

<b>Bravo v Alija</b>
2021 NY Slip Op 33019(U)
November 2, 2021
Supreme Court, Richmond County
Docket Number: Index No. 152286/2019
Judge: Orlando Marrazzo, Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**GABRIELA BRAVO,**

**DECISION/ORDER**

**ISA PART 26**

HON. ORLANDO MARRAZZO, JR.

*Plaintiff(s),*

Index No.: 152286/2019  
Motion No. 1

*-against-*

**LULE ALIJA and LIRIJE ISLAMOVSKI,**

*Defendant(s)*

The following numbered 1 to 3 were fully submitted on 4<sup>th</sup> day of November 2021

	Papers Numbered
Plaintiff’s Motion for Summary Judgment, with Supporting Papers and Exhibits, Dated, August 3, 2021 .....	1
Affirmation in Opposition, With Supporting Papers and Exhibits, Dated, October 14, 2021 .....	2
Reply, Dated, October 21, 2021 .....	3

Plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability. As is set forth below, plaintiff’s motion is denied.

There are issues of fact as to how the accident happened that prevents this court from granting summary judgment in plaintiff’s favor. This action is the result of a motor vehicle accident that occurred on May 1, 2019. The defendant, Lirije Islamovski, stopped at the stop sign controlling traffic in her direction on Rose

Avenue, Staten Island, New York prior to turning left onto 10th Street. The plaintiff was operating her vehicle on 10th Avenue. Although it appears that the plaintiff had the right of way, the plaintiff's deposition testimony establishes that she does not recall many details leading up to the subject accident. It is respectfully submitted that material issues of fact remain as to whether the plaintiff established a prima facie case of liability against the defendants, Lule Alija and Lirije Islamovski. Clearly, summary judgment is not appropriate.

Additionally, there are material issues of fact as to the plaintiff's comparative liability. The deposition testimony of the parties raises issues of fact as to the happening of this accident. The plaintiff, Gabriela Bravo, appeared for her deposition on January 14, 2021. Relevant portions of her deposition transcript are as follows: She was operating her 1997 Toyota Corolla on 10th Street for four or five blocks before this accident happened (pp. 26, 34). She does not recall traffic conditions on 10th Street as she drove towards the intersection with Rose Avenue (p.31). She does not recall observing a vehicle traveling ahead of her on 10th Avenue before this accident happened (p.35). Her vehicle was approximately one-quarter of a car length from the intersection when she first observed the defendant's vehicle before the stop line on Rose Avenue (pp.36-38).

Further the defendant's vehicle was approximately one-quarter of a car length before the stop line (p.40). She observed the defendant's vehicle using her peripheral

vision (p.42). She does not recall her speed when she first observe the defendant's vehicle (p.37). She is "not exactly sure where" her car was when this accident happened (p.38). She does not recall providing a police officer with the statement attributed to her in the Police Report (pp. 80-81).

The defendant, Lirije Islamovski, appeared for a deposition on January 14, 2021. Relevant portions of her deposition testimony are as follows: On May 1, 2019, she was operating a Nissan Rogue owned by the defendant, Lule Alija, when she was involved in the subject accident (pp.10-11, 53). She was traveling on Rose Avenue and intended to turn left onto 10th Avenue (p.21). She described Rose Avenue as a one-way road having one lane of moving traffic with parking permitted on the right side (p.21-22). She described 10th Street as a two-way roadway with a double yellow line separating the two lanes of traffic (p.22). A stop sign controlled traffic in her direction on Rose Avenue at 10th Street (p.23). There is a stop line on the roadway before the stop sign (p.24). Nothing blocked her view of traffic on 10th Street (p.25). She brought her vehicle to a stop before the stop sign for 15 seconds (pp. 25-26, 28-29, 36-37). She looked to her right and then to her left before entering the intersection (p.30). She heard the sound like a "fast boom" just before this accident happened (p.47). The front part of her vehicle was involved in the accident (p.36). 8.

The plaintiff in (*MD Sumsurzaha v Corso*, 175 AD3d 1583 (2d Dept 2019)), alleged in his affidavit that his vehicle was rear-ended as it was stopping for a traffic signal ahead. The defendants' opposition papers conflicted with the plaintiff's version of the events. In affirming the lower court's order denying the plaintiff's summary judgment liability motion, the Appellate Division, Second Department reasoned that the defendants raised a triable issue of fact precluding summary judgment. The plaintiff in (*Gray v Air Excel Serv. Corp.*, 171 AD3d 1026 (2d Dept 2019)), testified that he was turning right when the defendant driver cut him off, causing him to swerve into oncoming traffic and to "slam" on his brakes. The defendant's version differed from the plaintiff's version. In affirming the lower court's denial of summary judgment to the defendant, the Appellate Division, Second Department explained that summary judgment is an inappropriate remedy where the parties present differing versions of the events leading up to the subject motor vehicle accident. The Court held, "Where there are conflicting versions of events, it is for the trier of fact to evaluate credibility and determine what happened." (In *Poon v Nisanov*, 162 AD3d 804 (2d Dept 2018)), the Appellate Division, Second Department affirmed the denial of the summary judgment liability motion of the defendants, Rubin Nisanov and Dayan Nisanov, because the deposition testimony of the defendant, Angel Ramos, regarding the events leading up to the subject accident differed from the defendant Nisanov's deposition testimony. The defendant

Ramos alleged that the Nisanov vehicle was driving on the shoulder of the entrance ramp next to his vehicle just before this accident happened. His vehicle impacted the plaintiff's vehicle as he was trying to avoid the Nisanov vehicle. The Court held that the defendant Ramos's deposition testimony raised a triable issue of fact as to the comparative negligence of the defendants Nisanov.

Here, in this matter, the differing testimony regarding the events leading up to the subject accident makes summary judgment inappropriate.

Further the court cannot consider the Police Report attached to the movants papers because it is inadmissible as hearsay and not within any exception. (*See, Connors v Duck's Cesspool Serv.*, 144 AD2d 329 (2d Dept 1988); *Quaglio v Tomaselli*, 99 AD2d 487 (2d Dept 1984). The plaintiff testified that she does not recall making a statement to the police officer at the scene. A Police Report is generally inadmissible, as the police officer himself did not witness the accident and relies upon hearsay information to produce his report. *Johnson v Lutz*, 253 NY 124 (1930); *Noakes v Rosa*, 54 AD3d 317 (2d Dept 2008).

In *Memenza v Cole*, 131 AD3d 1020 (2d Dept 2015), the Second Department reversed the jury verdict and trial judgment for the defendant, based on the erroneous admission of the Police Accident Report, finding that the admission of a Police Accident Report into evidence requires that the source of information contained in

the report be identified, and without such identification the report remains inadmissible hearsay not subject to the business records exception.

In another recent case, (*Watch v Gertsen*, 126 AD3d 687 (2d Dept 2015)), a New York State Trooper prepared an accident report for an accident between defendant and plaintiff. After the Trooper testified at trial on liability, the Second Department held: [T]he Trooper's testimony concerning the notations in his accident report regarding who was at fault in the happening of the accident constituted inadmissible hearsay...the Trooper's opinion testimony constituted prejudicial and reversible error because it bore on the ultimate issue to be determined by the jury, i.e., which of the parties was at fault.

Here, the report that plaintiff uses in support of their motion contains unverified conclusions about how the accident happened as there is no evidence that the police officer actually witnessed this accident, and the source of the information is not identified.

It is well established that a motion for summary judgment must be supported by evidence from someone who has knowledge of the facts. (See, *Zuckerman v City of New York*, 49 NY2d 557 (1980).

The plaintiff's arguments that the defendants are the proximate cause of the subject accident are nothing more than mere speculation and, therefore, should be

entirely disregarded by the Court. Mere conclusions based upon surmise, conjecture, speculation, or assertions are without probative value. (*See, Seelinger v Town of Middletown*, 79 AD3d 1227 (3d Dept 2010); *Parks v Greenberg*, 161 AD2d 467 (1st Dept 1990). Here, the Court cannot permit the plaintiff to raise speculative arguments as to how defendant might have avoided the accident, which was wholly caused by the plaintiff (see, e.g., *Zuckerman v City of New York*, 49 NY2d 557 (1980), which held that mere “expressions of hope or unsubstantiated allegations” are insufficient to defeat summary judgment.

Clearly, plaintiff failed to meet her burden and did not establish, prima facie, that defendants were negligent and are liable as a matter of law. Accordingly, summary judgment is an inappropriate remedy where, as here, the plaintiff failed to establish where her vehicle was in relation to the intersection when the other vehicle turned left in front of her vehicle. (*See, Espinal v Volunteers of America-Greater N.Y., Inc.*, 121 AD3d 558 (1st Dept 2014); *Kassim v Uddin*, 119 AD3d 529 (2d Dept 2014); *Calderon-Scotti v Rosenstein*, 119 AD3d 722 (2d Dept 2014). 22.

In (*Kassim v. Uddin*, 119 Ad3d 529 (2d Dept. 2014), the defendant’s vehicle turned left in front of the plaintiff’s vehicle. The Appellate Division, Second Department affirmed the denial of the plaintiff’s summary judgment liability motion on the basis that the plaintiff failed to establish the location of his vehicle when this accident happened and failed to establish which vehicle entered the intersection first.

The Court re-asserted that a party having the right of way must exercise reasonable care to avoid an accident. In (*Calderon-Scotti v. Rosenstein*, 119 AD3d 722 (2d Dept 2014)), the Appellate Division, Second Department reversed the lower court's order granting summary judgment to the defendant who had the right of way. The Court reasoned that the deposition testimony raised a triable issue of fact as to whether the plaintiff's vehicle was already within the intersection as the defendant approached the intersection and whether the defendant should have observed the plaintiff's vehicle as it turned left.

Applying the law to the facts of this case, the deposition testimony of the parties to this lawsuit regarding the location of the vehicles within or outside of the intersection along with the points of impacts to these vehicles raise issues of fact as to which vehicle entered the intersection first and whether the vehicle with the right of way used reasonable care to avoid the accident. The plaintiff has failed to eliminate an issue of fact as to whether she acted reasonably under the circumstances and failed to see that which she should have seen through the proper use of senses. (*See, Bullock v Calabretta*, 119 AD3d 884 (2d Dept 2014); *Wilson v Rosedom*, 82 AD3d 970 (2d Dept 2011). 26. There is also a question as to whether the plaintiff was traveling at an excessive rate of speed given the condition of the roadway or was otherwise negligent in failing to take sufficient evasive action in avoiding the contact with the defendant's vehicle. (*Seymour v Obreza Trucking*, 288 AD2d 831

(4th Dept 2001). “Speeding” in this context must also be judged based on the driving conditions that prevail and not just the posted speed limit because “[the] operator of a vehicle must compensate for any known adverse road conditions.” (*Young v City of New York*, 113 AD2d 833 (2d Dept 1985). A driver who has the right of way has a duty to exercise reasonable care to avoid a collision, including keeping a proper lookout and to see what can be seen through the proper use of his/her senses. *Twitter v Lavi*, 104 AD3d 736 (2d Dept 2016); *Canales v Arichabala*, 123 AD3d 869 (2d Dept 2014). 29. A driver who proceeds into an intersection may be found partially responsible, notwithstanding the invitation to proceed if they do not use reasonable care to avoid an accident. *Siegel v Sweeney*, 266 AD2d 200 (2d Dept 1999); *Boston v Dunham*, 274 AD2d 708 (3d Dept 2000). 30.

Further, the Appellate Division recently re-affirmed its longstanding precedent in (*Blair v Coleman*, 146 AD3d 743 (2d Dept 2017), holding that the moving party failed to eliminate all triable issues of fact as to whether they contributed to the accident, in that they failed to observe the other party’s vehicle as they approached the intersection. *Regans v Baratta*, 106 AD3d 893 (2d Dept 2013); *Simmons v Canady*, 95 AD3d 1201 (2d Dept 2012). 31. The Blair Court also re-affirmed that “[w]hile an operator of a motor vehicle travelling with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, the operator travelling with the right-of-way nevertheless has a duty to use

reasonable care to avoid colliding with other vehicles. (*Twizer v Lavi*, 140 AD3d 736 (2d Dept 2016). In (*Linder v Guzman* (163 AD3d 947 [2d Dept 2018]), the Appellate Division, Second Department affirmed the lower court's order denying the defendant's summary judgment liability motion on the basis that the plaintiff raised a triable issue of fact as to whether the defendant stopped at the stop sign before entering the intersection. In (*Kaziu v Human Care Servs. For Families & Children, Inc.* (167 AD3d 588 [2d Dept 2018]), the Appellate Division, Second Department affirmed the denial of the defendant's summary judgment liability motion based on the conflicting testimony as to how the subject accident happened (whether or not the defendant stopped at the stop sign); and where the accident happened.

While the plaintiff argues that they had the right of way and, therefore, cannot be liable, this argument is not supported by the law. The law is clear. "A driver who has the right of way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection." (*See, Arias v Tiao*, 123 AD3d 857 (2d Dept 2014).

Further the court notes that the plaintiff has not established her freedom from comparative negligence. The Court of Appeals, in (*Rodriguez v City of New York*, 31 NY3d 312 (2018), clarified a movant's burden on summary judgment. If plaintiff is not seeking a determination that they are free from liability, but, merely seeking a

determination that a defendant is liable (establishing as a matter of law that a defendant is liable to some unknown percentage); then plaintiff does not have to prove freedom from comparative negligence. In that case, plaintiff has solely proven as a matter of law that the first two (2) questions on the standard jury verdict sheet have been answered in the affirmative (i.e., whether defendant was negligent, and if so, was a substantial factor [proximate cause]).

However, if a plaintiff is also seeking a determination that they are not liable (or seeking a determination that the case should proceed directly to a damages trial, or that a defendant's affirmative defense of comparative negligence should be stricken); then plaintiff is still required to prove his freedom from comparative negligence *Id.*; (see also *Thoma v. Ronai*, 82 NY2d 736 (1993); *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 (2d Dept 2015)). In the former scenario, (a determination solely that defendant is liable), the issue of plaintiff's possible comparative negligence is still not resolved. A trial is required to determine plaintiff's possible comparative negligence.

According to the plaintiff's deposition testimony, she does not recall specifics regarding the events leading up to the subject accident, including the accident. More specifically, the location of her vehicle with regard to the intersection when this accident happened. Additionally, the plaintiff observed the defendants' vehicle using her peripheral vision. The plaintiff's deposition testimony lacks any detail with

regard to whether she actually turned her head to observe the defendants' vehicle and whether she actually observed the defendants' vehicle fail to stop at the stop sign.

Therefore, the court as a matter of law is unable to grant plaintiff summary judgment on the issue of liability. The court emphasizes that 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, *Rotuba Extruder, Inc. v. Ceppor*, 46 NY2d 223 (1978); *Moskowitz v Garloc*, 23 AD2d 9343; *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979).

When deciding a summary judgment motion, the Court must construe the facts in light most favorable to the non-moving party. (see, *Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept. 1990); *Rebecchi v. Whitmore*, 172 AD2d 600 (2d Dept. 1991).

Further, the Court must draw all reasonable inferences in favor of the party opposing the motion. And the opposing party's statements are deemed to be true, (See, *Pantote Big Alpha Goods, Inc. v. Schefman*, 121 AD2d 295 (1st Dept. 1986); *Russell v. Barton Hepburn Hospital*, 154 AD2d 796 (3d Dept. 1989).

The court determines that it is the duty of the triers of fact to determine whether the defendant's conduct fell below any permissible standard of due care.

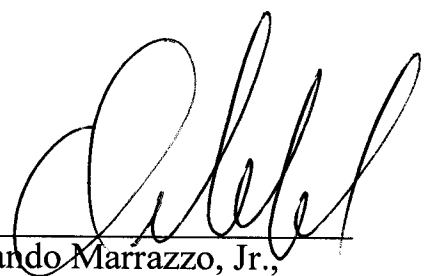
This question can "rarely be decided as a matter of law." (*See, Andre v. Pomeroy*, 35 NY2d 361 (1974). Moreover, there can be more than one proximate cause of an accident. (*See, Cox v. Nunez*, 23 AD3d 427 (2d Dept 2005); *Forte v. City of Albany*, 279 NY 416, (1939).

Summary judgment is "rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances" (*See, Johannsdottir v. Kohn*, 90 AD2d 842 (2d Dept 1982). 46.

Therefore, the court denies plaintiff's motion for summary judgment on the issue of liability as there are issues of fact in this case.

This constitutes the decision and order of the court.

Dated: November 2, 2021  
Staten Island, New York



Orlando Marrazzo, Jr.,  
Justice, Supreme Court