M. Rosato's (hereinafter referred to as "Rosato") car or whether Plaintiff's car came into contact with HBTC's car before Rosato came into contact with Plaintiff's car.

### Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

HBTC and Santoro

Plaintiff's cross motion for summary judgment as to defendants HBTC and Santoro must fail.

In *Rosa v. Colonial Transit Inc.*, plaintiff was injured when it collided with a stopped school bus. (*Rosa v. Colonial Transit Inc.*, 276 A.D.2d 781 [2d Dept 2000]). The bus was stopped at the time of the accident and moved for summary judgment. (*Id*) The court found that "Although a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle a triable issue of fact exists as to whether the driver of the stopped bus... contributed to the accident by making a sudden stop." (*Id*)

Here, similar to the school bus in *Rosa*, it is undisputed that both HBTC and Santoro were stopped prior to any impact. Unlike the school bus in *Rosa*, Plaintiff has failed to raise a triable issue of fact as to whether either of these defendants caused this accident by their own negligence. Therefore, HBTC and Santoro's motion/cross-motion for summary judgment as to liability against the Plaintiff is granted.

Rosato

Plaintiff's cross motion for summary judgment as to defendant Rosato must be granted.

In *Bournazos v. Malfitano*, align closely with the facts of this case, three vehicles were involved in a motor vehicle accident. (*Bournazos v. Malfitano*, 275 A.D.2d 437 [2d Dept 2000]) The first car came to a full stop due to a malfunction. (*Id*). The second and third cars dispute what occurred next. The third car asserts the second car came into contact with the first before it came into contact with the second. (*Id*) The second car asserts that it was stopped before the third car came into contact with it, which subsequently caused its collision with the first car. The third car failed to dispute that the second car was stopped before it came into contact with the second car. The court held that the second car established their entitlement to summary judgment. (*Id* at 438) The court reasoned the evidence was undisputed that the second car was stopped before it was struck in the rear (*Id*). Therefore, it was the third car's burden to rebut the inference of its own negligence created by the rear-end collision, or to demonstrate that negligence on the part of the second car contributed to the collision between the two. (*Id*) The court held, whether or not the second vehicle struck the first vehicle before the collision between the second and third car was irrelevant in determining the third car's liability. (*Id*)

Here, Rosato is akin to the third car in *Bournazos*. Rosato has not asserted that the Plaintiff was not stopped, but rather that prior to Rosato's contact with the Plaintiff's car she "heard" Plaintiff's car collide with HBTC's vehicle. Similar to the holding in *Bornazos* this Court finds the Plaintiff has not rebutted the presumption of its own negligence. Therefore, the Plaintiff's motion for summary judgment as to Rosato's liability is granted. Therefore it is,


**ORDERED**, that based on the foregoing, defendant HBTC's motion and defendant Santoro's cross motion under CPLR 3212 is granted in its entirety and it is further,

**ORDERED**, that the branch of Plaintiff's cross motion under CPLR 3212 is granted as it relates to defendant Rosato and denied as it relates to defendant's HBTC and Santoro; and it is further

**ORDERED**, that upon the completion of discovery on the issue of damages, the filing of a Note of Issue, along with the associated fees this matter shall proceed to trial solely on the issue of damages.

The foregoing constitutes the decision and Order of this Court.

Dated: January 31, 2019

  
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Hon. Chereé A. Buggs, JSC

**FILED**  
FEB - 6 2019  
COUNTY CLERK  
QUEENS COUNTY