

**Menoscal v Santos**

2021 NY Slip Op 30196(U)

January 20, 2021

Supreme Court, Kings County

Docket Number: 509249/2019

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20<sup>th</sup> day of JANUARY, 2021

P R E S E N T:  
HON. RICHARD VELASQUEZ, Justice.

-----X  
CARLOS MENOSCAL,

Plaintiff,  
-against-

Index No.: 509249/2019  
Decision and Order

FLAVIO AMAURI SANTOS AND BRITTANY  
MARIE CHIMBO,

Defendants,  
-----X

The following papers NYSCEF Doc #'s 13 to 58 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	13-19; 46-48
Opposing Affidavits (Affirmations)_____	44; 56
Reply Affidavits (Affirmations)_____	57; 58

After having heard Oral Argument on JANUARY 20, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Defendant BRITTANY MARIE CHIMBO moves pursuant to CLR 3212 for summary judgment on liability. (MS#1). Co-Defendant FLAVIO AMAURI SANTOS opposes the same. Plaintiff CARLOS MENOSCAL moves pursuant to CPLR 3212 for summary judgment on liability, on the basis that the plaintiff was a innocent passenger. (MS#4).

### ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 N.Y.2d 1019 [1995] ).

In the present case, the Defendant BRITTANY MARIE CHIMBO testimony establishes that she was hit in the rear by co-defendant FLAVIO AMAURI SANTOS.

(see *Hanakis v. DeCarlo*, 98 AD3d 1082, 1084, 951 NYS2d 206; *Napolitano v. Galletta*, 85 AD3d at 882, 925 NYS2d 163). “A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Hauser v. Adamov*, 74 AD3d 1024, 1025, 904 NYS2d 102). Here, the defendant BRITTANY MARIE CHIMBO established her prima facie entitlement to judgment as a matter of law by demonstrating that their vehicle was struck in the rear by the vehicle operated by the co-defendant FLAVIO AMAURI SANTOS, see *Perez v. Roberts*, 91 AD3d 620, 621, 936 NYS.2d 259; *Giangrasso v. Callahan*, 87 AD3d 521, 522, 928 NYS2d 68; *Hauser v. Adamov*, 74 AD3d at 1025, 904 NYS.2d 102; *Hanakis v. DeCarlo*, 98 AD3d 1082, 1084, 951 NYS2d 206, 208 (2012). In opposition, co-defendant FLAVIO AMAURI SANTOS fails to raise a triable issue of fact. Additionally, co-defendant FLAVIO AMAURI SANTOS deposition testimony, substantiates defendant BRITTANY MARIE CHIMBO’s testimony regarding how the accident occurred. Therefore, defendant BRITTANY CHIMBO is entitled to summary judgment as she was hit in the rear by co-defendant FLAVIO AMAURI SANTOS.

Plaintiff also moves for summary judgment on liability contending they are an innocent passenger. It is well established “the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers” (see CPLR 3212[g]; *Jung v. Glover*, 169 AD3d 782, 783, 93 NYS3d 390; *Phillip v. D & D Carting Co., Inc.*, 136 AD3d 18, 24–25, 22 NYS3d 75; *Anzel v. Pistorino*, 105 AD3d 784, 786, 962 NYS2d 700; *Medina v. Rodriguez*, 92

AD3d 850, 850, 939 NYS2d 514; *Garcia v. Tri-County Ambulette Serv.*, 282 AD2d 206, 207, 723 NYS2d 163; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 AD2d 833, 833–834, 486 NYS2d 357). In the present case, the plaintiff made a prima facie showing of entitlement to summary judgment on their motion (see generally *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572). The certified police report as well as the testimony of defendant BRITTANY MARIE CHIMBO establishes the plaintiff was a passenger seated in defendant BRITTANY MARIE CHIMBO vehicle. There is no claim that the injured plaintiff bore any fault in the happening of the accident (see *Phillip v. D & D Carting Co., Inc.*, 136 AD3d at 25, 22 NYS3d 75), quoting *Romain v. City of New York*, 177 AD3d 590, 591, 112 NYS3d 162, 164 (2d Dep't 2019). In opposition, co-defendant FLAVIO AMAURI SANTOS fails to raise an a issue of fact. Plaintiff in the present case is an innocent passenger is entitled to summary judgment on the issue of liability to the extent that they are not liable for the happening of the accident.

Accordingly, defendant BRITTANY MARIE CHIMBO's motion for summary judgment on liability is hereby granted, for the reasons stated above. (MS#1). Plaintiff's motion for summary judgment on liability is hereby granted. Plaintiff is an innocent passenger is entitled to summary judgment on the issue of liability to the extent that they are not liable for the happening of the accident. (MS#4).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
January 20 , 2021

ENTER FORTHWITH:

  
HON. RICHARD VELASQUEZ