

<b>Garcia v Salem Truck Leasing, Inc.</b>
2022 NY Slip Op 33435(U)
September 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 15246/2013
Judge: Devin P. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Supreme Court of the State of New York  
County of Kings

Index Number 15246/2013  
Seq. 005

Part 91

**DECISION/ORDER**

HARRY GARCIA,

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

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed . . . .	<u>    </u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Exhibits . . . . .	<u>    </u>
Other . . . . .	<u>    </u>

SALEM TRUCK LEASING, INC. AND MILE GATEAU,

Defendant.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 005) is decided as follows:

**Factual Background.**

Plaintiff brought this action for his personal injuries suffered on November 12, 2012, when he was struck by a truck operated by defendant Milo Gateau and owned by defendant Salem Truck Leasing (“Salem”) (*see* Garcia complaint at ¶¶16–21; *see also* verified answer ¶¶2, 6). The plaintiff alleges that on the above mentioned the date, he was legally crossing Kings Highway at the intersection with Glenwood Road, with pedestrian control in his favor, when defendant Gateau did not yield the plaintiff the right of way while making a left turn (Garcia EBT at 69). The defendant then struck the plaintiff (*id.*). The plaintiff claims that he was on the “crossway” when defendant Gateau struck him (*id.* at 79).

The defendants provide a counter-narrative to the plaintiff’s recitation of the facts. Defendant Gateau concedes that he struck the plaintiff and that the pedestrian control was in favor of the plaintiff. However, Mr. Gateau claims to have yielded to the plaintiff before making a left turn onto the Kings Highway service road from Glenwood Road. The defendant testified

that it was during or immediately after that left turn that he first saw the plaintiff, who “was already in the street” (*id.* at 69, 33). Mr. Gateau explains that he allowed the plaintiff to cross the road, and that he only started to make the left turn after the plaintiff was on the sidewalk of Kings Highway (*id.* at 34, 35). Mr. Gateau further alleges that he believed the plaintiff went back on the roadway after having arrived at the sidewalk (*id.* at 36). Finally, Mr. Gateau testified that he believed the plaintiff was not crossing the intersection in the marked pedestrian crossway, but rather 10 to 20 feet from it (*id.* at 51, 54).

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The plaintiff predicates his claims about the defendants’ negligence on alleged violations of VTL §§ 1111, 1112, and 1146. In a motor vehicle action, “a violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se” (*Barbieri v Vokoun*, 72 AD3d 853 [2d Dept 2010]; *see also Callahan v Glennon*, 193 AD3d 1029 [2d Dept 2021]). Under Vehicle and Traffic Law § 1112 (a), whenever a pedestrian is facing a signal of WALK or a walking person, such pedestrian “may proceed across the roadway in the direction of the signal and shall be given the right of way by other traffic.” VTL § 1111(a) (1) provides that vehicles facing a steady green signal “shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.”

It is undisputed that the plaintiff had the right of way to cross Kings Highway pursuant to VTL § 1112 (b). In their argument to resist summary judgment, defendants allege that Mr. Gateau yielded the right of way to Mr. Garcia before making his turn, allowing the plaintiff to cross the road. Defendant Gateau further contends that the plaintiff caused the accident by going back to the roadway after having been on the sidewalk. This creates a triable issue of fact as to whether defendant Gateau in fact violated VTL § 1111(a)(1). In response, the plaintiff argues that defendant's Gateau's recollection is so incredible that it should be discredited as a matter of law, citing *Prince v City of New York*, 172 AD3d 625, 629 [1st Dept 2019]. However, the binding Second Department authority, *Cruz v New York City Tr. Auth.*, has only been cited to discredit testimony after a jury verdict has been issued (31 AD3d 688 [2d Dept 2006]). In this case, walking back into a road with oncoming traffic after having reached safety on the sidewalk may well be "contrary to common experience[,]" but is not necessarily so unlikely as to be incredible. "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 631 [1997]). Whether Mr. Gateau's recollection is incredible or whether the plaintiff went back on the road are questions of fact that must be resolved by a fact finder.

The defendants further oppose the plaintiff's motion on the grounds that there are conflicting accounts of how the accident occurred—specifically, whether the plaintiff was in the "crossway" at the time of the accident. In his deposition, the plaintiff alleges that the accident took place while he was in the crosswalk. Here, the defendant has produced Mr. Gateau, who repeatedly testified that the plaintiff was not in the crosswalk at the time of the accident. Under VTL § 1152(a), "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all

vehicles upon the roadway.” Whether the plaintiff was in the marked crosswalk or not is an essential question of fact to fully determining liability in this action.

The plaintiff also argues that, even if he was not in the crosswalk when the accident happened, the defendants were negligent per se in that Mr. Gateau violated VTL § 1146. VTL § 1146 (a) requires that “every driver of a vehicle . . . exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway.” Here, the plaintiff’s prima facie case that the defendant violated VTL § 1146 is contested by Mr. Gateau’s testimony that he yielded to allow the plaintiff to reach the sidewalk before making his left turn, and that the plaintiff returned to the road and effectively caused the accident. Because the defendants offer testimony to rebut the plaintiff’s contention that Mr. Gateau violated VTL § 1146 (a), the plaintiff’s summary judgment motion must be denied.

The plaintiff also seeks summary judgment on its claims against defendant Salem as owners of the truck in question, arguing that Salem would be vicariously liable for defendant Gateau’s negligence under VTL § 388. VTL § 388 provides that “[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle.” As decided above, the plaintiff has not demonstrated as a matter of law that the defendant-driver operated his vehicle negligently. The plaintiff’s motion for summary judgment on the issue of Salem’s vicarious liability is therefore denied due to questions of fact.

Finally, the plaintiff seeks summary judgment on its comparative negligence. In light of the competing testimony about whether the plaintiff returned to the street after crossing the roadway, a question of fact remains as to whether the plaintiff was negligent and whether that

negligence contributed to the causation of the plaintiff's accident. Accordingly, the plaintiff's motion is denied.

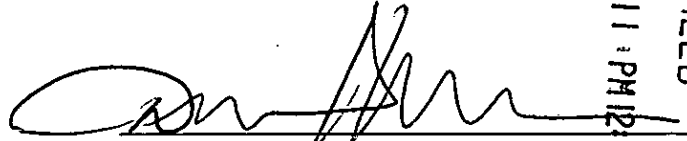
**Conclusion**

The plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the court.

September 23, 2022

**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

2022 OCT 11 PM 12:55  
KINGS COUNTY CLERK  
FILED