

**Teng v Fuentes**

2021 NY Slip Op 30281(U)

January 27, 2021

Supreme Court, Kings County

Docket Number: 526637/2019

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27<sup>th</sup> day of JANUARY, 2021

P R E S E N T:  
HON. RICHARD VELASQUEZ, Justice.

-----X  
ARIANA TENG,

Plaintiff,

-against-

Index No.: 526637/2019  
Decision and Order

ROCIO FUENTES, RAISER-NY LLC and  
JOSE E. TORRES.

Defendants,

-----X

The following papers NYSCEF Doc #'s 23 to 90 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	23-35; 54-62
Opposing Affidavits (Affirmations)_____	36-41; 44; 45-46 63-76; 82-88; 89
Reply Affidavits (Affirmations)_____	47-53; 77; 90

After having heard Oral Argument on JANUARY 27, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability against defendants ROCIO FUENTES and JOSE E. TORRES. (MS#1). Defendant JOSE E. TORRES cross-moves for summary judgment dismissing plaintiffs complaint as against him. (MS#2).

### ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will 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 the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 N.Y.2d 1019 [1995] ).

It is also well established "the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident

is not restricted by potential issues of comparative negligence as between two defendant drivers” (see CPLR 3212[g]; *Jung v. Glover*, 169 AD3d 782, 783, 93 NYS3d 390; *Phillip v. D & D Carting Co., Inc.*, 136 AD3d 18, 24–25, 22 NYS3d 75; *Anzel v. Pistorino*, 105 AD3d 784, 786, 962 NYS2d 700; *Medina v. Rodriguez*, 92 AD3d 850, 850, 939 NYS2d 514; *Garcia v. Tri-County Ambulette Serv.*, 282 AD2d 206, 207, 723 NYS2d 163; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 AD2d 833, 833–834, 486 NYS2d 357). Here, the plaintiff made a prima facie showing of entitlement to summary judgment on their motion (see generally *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572). It is uncontested that the injured plaintiff was a passenger seated in co-defendant’s vehicle. Neither driver suggested that the injured plaintiff bore any fault in the happening of the accident (see *Phillip v. D & D Carting Co., Inc.*, 136 AD3d at 25, 22 NYS3d 75), quoting *Romain v. City of New York*, 177 AD3d 590, 591, 112 NYS3d 162, 164 (2d Dep’t 2019). Plaintiff in the present case is an innocent passenger is entitled to summary judgment on the issue of liability to the extent that they are not liable for the happening of the accident. (MS#1). Accordingly, plaintiff is entitled only to an order finding that their absence of liability was established (*id.*; CPLR 3212[g]); quoting *Huerta-Saucedo v. City Bronx Leasing Inc.*, 147 AD3d 695, 48 NYS3d 132, 132–33 (2d Dep’t 2017).

All parties have conflicting stories regarding how the accident occurred, including but not limited to whether or not the defendant was speeding at the time of the accident. Clearly a he said she said situation. All of these contentions raise questions of fact as to all parties’ credibility. Credibility is solely for the jury (*Sorokin v. Food Fair Stores*, 51 AD2d 592, 593, 378 NYS2d 492, 493; *Pertofsky v. Drucks*, 16 AD2d 690, 227 NYS2d

508; *Ellis v. Hoelzel*, 57 AD2d 968, 968, 394 NYS2d 91, 93 (1977). See also *Calemine v. Hobler*, 263 AD2d 495, 693 NYS2d 622 (2d Dept. 1999) (holding issues of fact exist as to whether oncoming motorist was within the intersection, or so close as to constitute immediate hazard, at time turning motorist started his turn); *DeVivo v. Perdue*, 535 NYS2d 538, 144 AD2d 624 (2d Dept. 1988) (holding jury could have concluded defendant exercised due care when he made his left turn into the intersection where the accident occurred); *Bogorad v. Fitzpatrick*, 329 NYS2d 874, 38 AD2d 923 (1st Dept. 1972) (stating defendant, who was going straight, was under an obligation to use reasonable care not to hit the turning car if such could be avoided). As such, issues of fact and credibility of the parties remain and are best left for a jury.

Accordingly, Plaintiffs motion pursuant to CPLR 3212 is granted to the extent that they are not liable for the happening of the accident, for the reasons stated above. (MS#1). Defendant JOSE E. TORRES cross-motion pursuant to CPLR 3212 for summary judgment is hereby denied, for the reasons stated above. (MS#2)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
January 27, 2021

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ