

**Guerrero v Friendly Tr. Inc**

2021 NY Slip Op 34289(U)

October 21, 2021

Supreme Court, Bronx County

Docket Number: Index No. 30746/2020E

Judge: Veronica G. Hummel

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 31**

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**LIANY GUERRERO and LIANY VILLACIS,**

**Index №. 30746/2020E**

**-against-**

**Hon. VERONICA G. HUMMEL,**

**FRIENDLY TRANSIT INC, LASSINA BALLO, and  
CHRISTOPHER M. PINON,**

**Justice Supreme Court**

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The following papers were read on this motion and cross motion (NYSCEF Seq. No. 1), for Summary Judgment Liability, noticed Dec 16, 2020 and submitted March 23, 2021.

Notice of Motion–Affirmation & Exhibits	NYSCEF Doc No(s). 7-12
Notice of Cross Motion – Affirmation and Exhibits	NYSCEF Doc No(s). 16-22
Affirmation in Opposition and Exhibits	NYSCEF Doc No(s). 24-25
Reply Affirmation	NYSCEF Doc No(s). 27
Affirmation in Opposition to Cross Motion	NYSCEF Doc No(s). 28
Reply Affirmation	NYSCEF Doc No(s). 29
Affirmation in Opposition to Motion	NYSCEF Doc No(s). 31
Affirmation Opposition to Cross Motion	NYSCEF Doc No(s). 32

HON. VERONICA G. HUMMEL:

Plaintiffs LIANY GUERRERO and LIANY VILLACIS move [Mot. Seq. 1] for partial summary judgment in their favor on liability against Defendants FRIENDLY TRANSIT INC., LASSINA BALLO (jointly the Friendly Defendants), and CHRISTOPHER M. PINON, and dismissing any affirmative defense based on Plaintiff’s culpable conduct/ comparative negligence (Defendant Pinon’s first affirmative defense-paragraph 5 and the Friendly Defendants’ second affirmative defense). Defendant Pinon cross-moves for summary judgment dismissing the complaint and any cross claims asserted as against him.

This is an action to recover damages for alleged personal injuries sustained by Plaintiffs in a motor vehicle accident, which occurred on September 15, 2018, at about 8:35 A.M., at the intersection of Metropolitan Avenue

and Ascan Avenue in Queens, New York. Plaintiffs were passengers in the vehicle owned by Defendant Friendly Transit Inc. and operated by Defendant Ballo ( the Friendly Vehicle), which came in contact with the vehicle owned and operated by Defendant Pinon (the Pinon Vehicle).

In support of the motion, the submissions include the pleadings, the affidavits of the Plaintiffs, the police accident report, and the deposition transcript of the Defendant Pinon. In opposition to motion, the attorney for the Friendly Defendants submitted counsel's affirmation.

As for Defendant Pinon, said defendant cross-moves for summary judgment dismissing the complaint and all cross-claims against him. Plaintiff and the Friendly Defendants oppose the cross-motion by submission of affirmations by counsel.

According to Plaintiffs affidavits, Plaintiffs were back-seat passengers the Friendly Taxi and were injured as a result of a crash with the Pinon Vehicle. Plaintiffs submit affidavits each only stating "I was a passenger in [the Friendly Defendants'] car which was in a crash with another vehicle at the intersection of Metropolitan Avenue and Ascan Avenue in Queens. I sat on the rear back seat ... As a result, I was injured".

As for Defendant Pinon, he testified that, at the time of the accident, he was driving, within the speed limit, straight on Metropolitan Avenue towards its intersection with Ascan Avenue. At that intersection, which he describes as a "T" intersection, there was a traffic light which was then green, in his favor, and he had the right of way. While his vehicle was in the intersection, the front of the Friendly Taxi, coming from the other direction and apparently making a left turn onto Ascan Avenue, struck the Pinon Vehicle's left (driver's side) door. The force of the impact was hard, and his air bags deployed.

Plaintiffs' Motion:

*Plaintiffs' motion as to passenger liability and culpable defenses.*

"CPLR 3212 (g) permits the court to limit issues of fact for trial, by specifying which facts are not in

dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action” (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]). In *Garcia v. Tri-County Ambulette Service, Inc.*, the court ruled that “plaintiff, as an innocent rear-seat passenger in one of the vehicles who cannot possibly be found at fault under either defendant's version of the accident is entitled to partial summary judgment.” (*Id.* at 207).

Of note, there is a significant distinction between granting a plaintiff summary judgment on her lack of culpable conduct on liability and granting a plaintiff summary judgment on defendants’ negligence (*Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept. 2016]). A grant of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by its negligence, and such breach proximately caused the plaintiff injury (*Id.*; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 905-906 [2d Dept 2013]). In contrast, a grant of partial summary judgment on the issue of the plaintiff's lack of fault or culpability is a much narrower finding. Such a finding merely establishes as a matter of law that the plaintiff is free of any negligence, as would be the case of an innocent passenger (*Campbell v Mincello*, 184 AD3d 412 [1<sup>st</sup> Dept 2020]). The pronouncement in *Garcia v Tri County Ambulette Serv.*, *supra* stands only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence (*Oluwatayo v Dulinayan*, *supra*).

Here, it is undisputed that Plaintiffs were passengers in the Friendly Taxi and there is no claim that Plaintiffs contributed to causing the accident. As such, the motion by Plaintiffs seeking partial summary judgment on liability is granted to the extent that Plaintiffs, as innocent passengers, are found free from culpable conduct for the happening of the accident. Likewise, any affirmative defenses based on culpable conduct and comparative negligence alleged against Plaintiffs are dismissed (*Oluwatayo v Dulinayan*, *supra*).

*Plaintiff's motion for partial summary judgment on liability as against the Friendly Defendants*

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Tsyganash v Auto Mall Fleet Management, Inc.*, 163 AD3d 1033 [2d Dept 2018]). A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case (*see Rodriguez v City of New York, supra*; *Tsyganash v Auto Mall Fleet Management, Inc., supra*). A violation of the Vehicle and Traffic Law (VTL) constitutes negligence *per se* (*Drummond v Perez*, 146 AD3d 645 [1st Dept 2017]; *see Davis v Turner*, 132 AD3d 603 [1st Dept 2015]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

Vehicle and Traffic Law § 1141 “Vehicle turning left” provides as follows: “The driver of a vehicle intending to turn to the left within an intersection ... shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard”.

Further, Vehicle and Traffic Law § 1163 “Turning movements and required signals” provides that:

*“(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety”.*

A driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield the right of way (*Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]). Hence, a driver with the right of way is entitled to anticipate that the other vehicle would obey the traffic laws that required it to yield, and he had no duty to watch for and avoid a driver who might fail to stop at a stop sign (*Harrigan v Sow*, 165 AD3d 463, 464 [1st Dept 2018]; *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650, 651-652 [2d Dept 2008]).

Applying these legal principles here, Plaintiff sets forth a *prima facie* showing of the Friendly Defendants' negligence. Both Plaintiff and Defendant Pinon averred that, in sum and substance, the Friendly Vehicle failed to yield the right of way, and proceeded to turn in the intersection when it was not safe to do so, and consequently, struck the Pinon Vehicle, causing Plaintiff injury. Plaintiff therefore meets the *prima facie* burden for summary judgment by demonstrating that the Friendly Defendants violated Vehicle and Traffic Law §§ 1141 and 1163 and these violations constitute negligence as a matter of law. Thus, the burden shifted to the Friendly Defendants to advance a non-negligent explanation for the accident (*Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650, 651-652 [2d Dept 2008]).

The Friendly Defendants' opposition consists only of an attorney's affirmation and, therefore, fails to establish a non-negligent explanation for the happening of the accident. Defendant Ballo, the person with knowledge of the relevant facts concerning the circumstances surrounding the accident, fails to submit an affidavit or sworn testimony. As for the attorney's affirmation, it is merely a recitation of general principals, and in any event, it is well-established that where the submission on the part of the party opposing a summary judgment motion consisted only of the bare affirmation of his attorney who demonstrated no personal knowledge of the manner in which the accident occurred such an affirmation by counsel is without evidentiary value and thus unavailing (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]). Where a defendant has personal knowledge of the facts, yet fails to meet his obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact, summary judgment in favor of the movant is warranted (*Thompson v Pizzaro*, 155 AD3d 423, 423 [1st Dept 2017]). Accordingly, Plaintiffs are entitled to partial summary judgment against the Friendly Defendants.

*Plaintiffs' motion for partial summary judgment as against Defendant Pinon*

Plaintiffs do not submit any competent evidence showing negligence on the part of Defendant Pinon and, therefore, do not make a *prima facie* showing as against him. The motion is therefore denied without consideration of the opposition papers.

Defendant Pinon's cross-motion to dismiss the complaint and cross-claims.

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a *prima facie* showing that he or she is free from fault (*see Harrigan v Sow*, 165 AD3d 463 [1st Dept 2018]; *Hilago v Vasquez*, 187 AD3d 683 [1st Dept 2020]). In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, therefore, the driver must demonstrate, *prima facie*, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident (*see Harrigan v Sow, supra; Hilago v Vasquez, supra*).

Here, the moving defendant made a *prima facie* showing of his entitlement to summary judgment in his favor, by his aforesaid testimony, including, *inter alia*, that he was lawfully proceeding straight on Metropolitan Avenue, with the green light in his favor, and with the right of way, when his vehicle was suddenly struck on the left (driver's side) by the Friendly Vehicle, making an illegal left into the path of the movant's vehicle when it was unsafe to do so. As such, the driver of the Friendly Vehicle violated VTL 1141(a) and 1163 which require, in sum and substance, that a vehicle not turn in an intersection until it is safe to do so. Furthermore, drivers such as Defendant Pinon with the right of way are entitled to assume that other cars will obey the traffic laws and yield (*Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]; *Jacino v Sugarman*, 10 AD3d 593 [2d Dept 2004]). Hence, the uncontradicted submitted evidence demonstrates that the movant had the right of way, and was unable to avoid the collision and that his actions were not negligent (*Castro v Hatim*, 174 AD3d 464 [1st Dept 2019]; *Davis v Turner*, 132 AD3d 603 [1st Dept 2015]). Based on the submissions, Defendant Pinon demonstrates that the driver of the Friendly Vehicle was solely responsible for the Accident and he had a nonnegligent explanation for striking the Fernandez Vehicle (*Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]; *see Hidalgo v Vasquez, supra; Harrigan v Sow, supra*).

In opposition, Plaintiffs and the Friendly Defendants fail to generate an issue of fact in opposition to the motion by submitting only attorney affirmations (*Gonzalez v Bishop*, 157 AD3d 460, 461 [1st Dept 2018]). The affirmation of an attorney, as set forth above is insufficient to generate a question of fact warranting the denial of the motion.

In addition, the contention that Defendant Pinon's motion is premature because depositions have yet to be taken lacks merit as depositions are unnecessary before the court determines the liability motion, since defendants have personal knowledge of the facts, yet failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact" (*Thompson v Pizzaro*, 155 AD3d 423 [1st Dept. 2017] ).

Similarly, the argument that Defendant Pinon negligently failed to evade the collision is speculative (*see Jenkins v Alexander*, 9 AD3d 286, 288 [1st Dept 2018]; *Hidalgo v Vasquez*, 187 AD3d 683 [1<sup>st</sup> Dept 2020]), and no other evidence was proffered to support the claim that moving defendant failed to take reasonable steps to avoid the collision (*Hidalgo v Vasquez, supra*). As such, the motion by Defendant Pinon is granted (see Vehicle and Traffic Law §§ 1141; 1163[a]; *Sirlin v Schreib*, 117 AD3d 819, 819-820 [2d Dept 2014]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion by Plaintiffs LIANY GUERRERO and LIANY VILLACIS (Plaintiffs) [Mot. Seq. 1] that seeks an order granting Plaintiffs partial summary judgment on liability as an innocent passenger against defendants FRIENDLY TRANSIT INC., LASSINA BALLO, and CHRISTOPHER M. PINON is granted to the extent that Plaintiffs, innocent passengers, are found free from culpable conduct for the happening of the accident and the affirmative defenses of culpable conduct and comparative negligence (Defendant Pinon's first affirmative defense-paragraph 5 and the Friendly Defendants' second affirmative defense) are stricken; and it is further

ORDERED that the part of the motion by Plaintiffs [Mot. Seq. 1] that seeks an order granting partial summary judgment on liability against defendants FRIENDLY TRANSIT, INC. and LASSINA BALLO is granted; and it is further

ORDERED that the part of the motion by Plaintiffs [Mot. Seq. 1] that seeks an order granting partial summary judgment on liability against Defendant CHRISTOPHER M. PINON is denied; and it is further

ORDERED that the cross-motion of Defendant CHRISTOPHER M. PINON for summary judgment dismissing the complaint and any cross claims asserted as against him is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint and all cross-claims against Defendant Pinon and severing the remaining action; and it is further

ORDERED that the parties are reminded that this matter is scheduled for a status conference on January 19,2022. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations to resolve all outstanding discovery issues; and it is further

ORDERED that the caption of this action shall now read as:

-----x  
LIANY GUERRERO and LIANY VILLACIS,  
Plaintiffs,

Index Number 30746/2020e

-against-

FRIENDLY TRANSIT INC. and LASSINA BALLO,  
Defendants  
-----x

This constitutes the decision and order of this Court.

Dated: October 21, 2021

Hon. s/Hon. Veronica G. Hummel/signed 10/21/2021

VERONICA G. HUMMEL, A.J.S.C.

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- 1. CHECK ONE.....  CASE STILL ACTIVE
  
  - 2. PLAINTIFFS' MOTION IS .....  GRANTED TO THE EXTENT
  
  - 3. PINON's CROSS MOTION IS.....  GRANTED