

Romano v Cuenca Coronel Trucking, Inc.
2024 NY Slip Op 35014(U)
March 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 713780/2020
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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GUY J. ROMANO,

Index No.:713780/2020

Motion Date:12/16/2025

Plaintiff,

Motion Cal. No.: 18

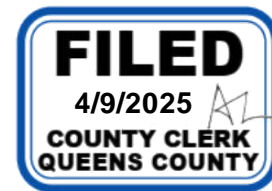
-against-

Motion Sequence No.: 2

CUENCA CORONEL TRUCKING, INC., DIEGO I.
IDROVO-AGUAYAZA, and CITY OF NEW YORK

Defendants.

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The following efiled papers numbered 69-80, 90-94 and 100 submitted and considered on this motion by Guy J. Romano (hereinafter “Romano”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting Romano partial summary judgment on the issue of liability against Defendants Cuenca Coronel Trucking Inc. (hereinafter “Cuenca”) and Diego I. Idrovo-Aguayaz (hereinafter “Idrovo-Aguayaz”). The motion is **denied**, as set forth below.

Motion Sequence 2	Papers <u>Numbered</u>
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 69-80
Affirmations in Opposition-Affidavits-Exhibits.....	EF 90-94
Affirmation in Reply-Affidavits-Exhibits.....	EF 100

Relevant Factual and Procedural Background

This case arises from an accident that occurred on October 8, 2019, at approximately 7:00 a.m. at the Kew Gardens Interchange Infrastructure and Operational Improvement Project on the Grand Central Parkway in Queens, New York. Romano, a construction foreman for Halmar International Construction, was allegedly struck by a 2016 Peterbilt dump truck operated by Idrovo-Aguayaza and owned by Cuenca.

At the time of the accident, Idrovo-Aguayaza was in line to receive dirt from an excavator. Romano alleges that he was standing 6 to 9 feet in front of the dump truck and approximately 1 foot to its passenger side, facing an excavator positioned on a hill above him. He claims that

without warning, the dump truck moved forward and its front passenger-side tire rolled over his feet, causing serious injury. Romano maintains that nothing obstructed the driver's view and that Idrovo-Aguayaza failed to see him despite the truck being equipped with multiple mirrors.

Idrovo-Aguayaza, in contrast, asserts that he did not move the truck on his own initiative. He claims he was given a hand signal by a flag person, Sal Pace (hereinafter "Pace"), directing him to move forward. He states that his truck was idling with the emergency brake engaged until he received this signal. After disengaging the brake and putting the vehicle in first gear, he moved forward 3 to 4 feet before hearing commotion and stopping. He contends that at no point before moving did he see Romano in front of the truck.

Testimony from witnesses varies as to where Romano was standing at the time of the accident. Some suggest he was in the position he describes, while others indicate he may have moved suddenly into the truck's path due to the movement of an excavator nearby.

Romano filed a motion for partial summary judgment on liability, arguing that the undisputed facts establish Idrovo-Aguayaza's negligence as a matter of law. He contends that the driver failed to see him despite having an unobstructed view and moved the truck forward when it was unsafe to do so. Romano further asserts that Idrovo-Aguayaza failed to provide any warning before moving and that the truck's mirrors would have allowed him to see a pedestrian in front of the vehicle.

Romano also relies on expert testimony from forensic consultant Robert Genna (hereinafter "Genna"), who inspected an exemplar Cuenca truck of the same make and model. Genna concluded that if Romano was standing in the position he described, he would have been clearly visible to the driver. According to Genna, there were no blind spots that could have prevented Idrovo-Aguayaza from seeing Romano. Romano further argues that any claims regarding whether a flag person signaled the truck to move, or whether hand signals should have been replaced with paddles, are immaterial because the driver bore the ultimate responsibility for ensuring the path was clear before moving.

Cuenca and Idrovo-Aguayaza oppose the motion, arguing that Romano has not established a prima facie case of negligence. They maintain that genuine issues of material fact exist regarding where Romano was standing, whether he was stationary or moving at the time of impact, and whether Idrovo-Aguayaza acted reasonably in moving forward after being signaled by Pace.

The defense relies on multiple depositions, including those of Pace, Zobra Odr (hereinafter "Odr"), and Nicholas Romano, all of whom worked with Romano at the time of the accident. Their testimonies contain conflicting accounts regarding where Romano was standing and whether the dump truck moved on its own or after a signal.

Pace, who was directing truck movement at the site, testified that Romano was standing toward the passenger side of the truck but also stated that he was trying to avoid a moving excavator at the time of impact. Pace further claimed that he did not direct Idrovo-Aguayaza to

move at that moment and that the truck "jerked forward" unexpectedly.

Odr testified that the driver had been asleep before the accident and had mentioned feeling tired from working overnight. However, she admitted that she did not report this information to anyone before the incident. Nicholas Romano, Romano's son, testified that his father had crossed in front of the dump truck about one minute before the accident but did not witness the actual impact.

The defense also presents testimony from expert Jeffrey Lange, P.E. (hereinafter "Lange"), who challenges Genna's findings. Lange argues that Genna's analysis is flawed because it was conducted in Cuenca's truck yard rather than at the accident site, which may have had different visibility conditions. Lange further contends that Romano's claim that he was stationary in the position he describes is inconsistent with the physical evidence, as Romano feet would not be in the path of the truck if Romano's location is as he claimed. He suggests that Romano may have moved into the truck's path while reacting to and avoiding the excavator, which would explain why Idrovo-Aguayaza did not see him.

Additionally, the defense points out contradictions in witness testimonies, such as whether the road at the accident site was level or on a slight grade, whether the trucks were lined up in a single file or two parallel lines, and whether Romano had his back to the truck or was facing it. Cuenca's owner, Mauro Cuenca, testified that the company's trucks have multiple mirrors and that he has never received complaints about blind spots.

Based on these arguments, the defense asserts that multiple factual disputes exist that require jury determination, making summary judgment inappropriate. They further argue that any alleged negligence by construction site workers, such as Pace's signaling or the absence of paddles, could contribute to comparative fault.

In reply, Romano maintains that the defense has failed to raise a triable issue of fact. He contends that Lange's expert opinion is speculative, conclusory, and based on unauthenticated photographs. He also highlights that both he and Idrovo-Aguayaza testified that nothing obstructed their views at the time of the accident.

Romano argues that any claim suggesting he may have moved into the truck's path is purely speculative and unsupported by the record. He contends that even if an excavator was moving nearby, that does not absolve the driver of responsibility for ensuring the area was clear before moving forward. Romano also disputes the defense's claim that the road conditions affected visibility, emphasizing that all witnesses described the area as flat or with only a slight grade.

Additionally, Romano argues that the defense's reliance on whether Pace signaled the truck to move is a red herring. He asserts that Idrovo-Aguayaza was still obligated to see what was there to be seen and to avoid striking a pedestrian in plain sight. He emphasizes that New York law imposes a duty on drivers to exercise due care and sound their horn when necessary, neither of which was done in this case.

Romano concludes that the undisputed facts show that Idrovo-Aguayaza never saw him before moving the truck, which constitutes negligence. He maintains that any conflicting testimony about whether hand signals were used, whether paddles should have been provided, or whether Romano was reacting to an excavator does not alter the fact that the driver failed to see him when he was in plain view. Accordingly, he reiterates that summary judgment should be granted.

Law and Application

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court

may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

On a summary judgment motion, “[t]he movant 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 Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “The proponent of a summary judgment motion 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 Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Rev 5, LLC v Congregation Beth Elohim*, 229 AD3d 820 [2d Dept 2024]). “The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*see Id at* 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc.*, 226 AD3d 960, 962 [2d Dept 2024]; *Antonyuk v Brightwater Towers Condo Homeowners' Ass'n, Inc.*, 147 AD3d 711, 712 [2d Dept 2017]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*see Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Derise v Jaak 773, Inc.*, 127 AD3d 1011 [2d Dept 2015]).

Upon review of the record, the Court finds that the conflicting expert opinions of Jeffrey Lange and Robert Genna, as well as the contradictory testimony of multiple witnesses, raises genuine issues of material fact. Specifically, there are triable questions as to whether Romano was stationary or moved into the path of the dump truck’s front passenger-side wheels at the time of impact, as well as the precise location of Romano when the accident occurred.

Genna opined that if Romano was positioned as he described, 6 to 9 feet in front of the dump truck, approximately 1 foot to the right of its passenger side, facing the hill with his right shoulder toward the truck, then Idrovo-Aguayaza should have been able to see him without obstruction. Lange did not dispute this assertion but argued that if Romano had indeed been in that exact location, his feet would not have been in the path of the truck’s front wheel, and the accident could not have occurred as alleged. Lange further testified that Romano must have moved into the path of the passenger-side front wheel at some point and identified additional factors, such as Idrovo-Aguayaza’s height, lighting conditions, the surface of the accident location, and whether Romano was moving or stationary, that could have affected Idrovo-Aguayaza’s ability to see Romano before the accident. These opinions directly conflict with the testimony of Romano and Genna, creating a credibility issue that must be resolved by a jury. As the Second Department has recognized, “[w]hen experts offer conflicting opinions, a credibility question is presented requiring a jury’s resolution” (*see Russell v Garafalo*, 189 AD3d 1100, 1102 [2d Dept 2020]).

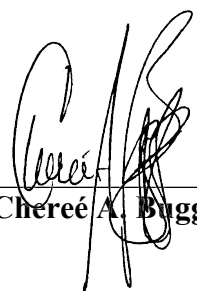
Moreover, Pace's testimony further contradicts Romano's version of events, as he stated that Romano was trying to avoid the excavator when the accident occurred. Given these factual inconsistencies, summary judgment is inappropriate. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*see Pokazanova v Kellyman*, 233 AD3d 952, 953 [2d Dept 2024]).

While Romano argues that Idrovo-Aguayaza failed to see what was there to be seen and should have exercised due care and sound his horn before moving the truck, this duty does not negate the factual disputes concerning Romano's location, movement, and visibility at the time of impact. These issues remain within the province of a factfinder and cannot be resolved as a matter of law.

Hence, in light most favorable to the non-movants, this Court finds that Romano failed to eliminate triable issues of fact. Accordingly, it is hereby

ORDERED, that the motion by Romano for partial summary judgment on the issue of liability as against Cuenca and Idrovo-Aguayaza is **denied**.

Dated: March 11, 2024



Hon. Chereé A. Buggs, JSC

