

**Herrera v Oliver**

2022 NY Slip Op 34751(U)

February 28, 2022

Supreme Court, Bronx County

Docket Number: Index No. 0025555/2017E

Judge: Veronica G. Hummel

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

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**IRMA HERRERA,**

**Index №. 0025555/2017E**

**-against-**

**Hon. VERONICA G. HUMMEL**

**PEDRO J. OLIVER, AONE LEASING LLC,  
'JOHN DOE' as a flagman employed by AONE  
Leasing LLC whose identity is presently unknown,  
HOME BUILDERS 1 L.P., C&S CONSTRUCTION  
AND CONSULTING GROUP, LLC, DREAMYARD  
3365 THIRD AVENUE HOUSING DEV FUND,  
BRONX PRO GROUP LLC, BP THIRD AVE. L.P.  
and BOCELLA PRECAST LLC**

**Acting Justice Supreme Court**

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The following papers were read on this motion ( Seq. No. 5 ) for **summary judgment** noticed on August 21, 2020 and submitted on March 23, 2021.

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 94-104
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 109-115 & 116-125
Cross Motion – Affirmation and Exhibits	NYSCEF Doc. # 126-139
Affirmation in Opposition to Cross Motion	NYSCEF Doc. # 140
Affirmation in Opposition to Cross Motion and Exhibits	NYSCEF Doc. # 188-193
Reply Affirmation in Further Support of Motion	NYSCEF Doc. # 194
Stipulation of Partial Discontinuance	NYSCEF Doc. # 209

Upon the foregoing papers, it is ordered that this motion by plaintiff IRMA HERRERA [mot. seq. 5] for an order pursuant to CPLR 3212 granting partial summary judgment against defendants PEDRO OLIVER and AONE LEASING LLC (“AONE”) and against defendants, HOME BUILDERS 1 L.P. (“HOME”) and C&S CONSTRUCTION AND CONSULTING GROUP LLC. (“C&S”); and the cross-motion by defendants HOME, C&S, DREAMYARD 3365 THIRD AVENUE HOUSING DEVELOPMENT FUND CORPORATION, (“DREAMYARD”), BRONX PRO GROUP LLC, (BRONX PRO”) and BP THIRD AVE. L.P., (BP THIRD”), for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint and all cross-claims against said defendants are decided in accordance herewith.

The portion of the cross-motion seeking relief in favor of DREAMYARD, BRONX PRO, and BP THIRD is denied as moot based on the Stipulation of Partial Discontinuance (NYSCEF Doc. # 209) which discontinued with prejudice all claims and cross-claims in this action as among the plaintiff and said defendants. The caption was amended to reflect this discontinuance by stipulation dated September 30, 2021, and said caption is utilized

in this order<sup>1</sup>. As such, at issue herein is the remaining portion of plaintiff's motion for summary judgment against defendants Oliver, AONE, HOME, and C&S and the cross-motion by HOME and C&S for summary judgment dismissing the complaint and all cross claims.

In this action plaintiff seeks to recover compensatory damages for alleged serious personal injuries suffered as a result of a motor vehicle accident which occurred on January 5, 2017, in the vicinity of E. 166<sup>th</sup> Street and Third Avenue in Bronx, New York. Plaintiff alleges that plaintiff's vehicle was stopped at a red light and the flatbed tractor trailer operated by defendant Oliver and owned by defendant AONE negligently backed up and struck plaintiff's motor vehicle after being directed to do so by a construction flagman (the flagman).

The defendant driver was delivering construction materials for a project located at 3365 Third Ave., Bronx, N.Y. Defendant C&S was the construction manager for the project and defendant HOME was the general contractor for the worksite. Defendant HOME employed and/or retained the flagman who was required to direct vehicular traffic at the jobsite. While the flagman involved in this collision was employed by HOME, he was also supervised by C&S. The flatbed truck was facing north in the southbound lanes of Third Avenue at the time of the accident. The defendant driver testified that he was directed to back up by the flagman.

Plaintiff claims that the flagman directed defendant Oliver to back his flatbed tractor trailer when it was unsafe to do so in violation of Vehicle and Traffic Law Section 1211(a) which provides: "The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic." Plaintiff argues that HOME and C&S are responsible for the actions of the flagman who instructed Oliver to back up when it was not safe to do so and then failed to instruct Oliver to stop in time to prevent rear-ending plaintiff's vehicle.

In support of the motion, plaintiff has annexed the pleadings, an affidavit by the plaintiff, the deposition testimony of the witnesses produced on behalf of the parties (plaintiff, defendant driver Oliver, Anthony Sinnocchi on behalf of defendant C&S, and James Burns on behalf of AONE). In opposition, defendants Oliver and AONE rely on the above depositions and also the deposition of Jennifer Nanne on behalf of Bronx Pro Group, the written statement of Anthony Leader, and an uncertified copy of the police report.

Here, in a case involving a vehicle backing-up into another vehicle, plaintiff makes a *prima facie* showing of entitlement to summary judgment on liability and a counterclaim by offering evidence that defendant driver

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<sup>1</sup> On April 2, 2021 a stipulation of discontinuance as against defendant Bocella Precast LLC. was filed.

was negligent as a matter of law in backing up into plaintiff's stopped car without taking adequate precautions and that the flagman's negligence contributed to causing the accident (*Drummond v Perez*, 146 AD3d 645 [1st Dept 2017]; *Ortiz v Lynch*, 105 AD3d 584 [1st Dept 2013]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004]; see also *Portalatin v City of New York*, 165 AD3d 1302 [2d Dept 2018]). Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*Drummond v Perez, supra*; see *Davis v Turner*, 132 AD3d 603 [1st Dept 2015]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). VTL 1211 places a duty upon motorists to not back up their vehicle unless such movement can be made with safety and without interfering with other traffic (*Drummond v Perez, supra*; *Portalatin v City of New York, supra*).

Here the only competent and admissible evidence as to how the accident occurred is the affidavit of and deposition testimony by the plaintiff. The proof submitted by the plaintiff establishes a *prima facie* case warranting the grant of summary judgment on liability against defendant Oliver as the operator of the tractor trailer, and the vehicle owner AONE, for backing up and striking plaintiff's stopped vehicle in the rear (*Garcia v Verizon N.Y., Inc., supra*). Furthermore, as it is undisputed that the flagman's actions contributed to causing the accident and the flagman worked for and was supervised by defendants HOME and C&S, plaintiff's showing sets forth a *prima facie* case as against these two defendants as vicariously liability for the flagman's negligence. The burden shifts to said defendants to raise an issue of fact.

In opposition, defendants fail to raise an issue of fact warranting the denial of the motion. The defendants have failed to present competent admissible evidence controverting plaintiff's version as to how the accident occurred or furnish a non-negligent explanation. The statement by Anthony Leader, the only potential eye witness other than the plaintiff is not notarized and cannot be considered on the motion. To the extent that the defendant driver states that he did not see the plaintiff's vehicle before backing up and began going in reverse when he received the signal from the flagman, that does not constitute a non-negligent action. All other arguments raised by the defendants are based on hearsay deposition testimony or other inadmissible proof and therefore fail to establish the existence of a material issue of fact.

As it is uncontroverted that the defendant driver backed-up the tractor trailer because he relied on and was following the directions of the flagman, defendants HOME and C&S, the employer and supervisor of the flagman are responsible for his actions and plaintiff is entitled to summary judgment of liability against all defendants. Thus, defendants fail to generate a question of fact both as to their liability for the accident and as to plaintiff's freedom from comparative fault for the happening of the accident (see *Drummond v Perez, supra*; *Ortiz v Lynch, supra*; *Plaut v Allright Parking Management, Inc.*, 18 AD3d 396 [1st Dept 2005]).

The cross-motion by HOME and C&S seeking summary judgment dismissing the complaint and the cross-claims asserted by Oliver and AONE is supported by the affirmation of counsel and the above referenced depositions, statement by Anthony Leader and the uncertified copy of the police report. The cross-motion is denied for the reasons set forth above as the moving parties, HOME and C&S have failed to rebut plaintiff's *prima facie* showing or to set forth a *prima facie* showing entitling movants to summary judgment dismissing the complaint and the cross-claims. It is not contested that the flagman at the scene gave instructions to Oliver to begin backing the tractor trailer and this resulted in the collision. The flagman was an employee of HOME and was supervised by C&S. and therefore said defendants are liable for his actions. The argument raised by cross-moving counsel is that these defendants were involved in construction as the general contractor and the construction manager and are not therefore liable for a motor vehicle accident caused by their employee is without legal merit. There can be more than one proximate cause for an accident and plaintiff has established that it was the flagman who instructed Oliver to back-up the tractor trailer resulting in the collision with plaintiff's stopped vehicle. As noted above, the only admissible proof as to the manner in which the accident happened is the affidavit by and the deposition testimony of the plaintiff.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movants was not addressed by the Court, it is hereby denied.

Accordingly, it is ordered that this motion by plaintiff IRMA HERRERA [mot. seq. 5] for an order pursuant to CPLR 3212 granting partial summary judgment against defendants PEDRO OLIVER and AONE LEASING LLC ("AONE") and against defendants, HOME BUILDERS 1 L.P. ("HOME") and C&S CONSTRUCTION AND CONSULTING GROUP LLC. ("C&S") is granted; and it is further

ORDERED that the cross-motion by defendants HOME and C&S for an order granting summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against said defendants is denied.

This is the decision and order of the court.

**Dated:** February 28, 2022

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

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1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
2. MOTION IS..... GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT