

**Marquez v Lazohernandez**

2020 NY Slip Op 35177(U)

May 8, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 610325/2019

Judge: Paul J. Baisley, Jr.

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**SHORT FORM ORDER**

**INDEX NO. 610325/2019**

**SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY**

**PRESENT:**

**Hon. Paul J. Baisley, Jr., J.S.C.**

LAURA A. MARQUEZ and FELIX MARQUEZ,

Plaintiffs,

-against-

LUIS LAZOHERNANDEZ and BCD  
ENTERPRISE, LLC.,

Defendants.

**ORIG. RETURN DATE:** November 22, 2019  
**FINAL RETURN DATE:** January 17, 2020  
**MOT. SEQ. #:** 001 MotD

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiffs, on October 14, 2019; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers filed by defendants, on January 13, 2020; Replying Affidavits and supporting papers filed by plaintiffs, on January 13, 2010; Other \_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by plaintiffs for partial summary judgment on the issue of liability, and to strike defendants' first, eighth, and tenth affirmative defenses, is granted in part and denied in part; and it is further

**ORDERED** that the parties to this action shall appear for a preliminary conference on September 10, 2020 at 10:00 a.m., at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This is an action to recover damages for injuries allegedly sustained by plaintiff Laura A. Marquez as a result of a motor vehicle accident, which occurred on November 24, 2018, at approximately 5:00 p.m., on Edison Road, near its intersection with Wellwood Avenue, in the Town of Babylon, New York. The accident allegedly occurred when a tractor-trailer owned by defendant BCD Enterprise, LLC, and operated by defendant Luis Lazohernandez, struck plaintiff's vehicle while both were attempting to make a right turn onto Wellwood Avenue. Plaintiff's husband, Felix Marquez, sues derivatively for loss of services.

Plaintiffs now move for summary judgment on the issue of liability, arguing that defendant driver's negligence was the sole proximate cause of the accident. Plaintiffs argue that defendant driver violated, inter alia, Vehicle and Traffic Law § 1128 (a) by making a right turn from the left lane.

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Plaintiffs also move to strike defendants' affirmative defenses of culpable conduct, emergency doctrine, and failure to use a seat belt. In support of their motion, plaintiffs submit, inter alia, the affidavit of Laura Marquez, photographs of her vehicle after the collision, and a certified police report. In opposition, defendants argue that plaintiff was at fault for the happening of the accident, as she violated, inter alia, Vehicle and Traffic Law § 1123 by overtaking defendant driver on the right while defendant driver was attempting to make a wide right turn from both lanes of traffic. Defendants submit the affidavit of Luis Lazohernandez.

By her affidavit, plaintiff avers that at the time of the collision she was seat-belted and traveling westbound on Edison Avenue, approaching the intersection of Wellwood Avenue. She states that Edison Avenue ends when it reaches the intersection of Wellwood Avenue, terminating with two lanes, a left-turn and a right-turn lane. She further states that the intersection is governed by a traffic signal. She testified that as she approached the intersection, she observed defendants' tractor-trailer stopped at a red light, in the left-turn lane. She avers that defendants' vehicle did not have its right-turn indicator on. She states that she entered the right-turn lane, and stopped for the red traffic light. She states that when the traffic light turned green, defendant driver attempted to turn right, from the left lane, striking her vehicle.

By his affidavit, defendant driver avers that he was traveling westbound on Edison Avenue. He states that as he approached the intersection of Wellwood Avenue, he intended to turn right onto Wellwood Avenue. He states that due to the length of the tractor-trailer and the need for a wide turn, he stopped in between both the left-turn and the right-turn lane, and turned his right-turn indicator on. He testified that when the light turned green, he checked his side mirrors before attempting the turn, and did not see any vehicles on either side of him. He states that when he was halfway through his turn, his tractor-trailer collided with plaintiff's vehicle on his right side.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Bloechle v Heritage Catering, Ltd.*, *supra*; *Catanzaro v Ederly*, *supra*; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *Auguste v Jeter*, 167 AD3d

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560, 560, 88 NYS3d 509 [2d Dept 2018]). However, the issue of a plaintiff's comparative negligence may, however, be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *Charlery v Allied Tr. Corp.*, 163 AD3d 914, 81 NYS3d 523 [2d Dept 2018]). However, an operator of a motor vehicle has a duty to always be aware of the potential hazards created by prevailing traffic conditions (*see Vehicle and Traffic Law* § 1129; *see generally Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]), and to observe that which he can clearly see (*see Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]; *Pawlukiewicz v Boisson*, 275 AD2d 446, 712 NYS2d 634 [2d Dept 2000]; *Mohamed v Frische*, 223 AD2d 628, 636 NYS2d 859 [2d Dept 1996]). Vehicle and Traffic Law § 1128 (a) states "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (*see Pipinias v Ferreira*, 155 AD3d 1073, 65 NYS3d 533 [2d Dept 2017]; *Davis v Turner*, 132 AD3d 603, 20 NYS3d 1 [2d Dept 2015]). Plaintiffs have established, prima facie, that defendant driver was negligent as a matter of law by turning right from the left lane when it was not safe to do so (*see Pipinias v Ferreira, supra*; *Walker v Patrix Trucking NY Corp.*, 115 AD3d 943, 982 NYS2d 552 [2d Dept 2014]).

As plaintiffs have met their prima facie burden, the burden now shifts to defendants to raise a triable issue of fact on the issue of negligence (*see Alvarez v Prospect Hosp., supra*). Defendants have failed to raise a triable issue of fact on the issue of defendant driver's liability (*see Pipinias v Ferreria, supra*; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]).

With respect to the branch of plaintiffs' motion seeking to dismiss defendants' affirmative defense of comparative negligence, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

Turning first to the affirmative defense of comparative negligence, plaintiffs have established, prima facie, entitlement to the relief requested. Plaintiff testified that she was traveling within her lane of travel in the right-hand lane, observed defendant driver's tractor-trailer in the left-hand lane, and began to make a right turn when the traffic signal turned green. However, defendants have raised a triable issue of fact with respect to plaintiff's comparative negligence by submitting the affidavit of defendant driver who avers that he signaled his intention to turn right and that plaintiff overtook his tractor-trailer on the right when it was not safe to do so. Therefore, defendants have raised a question of fact as to the cause of the collision which cannot be decided on a motion for summary judgment. As

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such, plaintiff's application to dismiss defendants' affirmative defense of comparative negligence is denied.

As to plaintiffs' application to dismiss defendants' affirmative defense of failure use of seatbelt, plaintiffs have established, prima facie, entitlement to dismissal as plaintiff states in her affidavit that she was wearing her seatbelt at the time of the collision and that it was in good working order. In opposition, defendants argue that more discovery is needed. However, summary judgment may not be avoided based on a claim that discovery is needed "unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536, 906 NYS2d 331 [2d Dept 2010], quoting *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [2d Dept 1999]; see *Wienfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2d Dept 2017]). Here, there is no evidentiary basis suggesting discovery "might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Skura v Wojtowski*, 165 AD3d 1196, 1200, 87 NYS3d 100 [2d Dept 2018], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041, 13 NYS3d 139 [2d Dept 2015] [internal quotations and citations omitted]). As such, defendants have failed to raise a triable issue of fact with respect to plaintiff's use of a seatbelt.

Plaintiffs have failed to make a prima facie case of entitlement to summary judgment in their favor dismissing defendants' affirmative defense involving the emergency doctrine. The emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency" (*Lifson v City of Syracuse*, 17 NY3d 492, 497, 934 NYS2d 38 [2011], quoting *Caristo v Sanzone*, 96 NY2d 172, 174, 726 NYS2d 334 [2001]; *Levi v Benyaminova*, 128 AD3d 779, 9 NYS3d 123 [2d Dept 2015]). "[T]he existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; see *Flores v Metropolitan Transp. Auth., Long Is. Bus.*, 122 AD3d 672, 996 NYS2d 184 [2d Dept 2014]). Plaintiff fails to demonstrate that defendants were not faced with an emergency situation (see *Alvarez v Prospect Hosp.*, *supra*).

Accordingly, the branch of plaintiffs' motion for summary judgment in their favor on the issue of liability is granted, and the branch of the motion to strike defendants' affirmative defenses of comparative negligence, use of seatbelt, and the emergency doctrine is granted in part and denied in part.

Dated: May 8, 2020

  
HON. PAUL J. BAISLEY, JR., J.S.C.