

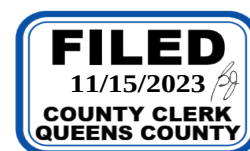
|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Rodriguez v Wilson</b>                                                                                                                                                                                                      |
| 2023 NY Slip Op 35295(U)                                                                                                                                                                                                       |
| November 15, 2023                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 715198/18                                                                                                                                                                                             |
| Judge: Timothy J. Dufficy                                                                                                                                                                                                      |
| 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.                                                                                                                                                         |

**Short Form Order****NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY****PART 35****Justice**

-----X  
**BERNARDO RODRIGUEZ, URSULA  
 RODRIGUEZ, and MERILIO ABREU-COSTA,**

**Plaintiffs,****-against-****Index No.: 715198/18****Mot. Date: 10/24/23****Mot. Seq. 7**

**ANDREW WILSON, CORPORATE COFFEE  
 SYSTEMS, LLC, and ALBERTO MOREL  
 CASTILLO,**

**Defendants.**

-----X  
 The following papers were read on this motion by defendant Alberto Morel Castillo (Castillo) for an order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the plaintiff's complaint and all cross claims against him, the "cross-motion" by plaintiffs Ursula Rodriguez and Merilio Abreu-Acosta for, in effect, summary judgment, pursuant to CPLR 3212, against defendants Andrew Wilson and Corporate Coffee Systems LLC (Wilson/Coffee), and a second "cross-motion" by plaintiff Bernardo Rodriguez for summary judgment, pursuant to CPLR 3212, against Wilson/Coffee and striking the affirmative defenses of contributory negligence and culpable conduct.

|                                                  | <u>PAPERS<br/>NUMBERED</u> |
|--------------------------------------------------|----------------------------|
| Notice of Motion-Affirmation-Exhibits.....       | EF 24                      |
| Notice of Cross-Motion-Affirmation-Exhibits..... | EF 212-216                 |
| Notice of Cross-Motion-Affirmation-Exhibits..... | EF 217-228                 |
| Answering Affidavit-Exhibits.....                | EF 229-223                 |
| Replying Affidavit.....                          | EF 234                     |

Upon the foregoing papers, it is ordered that the motion by defendant Alberto Morel Castillo (Castillo), the "cross-motion" by plaintiffs Ursula Rodriguez and Merilio Abreu-Acosta, and a second "cross-motion" by plaintiff Bernardo Rodriguez are all granted.

As an initial matter, the "cross-motion" by plaintiffs Ursula Rodriguez and Merilio Abreu-Acosta is not a true cross-motion as it was not made against a moving party (see CPLR 2215; *Kershaw v Hospital for Special Surgery*, 114 Ad3d 75 [1st Dept. 2013]).

The same is the case for the “cross-motion” by plaintiff Bernardo Rodriguez, which is, in effect, a “cross-motion to a cross-motion”.

Both of the “cross-motions” by the plaintiffs should have been made as separate, stand-alone motions under their own motion sequence numbers. In the interests of judicial economy, the Court will consider the “cross-motions,” although they are procedurally defective, especially since they were timely filed. However, counsel is cautioned that in the future, improperly filed and procedurally defective motions will not be considered by the Court.

This personal injury negligence action arises out of a motor vehicle collision on the Brooklyn Queens Expressway (BQE), that occurred on October 17, 2017, between a vehicle owned and operated by moving defendant Castillo and a vehicle owned and operated by Andrew Wilson and Corporate Coffee Systems LLC (the Wilson/Coffee defendants. All of the plaintiffs were passengers in the Castillo vehicle.

In support of the motion, Castillo submits, *inter alia*, his examination before trial (EBT) transcript. Castillo testified that he was traveling in the right lane of the BQE, at about forty (40) miles per hour, when he observed a box truck traveling in front of him in the right lane. This box truck was the Wilson/Coffee vehicle. Castillo observed the box truck enter an exit lane that was to the right of the travel lane. After moving into the exit lane, the box truck moved back into the right travel lane. Castillo reduced his speed and blew his horn but the side of the box truck impacted the passenger side of his vehicle.

"[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" (*E.B. v Gonzalez*, 208 AD3d 618, 619 [2d Dept. 2020] [internal quotation marks omitted]; see *Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept. 2020]). If one party has established that the other party has committed negligence per se, the burden then falls to the opposing party to submit a nonnegligent explanation for the action" (*Orellana v Mendez*, 208 AD3d at 889).

Vehicle and Traffic Law Section 1128 (a) states: “A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety”.

Here, Castillo has established a *prima facie* entitlement to judgment as a matter of law by submitting evidence that he was free from comparative negligence and that the co-defendants violated Vehicle and Traffic Law Section 1128 (a) by moving from the exit lane to the right travel lane without ascertaining that this movement could be done safely, and this was the sole proximate cause of the accident (see *Peluso v Martinez*, 136 AD3d 769 [2d Dept. 2016]; *Rivera v Corbett*, 69 AD3d 916 [2d Dept. 2010]).

In opposition, the Wilson/Coffee defendants fail to submit a non-negligent explanation for the accident, and thus fails to raise a triable issue of fact. The purported transcript of an alleged witness, Roman Abraham, is not in admissible form and therefore has not been considered by the Court. Significantly, there is no affidavit or EBT testimony submitted of this witness. The arguments of counsel, citing the EBT testimony of Castillo, amount to speculation that Castillo, who had the right of way, could have avoided the accident caused by the unsafe and illegal lane change. Speculative contentions regarding how a driver with the right of way could have avoided the accident are insufficient to raise an issue of fact. (*see Breen v. Seibert*, 123 AD3d 963 [2d Dept. 2014]).

In light of the foregoing, Castillo's motion for summary judgment is granted and plaintiff's complaint and all cross-claims against him are dismissed.

The "cross-motion by plaintiffs Ursula Rodriguez and Merilio Abreu-Acosta for summary judgment on the issue of liability against the Wilson/Coffee defendants is also granted. Both of these plaintiffs have established that they were "innocent passengers" who did not contribute to the accident (*see Garcia v Tri-County Ambulette*, 282 AD2d 206 [1st Dept. 2001]) and, for the reasons stated above, that the Wilson/Coffee defendants were negligent as a matter of law. No issue of fact is raised in opposition.

For the same reasons, the "cross-motion" by plaintiff Bernardo Rodriguez (Rodriguez) for summary judgment on the issue of liability against the Wilson/ Coffee defendants is also granted. Further, Rodriguez has also shown that the affirmative defenses of contributory negligence and culpable conduct are without merit. No issue of fact is raised in opposition

Accordingly, it is

**ORDERED** that the motion for summary judgment by defendant Alberto Morel Castillo is granted; and it is further

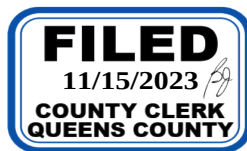
**ORDERED** that plaintiff's complaint and all cross-claims against defendant Alberto Morel Castillo are dismissed; and it is further

**ORDERED** that the "cross-motion" by plaintiffs Ursula Rodriguez and Merilio Abreu-Acosta for summary judgment on the issue of liability against defendants Andrew Wilson and Corporate Coffee Systems LLC is granted; and it is further

**ORDERED** that the “cross-motion” by plaintiff Bernardo Rodriguez for summary judgment on the issue of liability against the defendants Andrew Wilson and Corporate Coffee Systems LLC is granted; and it is further

**ORDERED** that the branch of Rodriguez’s “cross-motion to strike the affirmative defenses of contributory negligence and culpable conduct is granted.

**Dated: November 15, 2023**



A handwritten signature in black ink, appearing to read "T. J. Dufficy".

**TIMOTHY J. DUFFICY, J.S.C.**