

**Nunez v A&J Produce Corp.**

2022 NY Slip Op 35020(U)

January 10, 2022

Supreme Court, Bronx County

Docket Number: Index No. 29583/2019E

Judge: Ben R. Barbato

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E# 001

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-15

DOMINGO NUNEZ,

Index No. 29583/2019E

-against-

Hon. BEN R. BARBATO,

A&J PRODUCE CORP. and JOHN TRUMUTOLA,  
Jr.

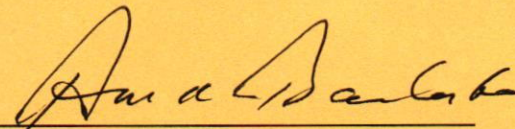
Justice Supreme Court

The following papers were read on this motion (NYSCEF Seq. No. 1), for Summary Judgment Liability, noticed & submitted October 14, 2021.

Notice of Motion–Affirmation & Exhibits- by Plaintiff	NYSCEF Doc No(s). 18-29
Answering Affirmation & Exhibits – Opposition by Defendant	NYSCEF Doc No(s). 30-31
Replying Affirmation & Exhibits – by Plaintiff	NYSCEF Doc No(s). 32-33
Miscellaneous	NYSCEF Doc No(s).

Upon the foregoing papers, Plaintiff’s Motion for partial summary judgment in his favor on liability, and for related relief, is **GRANTED** in accord with the annexed memorandum decision and order.

Dated: JAN 10 2022 2021

Hon.   
BEN R. BARBATO, J.S.C.

- 1. CHECK ONE.....  CASE STILL ACTIVE -
- 2. MOTION IS .....  GRANTED TO THE EXTENT
- 3. SCHEDULE APPEARANCE .....

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X

DOMINGO NUNEZ,

Plaintiff,

-against-

Index No.: 29583/2019E

A&J PRODUCE CORP. and JOHN TRUMUTOLA, Jr.,  
Defendants.

-----X

HON. BEN R. BARBATO:

Plaintiff, DOMINGO NUNEZ, moves for partial summary judgment in his favor on the issue of liability, and to dismiss Defendant’s affirmation defenses alleging Plaintiff’s comparative negligence, contributory negligence, and culpable conduct, and for related relief.

This is an action to recover damages for alleged personal injuries sustained by Plaintiff, a pedestrian, in a motor vehicle accident, which occurred on July 16, 2019, at about 10:55 p.m. as per the video timestamp, within the confines of the Hunts Point Food Terminal Market located at 772 Edgewater Road, in the Bronx, New York. The motor vehicle operated by Defendant, JOHN TRUMUTOLA, Jr., came in contact with Plaintiff, who was crossing the street, without any crosswalk markings, at the location. Plaintiffs’ submissions include the pleadings, Plaintiff’s and Defendant’s deposition transcript, the Police Accident Report and an 18-second surveillance video showing the occurrence.

In opposition to the motion, Defendant submits Counsel’s Affirmation.

Undisputed Facts:

As clearly demonstrated in the video, Plaintiff was crossing Edgewater Road, and proceeded past the midpoint of the street, when he was struck by Defendant, who was attempting to make a left-hand turn. The Defendant was not braking prior to the accident, as the vehicle’s brake lights are clearly visible only upon impacting

the Plaintiff. Defendant testified that he did not see the Plaintiff. The area appears well lit in the video and the pavement is clearly dry and there is no traffic control device at the intersection.

Applicable Law/Analysis:

At the outset, Vehicle and Traffic Law § 1146 “Drivers to exercise due care”, provides as follows:

“(a) Notwithstanding the provisions of any other law to the contrary, **every driver of a vehicle shall exercise due care to avoid colliding with any ... pedestrian ...** upon any roadway and shall give warning by sounding the horn when necessary ...

(b) 2. If such driver of a motor vehicle causes physical injury while failing to exercise due care in violation of subdivision (a) of this section, then there shall be a rebuttable presumption that, as a result of such failure to exercise due care, such person operated the motor vehicle in a manner that caused such physical injury”.

VTL § 1163 “Turning movements and required signals” provides as follows:

“(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 plaintiff “established prima facie entitlement to summary judgment on the issue of liability by submitting evidence showing that she was crossing an

intersection within the crosswalk, with the light in her favor, when defendants' vehicle struck" plaintiff while defendant was making a turn. (*Curl v Schiffman*, 183 AD3d 415, 415 [1st Dept 2020]; see *Rozon v Rosario*, 144 AD3d 597 [1st Dept 2016]; see *Coutu v Domingo*, 123 AD3d 410 [1st Dept 2014]). Thus, the burden shifted to defendant to raise a triable issue of fact as to whether there was a nonnegligent explanation for the accident. (See *Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]).

Defendant's counsel argues there are questions of fact, however, the arguments become specious upon Defendant's admission that he did not see the Plaintiff prior to striking him. It is irrelevant as to what reason existed for Defendant's failure to see the Plaintiff, since as a motorist, he owed a duty of care to insure the Plaintiff, as a pedestrian, was not injured – a duty clearly breached by Defendant.

Conclusion:

Accordingly, Plaintiff's granted partial summary judgment on liability in his favor, on his lack of comparative negligence, since he was an innocent pedestrian, and Defendant is found negligent and his negligence was a substantial factor in causing the accident. Thus, the Defendant's affirmative defenses alleging comparative negligence, contributory negligence, and/or culpable conduct, on the part of Plaintiff, are dismissed.

In making this determination, the Court is not passing on the other issues herein, including whether Plaintiff's alleged injuries were proximately caused by the negligence of Defendant; and whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

This constitutes the decision and Order of the Court.

Dated: JAN 10 2022, 2021

  
HON. BEN R. BARBATO, J.S.C.