

**Burt v Amitrano**

2020 NY Slip Op 35422(U)

November 19, 2020

Supreme Court, Kings County

Docket Number: Index No. 524560/2017

Judge: Reginald A. Boddie

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 19<sup>th</sup> day of November 2020.

PRESENT:  
Honorable Reginald A. Boddie  
Justice, Supreme Court

-----x  
Robert Burt,

Plaintiffs,

Index No. 524560/2017  
Cal. No. 8 (MS 3)

-against-

DECISION AND ORDER

Melissa Amitrano, Wilson Charles and  
Venture Leasing, LLC.,

Defendants.  
-----x

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers  
MS 3

Numbered  
Docs. # 26-34; 42-45

Upon the foregoing cited papers, the defendants Wilson Charles and Venture Leasing LLC's motion for summary judgment, pursuant to CPLR 3212, and dismissing one or more causes of action, pursuant to CPLR 3211 (a) (1) and (a) (7), are decided as follows:

Plaintiff commenced this action to recover damages for injuries allegedly suffered as the result of an automobile accident on June 1, 2017, at approximately 6:15 a.m., at the intersection of Barbey Street and Pitkin Avenue, in Brooklyn, New York. Plaintiff was a passenger in the vehicle of defendant Wilson Charles. Barbey Street is a one-way street with a stop sign at the intersection. Pitkin Avenue is a two-way street with parked cars on both sides and one lane of traffic in each direction. There is no traffic control device on Pitkin at its intersection with

Barbey Street. The vehicles driven by Melissa Amitrano and Wilson Charles collided in the intersection. The front of the Charles vehicle was allegedly struck.

Plaintiff Burt averred immediately before the accident he noticed defendant Amitrano's vehicle two seconds before the collision after it passed the stop sign at Barbey Street going straight at a steady speed. Defendant Charles averred he did not see the Amitrano vehicle until he was hit, although plaintiff averred that during the two seconds prior to the collision Charles sped up. Defendant Charles and Venture Leasing, the vehicle owner, alleged Amitrano failed to stop at stop sign at the corner of Barbey Street, in violation of VTL 1172 (a), and failed to yield the right of way in violation of VTL 1142 (a). They sought summary judgment and dismissal of the complaint and cross claims against them. Defendant Amitrano opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

VTL 1172 provides:

**Stop signs and yield signs**

(a) Except when directed to proceed by a police officer, 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, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the

intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

VTL 1142 (a) provides:

**Vehicle entering stop or yield intersection**

(a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two 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.

Defendants Charles and Venture Leasing alleged the Amitrano vehicle failed to stop at the stop sign and failed to yield the right of way, causing a collision in the intersection. However, on this record, defendants cannot clearly establish whether or not Amitrano stopped at the stopped sign. Amitrano averred she stopped at the sign. Moreover, plaintiff averred he first saw her vehicle after she passed the sign, and defendant Charles averred he only saw the vehicle after he was hit, although plaintiff averred he sped up just prior to the collision. Therefore, a question of fact exists as to whether Amitrano violated VTL 1172. A question of fact also exists as to whether Amitrano failed to yield the right of way, pursuant to VTL 1142 (a), since Charles averred he did not see the Amitrano vehicle prior to the collision, although plaintiff averred he sped up (*see Tornabene v Seikel*, 186 AD3d 645 [2d Dept 2020]). Accordingly, the motion for summary judgment is denied.

Defendants also sought to dismiss the complaint and cross claim against them on the grounds of documentary evidence and failure to state a cause of action. When a party moves to dismiss a complaint on the grounds of failure to state a cause of action, the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Thaw v North Shore Univ. Hosp.*, 129 AD3d 937 [2d Dept 2015]). Here, the plaintiff

