

**Rivas v Jimenez**

2016 NY Slip Op 30442(U)

February 11, 2016

Supreme Court, Bronx County

Docket Number: 301270/12

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

-----x  
Armando Rivas

Decision and Order

Index No.: 301270/12

*Plaintiff,*

-against-

FEB 18 2016

Joseph Jimenez, Yngrid Jimenez,  
Jovanny Frometa , and 123 Livery Services,  
Inc.,

Howard H. Sherman  
J.S.C.

*Defendants*

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The following papers numbered 1 to 2A read on this motion for summary judgment defendant noticed on December 20, 2013 and duly submitted after oral argument July 7, 2014

Notice of Motion - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Memoranda of Law	2A	

Upon the foregoing papers and after oral argument the motion of defendants Joseph Jimenez and Yngrid Jimenez (the Jiminez defendants) for an award of summary judgment dismissing the complaint asserted against them is granted for the reasons set forth herein.

Facts and Procedural Background

In connection with a rear-end collision with his stopped patrol car occurring on the northbound Mosholu Parkway on the evening of December 24, 2011, plaintiff police officer

commenced this personal injury action asserting as against the Jimenez defendants causes of action in negligence, and violation of General Municipal Law Section (GML) 205-e as predicated on Joseph Jimenez's failure to comply with Vehicle and Traffic Law Sections 1180, 1212 and 375 (1) [Verified Complaint ¶¶ 19-25].<sup>1</sup>

Defendants Joseph Jimenez and Yngrid Contreras s/h/a Yngrid Jimenez are the respective driver and owner of a motor vehicle that had become disabled in the right lane of the parkway after skidding on ice, and hitting a guardrail. Plaintiff and another officer responded to the scene parking their patrol car in the right lane behind a vehicle belonging to Jimenez' mother, Yngrid Contreras, who had driven to the scene after receiving a call from her son. Contreras parked her car in the right lane behind the disabled car that was positioned diagonally facing oncoming traffic.

Plaintiff set up flares and returned to the police car to call for a tow truck. He testified that approximately one and one-half hour after his arrival at the scene, he felt a hard impact to the rear of the police vehicle, and after exiting, he directed the driver to step out of his car, and after he did so, plaintiff moved the car to the right lane to free up the left lane for traffic. The vehicle that impacted the rear of the police vehicle was being driven by defendant Frometa and is owned by the co-defendant livery service. Neither of these defendants have answer or appeared in this action.

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<sup>1</sup> The Verified Bill of Particulars asserts an additional violation of Vehicle and Traffic Law Section 1129(a).

The Note of Issue was filed on August 7, 2013.

Motion/Contention of the Parties

Defendants now move for summary judgment dismissing the complaint as asserted against them on the grounds that there is no evidence to raise an issue of fact that Jimenez violated the Vehicle and Traffic Law provisions on which the statutory claim is predicated, nor an issue of fact that Joseph Jimenez's conduct prior to striking the guardrail caused or contributed to the rear-end collision. The motion is supported by transcripts of the deposition testimony of the moving defendants and plaintiff.

Plaintiff contends that the motion should be denied to the extent it seeks the dismissal of the GML 205-e claim because there are unresolved issues of fact as to whether Jimenez violated Vehicle and Traffic Law 1180(a)<sup>2</sup> by proceeding at an excessive speed in view of the icy road conditions after having observed another vehicle "fishtailing" in front of him, and whether he failed to maintain a safe distance from the vehicle ahead

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<sup>2</sup>§ 1180-a. Maximum speed limits

1. Notwithstanding any other provision of law, no city, village, town, county, public authority, division, office or department of the state shall maintain or create (a) any speed limit in excess of fifty-five miles per hour on any road, highway, parkway or bridge or (b) any speed limit on any other portion of a public highway, which is not uniformly applicable to all types of motor vehicles using such portion of highway, if on November first, nineteen hundred seventy-three, such portion of highway had a speed limit which was uniformly applicable to all types of motor vehicles using it; provided however, a lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon, and (c) provided further, paragraph (b) of this subdivision shall not apply to any portion of a highway during such time that the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of a highway....

of him (see, Vehicle and Traffic Law §1129 [a]<sup>3</sup>) because he lost control of his vehicle when that vehicle began to fishtail, and defendants have failed to demonstrate as a matter of law that there was no "indirect connection" between these statutory violations and plaintiff's injuries.

### Discussion and Conclusions

#### Summary Judgment

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 501 N.E.2d 572 [1986 ]), and "[t]his drastic remedy should not be granted where there is any doubt as to the existence of such issues ( Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' ( Barrett v. Jacobs, 255 N. Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' ( Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957]

Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see, Alvarez, supra at 324; see also, Smalls v.

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<sup>3</sup>§ 1129. Following too closely

(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

AJI Industires, Inc., 10 NY3d 733, 735, [2008] ). In addition , " [a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense" ( Pace v. International Bus. Mach., 248 AD2d 690,691, 670 NYS2d 543 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615, [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 NYS2d 594 [2d Dept. 2003] ; St. Paul Travelers Cos., Inc. v. Joseph Mauro & Son, Inc., 93 A.D.3d 658, 940 N.Y.S.2d 123 [2d Dept. 2012]). Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (see, Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 [2d Dept 1991]; People v. Grasso, 50 A.D.3d 535, 858 N.Y.S.2d 23 [1st Dept. 2008], affd. 11 N.Y.3d 64, 893 N.E.2d [2008]).

General Municipal Law 205-e claim

GML § 205-e was enacted to provide a right of action allowing police officers to sue for injuries sustained in the line of duty "as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments ;[ ] ", and the Court of Appeals " has acknowledged that each enactment to the statute has been promoted as being for the

express purpose of clarifying and emphasizing the legislative intent that § 205-e be applied expansively.” Gonzalez v. Iocovello, 93 N.Y.2d 539, 548 , 715 N.E.2d 489 [1999] , citing L. 1990, ch.762; L. 1992, ch. 474; L. 1994, ch. 664;L.1996, ch. 703; see also, Gammons v. City of New York, 24 N.Y.3d 562, 568, 25 N.E.3d 958 [2014] ).

To assert a claim under the statute, a plaintiff “must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm.” Zanghi v Niagara Frontier Transp. Commn., 85 N.Y.2d 423, 441, 649 N.E.2d 1167 [1995]). Concerning this last requirement of direct or indirect causation, plaintiff need only establish a “practical or reasonable connection” between the violation and the plaintiff’s injuries (Zanghi, supra at 441 ; see also, Giuffrida v Citibank Corp., 100 NY2d 72, 81, 790 N.E.2d 772 [2003]).

With respect to the second requirement, it is settled that the violations of VTL §§ 1180 and 1129(a), the sections upon which plaintiff bases his Section 205-e claim, may serve as predicate violations for such a claim (see, Dubois v. Vanderwalker, 245 A.D.2d 758, 760, 665 N.Y.S.2d 460, 462 ( 3d Dept 1997) [Section 205-e claims based upon alleged violations of VTL § 1180, among other sections]; Williams v. City of New York, 240 A.D.2d 734, 659 N.Y.S.2d 302 [2d Dept. 1997] [Section 205-e claims predicated upon alleged violations of V&T §§ 1129(a) and another section ] ).

Upon consideration of the record here and the applicable law, it is the finding of this court that defendants have established their entitlement to judgment as a matter of law by negating the first essential element of plaintiff's 205-e claim as there is no evidence to raise an issue of fact that prior to the one-vehicle collision, Joseph Jimenez was either proceeding at an excessive rate of speed or failing to maintain a safe distance behind the vehicle directly in front of his.

The only probative evidence of the events preceding Jimenez's accident is the driver's own testimony . He was proceeding in moderate or "moving " traffic at a rate of speed never above that of the posted maximum of 40 miles per hour [26], and although he was not able to state the exact speed at which he was traveling when he hit the patch of ice, prior to doing so he "was trying to engage the brakes" because although he did not see the ice, he had observed drivers in front of his in the right lane "fishtailing." [ He was at that point three car lengths behind the car directly in front of his [28] ]. In reaction , he tried to slow down and merge to the left lane before reaching that location . It was then that Jimenez "also realized that the car was fishtailing so [he] tried to avoid the ice." [27:24-28:2], but he was unable to move out of the right lane [28]. When he hit the ice patch he stepped on the brakes " but since the car was still in forward motion the brakes engaged, . . . . . right on the ice causing the car to lose control [ ] " [28:24-29:3], and swerve, and then hit into the guardrail [29].



It is submitted that Jimenez's testimony as afforded all favorable inferences in favor of plaintiff as the non-moving party, fails to raise an issue of fact of non-compliance with either of the predicate Vehicle and Traffic Law Sections. The contention that the loss of control of the vehicle "clearly implicates that [Jimenez] was traveling too fast under the circumstances ", or that he did not maintain a safe distance behind the vehicle he was following "because he lost control of the vehicle" is mere conjecture, and not proof sufficient to raise a triable issue that before his collision ,Jimenez had violated either statute (compare, Guiffrida, supra., at 82 on which plaintiff relies, in which a fellow firefighter's statement that he did not observe a functioning fire extinguishing system, combined with violation orders which, at the very least, show that the fire suppression system had been altered and required testing, " raised a factual question as to whether defendant's violations resulted in a malfunctioning fire control system that directly or indirectly caused plaintiff's injuries by failing to prevent the fire or by exacerbating it.")

It is the further finding of this court that defendants have demonstrated as a matter of law their defense to the negligence cause of action , and plaintiff offers neither argument nor evidence in opposition to this showing.

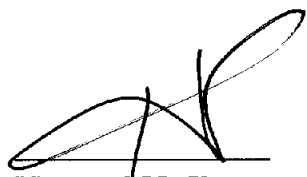
Accordingly, it is

ORDERED that the motion be and hereby is granted , and it is further

ORDERED that summary judgment be entered in favor of defendants Joseph Jimenez and Yngrid Jimenez as against plaintiff Armando Rivas dismissing the complaint as asserted against them.

This shall constitute the decision and order of this court.

February 11, 2016



Howard H. Sherman