

**Escobar v Velez**

2013 NY Slip Op 30940(U)

April 30, 2013

Supreme Court, Queens County

Docket Number: 12300/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

ARMANDO ESCOBAR, Index No.: 12300/2011  
Plaintiff, Motion Date: 03/12/2011  
- against - Motion No.: 40  
JULIAN VELEZ and USA TRUCKING INC.,, Motion Seq.: 1  
Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by the plaintiff for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6  
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10  
Reply Affirmation.....11 - 13

This is a personal injury action in which Plaintiff, Armando Escobar, age 32, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on May 4, 2011, when the motorized bicycle he was riding collided with a truck owned by defendant USA Trucking Inc., and operated by defendant Julian Velez. At the time of the accident, plaintiff was riding his bicycle on 31<sup>st</sup> Street crossing the intersection at Hoyt Avenue in Queens County, New York, when the defendant's truck made a right turn onto Hoyt Avenue from 31<sup>st</sup> Street and collided with the plaintiff's bicycle. As a result of the impact, the plaintiff allegedly sustained serious physical injuries including pelvic fractures and right knee injuries that required surgery.

Plaintiff commenced an action against Mr. Velez and his employer, USA Trucking Inc. by filing a summons and complaint on May 20, 2011. Issue was joined by service of defendant's verified answer dated August 22, 2011. A note of issue was filed and the matter is presently on the calendar of the trial scheduling part for May 2, 2013.

Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiff submits an affirmation from counsel, Stephanie A. Mastrocola, Esq; an affidavit from plaintiff, Armando Escobar; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; a copy of the police accident report; and a copies of the transcript of the examinations before trial of the plaintiff and the defendant driver.

In his examination before trial taken on May 3, 2012, plaintiff stated that on the date of the accident, May 4, 2011, he was riding a motorized bicycle making deliveries for Gold Kitchen Chinese Restaurant. He stated that he had just made a delivery and was on his way back to the restaurant riding southbound on 31<sup>st</sup> Street. When he came to the intersection with Hoyt Avenue he stopped his bicycle next to the curb waiting at a red traffic signal. He stated that a truck was also waiting next to him at the red traffic signal. He waited approximately 30 - 40 seconds. He was looking straight ahead and did not see a right turn signal on the truck. He believed that the truck intended to proceed straight ahead across the intersection on 31<sup>st</sup> Street. When the light turned green, plaintiff proceeded straight ahead but the truck turned to the right immediately in front of his bike. The front tire of his bicycle collided with the truck between the truck's front tire and the passenger side door. He stated that although he was wearing a helmet, when he fell off the bike he hit his head and momentarily lost consciousness. When he regained consciousness he was in the ambulance.

In his affidavit dated January 29, 2013, plaintiff states that he could not have known that the defendants' truck was going to make a right turn at the intersection as he had not noted a turn signal operating on the truck. He states that defendant was negligent in that the truck driver failed to see him at the intersection and negligently and improperly made a right turn without yielding the right of way.

The defendant-driver, Mr. Julian Velez, age 44, was deposed on May 3, 2012. At the time of the accident in May, 2011 he was employed by defendant USA Trucking delivering general merchandise

in a 20 foot box truck. He testified that he was coming from a pick-up in Astoria and driving back to his base in Passaic, New Jersey. He was traveling on 31<sup>st</sup> Avenue when he came to the intersection at Hoyt Avenue. He stated that he stopped at the red signal and waited about a minute before the light turned green. His intention was to turn right onto Hoyt Avenue to get to the Triborough Bridge. He stated that he had his right turn signal on. When the light turned green he looked to his right, did not see any other vehicles and began to make a right turn onto Hoyt Avenue. As he was halfway through the turn he heard an impact on his right passenger door. He stated that when he looked to the right he did not see the bicyclist next to him and did not see the bicycle when he began to make the right turn. After the impact he looked through his mirror and saw the plaintiff on the ground. He stopped his vehicle, got out and waited for the police to arrive. When the police arrived he explained to them that he was stopped at the intersection waiting for the light. When the light changed he began to make a slow wide right turn. He told the officer that he did not see anyone in front of his truck.

The police report, which is based upon the statement made to the police officer by the defendant states that defendant was making a right turn when a woman flagged him down and told him that he just struck a man on a motorized bicycle. He told the Officer at the scene that he did not know he hit anything.

Plaintiff contends that he is entitled to partial summary judgment on the issue of liability on the ground that the defendant driver was negligent in failing to see the plaintiff's bicycle that was next to him at the light and in failing to see the bicyclist proceeding through the intersection as he was making the right turn. The plaintiff contends that the defendant was negligent for failing to see that which under the circumstances he should have seen (citing Summers v Teddy Cab Corp. 50 ASD3d 671 [2d Dept. 2008]; Sulaiman v Thomas, 54 AD3d 751 [2d Dept. 2008]). Counsel asserts the defendant driver was negligent in that he violated section 1146(a) of the Vehicle and Traffic Law which requires drivers to exercise due care to avoid colliding with a bicyclist upon any roadway. Counsel asserts that the evidence demonstrates that the defendant violated Vehicle and Traffic Law § 1146(a) by failing to exercise due care to avoid striking the plaintiff/bicyclist. Counsel also contends that defendant was negligent in violating VTL§ 1163(a) which states that no person shall turn a vehicle at an intersection unless the vehicle is in proper position, or turn a vehicle to enter a private road or driveway or other wise 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. In addition, citing VTL § 1111(a) counsel contends that the

defendant, who was facing a green signal was negligent in failing to yield the right of way at the intersection to the bicycle, which was lawfully in the intersection, prior to making the right turn. Counsel asserts that the defendant's unexcused violation of said VTL sections constitutes negligence per se and that defendant was negligent in making the right turn when it was unsafe to do so.

Counsel also contends that the plaintiff's testimony demonstrates that he was not comparatively negligent in any way. Counsel contends that the plaintiff was traveling lawfully on 31<sup>st</sup> Street, waited for the red light to change to green, noted defendant's truck, did not see any turn signals on the truck, and lawfully entered the intersection with the right of way intending to go straight across. Counsel contends that there was no testimony demonstrating how the plaintiff could have avoided the accident. Moreover, counsel asserts that the bicyclist with the right of way was entitled to anticipate that the other motorists will obey the traffic laws and yield the right of way (citing Sirot v Troiano, 66 AD3d 763 [2d Dept. 2009]; Zeaya v Starks, 67 AD3d 1005[2d Dept. 2009]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]).

In opposition to the motion, counsel for defendant Michael J. Falletta, Esq., submits his own affirmation as well as the deposition transcript of defendant, Julian Velez. Counsel states that the motion must be denied as there are genuine issues of material fact which must be resolved by a jury. Citing Sirot v. Troiano, 66 AD3d 763 [2d Dept. 2009] counsel asserts that "a driver who has the right-of-way is entitled to anticipate that other motorists will obey the traffic laws and yield the right-of-way. However, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection." Thus, defendant claims that there are questions of fact regarding the comparative fault of the plaintiff in failing to see the right turn signal on the defendant's truck. Defendant also asserts that there are questions of fact as to whether the plaintiff was riding his bicycle with reasonable care and whether the bicycle was being operated in the appropriate place in the road. Counsel argues that plaintiff should have observed the truck's right turn signal and should have been on proper lookout, looking to see what was there to be seen and thereby he could have avoided the collision. Defendant claims that even if the evidence demonstrates that he was negligent in failing to yield the right of way, the plaintiff is not entitled to summary judgment as he failed to submit sufficient evidence to establish his own freedom from comparative negligence.

Upon review of the plaintiff's motion, the defendant's opposition and the plaintiff's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony as well as the deposition testimony of the defendant both of whom stated that defendant made a right turn onto Hoyt Avenue immediately after the light turned green. It is undisputed that plaintiff was proceeding straight ahead in the right lane at the same time the truck was turning right and that contact occurred while defendant was attempting the right turn. The defendant testified that although he looked to the right prior to turning, he did not see the plaintiff's vehicle next to the truck prior to the collision.

Vehicle and Traffic Law § 1163(a) states that:

"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."

Further, a driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792 [2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519 [2d Dept. 2006]). In addition, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592[2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

Thus, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting proof that the defendant violated Vehicle and Traffic

Law §§ 111(a), 1163(a) and 1146(a), and was negligent making a right turn into the path of the plaintiff's bicycle when it was hazardous to do so and failing to see the plaintiff's bicycle in the right lane, which under the circumstances, he should have seen (see Charles v William Hird & Co., Inc., 102 AD3d 907 [2d Dept. 2013]; DeLuca v. Cerda, 60 AD3d 721 [2d Dept. 2009]; Miller v Richardson, 48 AD3d 1298 [4<sup>th</sup> Dept. 2008] [plaintiff met its burden by establishing as a matter of law that the sole proximate cause of the accident was defendant's failure to yield the right of way]; Almonte v. Tobias, 36 AD3d 636 [2d Dept. 2009]; Stiles v County of Dutchess, 278 AD2d 304 [2d Dept. 2000]). Here the defendant driver admitted that he did not see the plaintiff despite the fact that he looked to the right at the subject intersection before turning right.

Further, the plaintiff established, prima facie, his entitlement to judgment as a matter of law as the evidence submitted in support of his motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of the plaintiff. His uncontradicted testimony established that he was traveling with the right of way and that he was entitled to anticipate that the truck would obey the traffic laws which required him to yield (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]).

In opposition to the defendant's prima facie showing, defendant failed to raise any material questions of fact as to whether the plaintiff was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420, 421 [2d Dept. 2005]). Although a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle (see Demant v Rochevet, 43 AD3d 981 [2d Dept. 2007]), there was no testimony by any of the parties that plaintiff failed to keep a proper lookout or failed to exercise due care to avoid colliding with the truck which made a right turn in front of him (see Moreback v Mesquita, 17 AD3d 420 [2d Dept. 2005]; Meretskaya v Logozzo, 2 AD3d 599 [2d Dept. 2003]). It has been recognized that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (see Yelder v Walters, 60 AD3d 734 [2d Dept. 2010]; Jaramillo v Torres, 60 AD3d at 735 [2d Dept. 2009]; DeLuca v Cerda, 60 AD3d 721 [2d Dept. 2009]).

Thus, the defendant failed to raise a triable issue of fact, proffering only speculative assertions that the defendant may have been comparatively negligent which are unsupported by the testimony of the parties (see Gorelik v Laidlaw Tr. Inc., 50

AD3d 739 [2d Dept. 2007]; Ishak v Guzman, 12 AD3d 409 [2d Dept. 2004]).

Accordingly, for all of the above-stated reasons, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, ARMANDO ESCOBAR, shall have partial summary judgment on the issue of liability against the defendants, JULIAN VELEZ and USA TRUCKING INC, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: Long Island City, N.Y.  
April 30, 2013

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**ROBERT J. MCDONALD**  
**J.S.C.**