

<b>Plasencia v Canzone</b>
2020 NY Slip Op 31032(U)
March 10, 2020
Supreme Court, Bronx County
Docket Number: 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 the October 25, 2019 notice of motion of defendants Joel Plasencia and Vicente Plasencia (“the Plasencia defendants”) and the affirmation and exhibits submitted in support thereof; plaintiff’s November 18, 2019 notice of cross motion and the affirmation and exhibits submitted in support thereof; defendant Canzone’s January 21, 2020 affirmation in opposition to the motion; defendant Canzone’s January 21, 2020 affirmation in opposition to the cross motion; the Plasencia defendants’ January 28, 2020 affirmation in reply; plaintiff’s January 28, 2020 affirmation in reply; and due deliberation; the Plasencia defendants’ motion for summary judgment is denied and plaintiff’s cross motion for partial summary judgment on the issue of defendant Canzone’s liability and for dismissal of the Plasencia defendants’ first affirmative defense alleging plaintiff’s culpable conduct is granted in part.

Plaintiff alleges that the vehicle in which she was a passenger, owned by defendant Vicente Plasencia and operated by defendant Joel Plasencia, was struck by defendant Canzone’s vehicle when defendant Canzone failed to stop for a stop sign controlling his direction of travel. The Plasencia defendants move for summary judgment on the ground that they bear no liability for the happening of the accident. In support of the motion, they submit the transcripts of the parties’ deposition testimony.

Plaintiff cross-moves for summary judgment on the issue of defendant Canzone’s liability.

The cross motion is premised on defendant Calzone's failure to stop at the stop sign, failure to yield the right of way to the Plasencia defendants and failure to see what there was to be seen. The undersigned denied plaintiff's prior motion for similar relief on August 31, 2018 because of, among other things, the parties' differing versions of the facts. Plaintiff's motion is premised on the deposition transcripts submitted by the Plasencia defendants, together with the affidavits that the undersigned previously found to be insufficient to demonstrate the absence of triable issues of material fact with respect to defendant Canzone's liability.<sup>1</sup>

Plaintiff testified that no device controlled the direction of traffic of the vehicle in which she was a passenger, that defendant Canzone's direction of travel was controlled by a stop sign, and that she saw defendant Canzone's vehicle enter the intersection after failing to stop for the stop sign.

Defendant Canzone testified that he had an unobstructed view of the intersection and roadway. He stopped at the stop sign for five seconds, looked both ways, drove forward approximately eight feet, and stopped again for five seconds. He looked to his left and right and, seeing no oncoming traffic, entered the intersection. He assumed (incorrectly) that traffic on the other street forming the intersection was also controlled by a stop sign. He proceeded slowly and did not see the Plasencia defendants' vehicle at any time prior to the accident.<sup>2</sup>

Defendant Joel Plasencia testified that when he first saw defendant Canzone's vehicle, it was stopped approximately "two cars away" (Plasencia deposition at p. 28) "on the stop sign before the intersection" (*id.* at p. 29), "in a complete stop at the stop sign" (*id.* at p. 33).

"That [defendant Canzone's] approach in the intersection was regulated by a stop sign and no traffic control devices regulated [the Plasencia defendants'] approach is not a basis for awarding

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<sup>1</sup> Plaintiff's cross motion, an otherwise impermissible successive motion for summary judgment, is considered on its merits, in light of the new evidence -- the deposition transcripts -- obtained as a result of discovery occurring since the prior decision (*see Elihu v Nicoleau*, 173 AD3d 578 [1st Dept 2019]).

<sup>2</sup> Because defendant Canzone testified that he did not see the Plasencia defendants' vehicle until the impact, his assertion that their vehicle was speeding is speculative (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]).

[the Plasencia defendants] summary judgment” (*Parris v Gonzalez-Martinez*, 129 AD3d 519, 519 [1st Dept 2015] [citations omitted]). “[A] driver who lawfully enters an intersection ... may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection” (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]; *see also Blair v Coleman*, 146 AD3d 743 [2d Dept 2017]). Given defendant Canzone’s testimony that he proceeded “slowly,” defendant Joel Plasencia’s testimony that the speed limit in the area was 15 miles per hour or less and that he was travelling at less than the speed limit because of a school zone, plaintiff’s assertion that the two vehicles entered the intersection at the same time (*see* November 18, 2019 Schiller affirmation at paras. 23-25), and the points of contact of the two vehicles, there remains a question of fact as to whether the Plasencia defendants exercised reasonable care (*see Ampofo v Brydson*, 144 AD3d 611 [1st Dept 2016]). “To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Matter of N.Y.C. Asbestos Litig.*, 33 NY3d 20, 25 [2019] [citations and quotation marks omitted]).

Viewing the proof in the light most favorable to the non-moving parties (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]), the court finds that the conflicting evidence presents questions of credibility that cannot be resolved on a motion for summary judgment (*see A.L. v N.Y.C. Hous. Auth.*, 169 AD3d 40 [1st Dept 2019]; *Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018]). “[T]he various parties’ testimony as to the manner in which each driver controlled his [or her] vehicle, the circumstances surrounding their collision[s], and the chain of events leading up to the collision involving plaintiff’s vehicle raise other questions of fact, which are best left for a jury to decide” (*Odikpo v American Transit, Inc.*, 72 AD3d 568, 569 [1st Dept 2010]).

Given that the court's role on a motion for summary judgment is merely the identification of genuine issues of fact, and not the determination of factual questions requiring an assessment of witness memory or credibility (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299 [1st Dept 2000]), the court cannot resolve the conflict between the testimonial evidence (*see Rhodes v E. 81st, LLC*, 81 AD3d 453 [1st Dept 2011]; *Fenty v 634 Morris Park Assocs., LLC*, 291 AD2d 275 [1st Dept 2002]).

Plaintiff also moves for an order dismissing the Plasencia defendants' first affirmative defense alleging plaintiff's culpable conduct. As a passenger, plaintiff's proof was sufficient to establish, prima facie, her freedom from negligence contributing to the accident, and no party raised a question of fact with respect to this aspect of the cross motion (*see Ramirez v Elias-Tejada*, 168 AD3d 401 [1st Dept 2019]).

Accordingly, it is

ORDERED, that the Plasencia defendants' motion for summary judgment is denied; and it is further

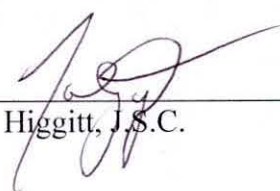
ORDERED, that the aspect of plaintiff's cross motion for dismissal of the Plasencia defendants' first affirmative defense alleging plaintiff's culpable conduct is granted, and the Plasencia defendants' first affirmative defense is dismissed; and it is further

ORDERED, that plaintiff's cross motion is otherwise denied.

The parties are reminded of the March 16, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: March 10, 2020

  
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John R. Higgitt, J.S.C.