

**Barbier v Duzen**

2022 NY Slip Op 34893(U)

March 31, 2022

Supreme Court, Kings County

Docket Number: Index No. 508329/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 31<sup>st</sup> day of March, 2022.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
JAMES BARBIER,

*Plaintiff,*

-against-

BILL DUZEN, KARZINKA US INC., JEAN ELIZER  
AND FIVE STAR INCOME TAX CORP.,

*Defendant.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Index No.: 508329/2019

DECISION AND ORDER

Motion Sequence #2

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed .....	41-52,
Opposing Affidavits (Affirmations).....	54, 56-60,
Reply Affidavits (Affirmations) .....	61, 62

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KINGS COUNTY CLERK  
FILED

After a review of the papers and oral argument, the Court finds as follows:

The instant action is a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on August 13, 2018. The Plaintiff, James Barbier (hereinafter the "Plaintiff") was a passenger in a vehicle operated by Defendant Jean Elizer and owned by Defendant Five Star Income Tax Corp. (hereinafter referred to as the "Five Star Defendants") when that vehicle was allegedly involved in a collision with a tractor trailer operated by Defendant Bill Duzen and owned by Defendant Karzinka US Inc. (hereinafter referred to individually or collectively as "Karzinka Defendants"). The collision allegedly occurred on Flatbush Avenue at or near its intersection with Avenue J in Brooklyn, New York.

The Plaintiff now moves (motions sequence #2) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability. The Plaintiff contends that summary judgment should be granted because he was injured while an “innocent passenger” when the vehicle he was a passenger in moved to avoid a double parked vehicle and as a result collided with the Karzinka Defendants vehicle. In support of his application, the Plaintiff relies on his own deposition as well as the deposition of Defendant Duzen and Defendant Elizer.

Both the Karzinka Defendants and the Five Star Defendants oppose the motion.<sup>1</sup> The Karzinka Defendants contend that the motion should be denied as they were not the proximate cause of the collision at issue. Specifically, the Karzinka Defendants contend that they were driving forward in their lane when the Five Star Defendants’ vehicle entered that line from the right lane. The Karzinka Defendants contend that there was no double parked vehicle. The Five Star Defendant contend that the motion should be denied as it was their vehicle that remained in the right lane and that it was the Karzinka vehicle that entered into the right lane and collided with the Five Star vehicle.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986],

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<sup>1</sup> Both the Karzinka Defendants and the Five Star Defendants had initially argued in their affirmations in opposition that the Plaintiff’s motion was defective since it failed to annex a statement of facts as required by Section 202.8-g(a) of the Uniform Civil Rules for the Supreme Court. The Defendants withdrew this objection during oral argument. Also, the Plaintiff withdrew his objection to the Defendants’ late service of their affirmation in opposition.

*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

“In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.”

*Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that the Plaintiff has only provided sufficient evidence that he is an innocent passenger free from liability. When asked what lane his vehicle was in prior to the accident, the Plaintiff responded “[o]n the lane next to the parking lane.” When asked whether the parking lane was to the left or the right, he answered “[t]he right.” (See Plaintiff’s Motion, Exhibit D, Pages 12 through 14). When asked whether the vehicle he was a passenger in had to change lanes he stated “[b]efore the accident, what I remember, there was a big bus parked and you have to do

some detour to avoid the big bus before the accident.” (See Plaintiff’s Motion, Exhibit D, Page 29). When asked about the nature of the collision, the Plaintiff stated that he did not see the impact but felt it. He stated, “I don’t know how many impacts, but the trailer kept pushing us forward and to the right, so I don’t remember how many impacts.” This testimony, taken together, is not sufficient for the Plaintiff to show that either of the defendant drivers were negligent and a proximate cause of the collision at issue. “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.” *Medina v. Rodriguez*, 92 A.D.3d 850, 850, 939 N.Y.S.2d 514, 515 [2d Dept 2012]. A determination cannot be made on the papers presented whether either defendant driver was negligent and a proximate cause of the accident. Each driver asserts a materially different description of how the accident occurred, and each version, taken as true, could serve to establish that driver’s freedom from comparative fault.

Based upon the foregoing, it is hereby ORDERED as follows:

Plaintiff’s Motion (motion sequence #1) is granted solely to the extent that Plaintiff is an innocent passenger free from liability.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Handwritten signature of Carl J. Landicino, J.S.C. and a vertical stamp reading "KINGS COUNTY CLERK FILED 2022 APR -4 AM 10:22".