

**Diaz v Rodriguez**

2019 NY Slip Op 35147(U)

October 25, 2019

Supreme Court, Bronx County

Docket Number: Index No. 26644/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: **PART 14**

-----X  
**DIAZ, NOEMI, et al**

Index No. **26644/2018E**

- against -

Hon. **JOHN R. HIGGITT,**  
A.J.S.C.

**RODRIGUEZ, FELIX, et al**  
-----X

The following papers numbered **47** to **60** and **62** to **68** in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on **September 6, 2019** and duly submitted as No. **37** on the Motion Calendar of **September 6, 2019**.

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	47-60
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	62-67
Replying Affidavit and Exhibits	68
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers plaintiffs’ motion for partial summary judgment on the issue of defendant Rodriguez’s liability for causing the subject motor vehicle accident and, if summary judgment is not granted, an order striking defendant Rodriguez’s answer for failure to appear for examination before trial is granted in part, in accordance with the annexed decision and order.

Dated: **10/25/2019**

Hon.   
**JOHN R. HIGGITT, A.J.S.C.**

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted
- Denied
- GIP
- Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
NOEMI DIAZ, MARTHA RODRIGUEZ, ROBERT  
ZAPATA and ALTAGRACIA CHAVEZ,

DECISION AND ORDER

Plaintiffs,

Index No. 26644/2018E

- against -

FELIZ RODRIGUEZ, ALFI J. OCCHINO, DORA M.  
OCCHINO and SABINO MARTINEZ,

Defendants.  
-----X

John R. Higgitt, J.

Upon plaintiffs' August 10, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant Rodriguez's August 22, 2019 affirmation in opposition and the exhibit submitted therewith; plaintiffs' September 5, 2019 affirmation in reply; and due deliberation; plaintiffs' motion for partial summary judgment on the issue of defendant Rodriguez's liability for causing the subject motor vehicle accident and, if summary judgment is not granted, an order striking defendant Rodriguez's answer for failure to appear for examination before trial is granted in part.<sup>1</sup>

This is a negligence action to recover damages for personal injuries plaintiffs sustained in a motor vehicle accident that took place on September 11, 2016. In support of their motion, plaintiffs submitted the pleadings and the transcripts of plaintiffs Diaz's and Zapata's deposition testimony, the affidavits of defendants Martinez, Alfi J. Occhino and Rodriguez, and the police accident report.

Plaintiff Zapata testified that at the time of the accident he was a passenger in defendant Rodriguez's vehicle, which was traveling behind defendant Martinez's vehicle, when defendant Rodriguez struck the rear of defendant Martinez's vehicle, causing the Martinez vehicle to strike the Occhino defendants' vehicle. Plaintiff Diaz's testimony corroborates plaintiff Zapata's testimony.

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<sup>1</sup>The court notes that the action as against defendants Alfi J. Occhino, Dora M. Occhino, and Sabino Martinez was dismissed in a March 25, 2019 decision and order by the undersigned.

Both defendants Martinez and Alfi J. Ochhino averred that at the time of the accident they were stopped due to traffic when the rear of defendant Martinez's vehicle was struck by defendant Rodriguez's vehicle, causing defendant Martinez's vehicle to strike the Ochhino defendants' vehicle.

"A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring judgment in favor of the stationary vehicle unless defendant proffers a non-negligent explanation for the failure to maintain a safe distance . . . A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with stopped vehicles, taking into account weather and road conditions" (*LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]). A rear-end collision constitutes a prima facie case of negligence against the rearmost driver in a chain confronted with a stopped or stopping the vehicle (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

Vehicle and Traffic Law § 1129(a) states that a "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" (*see Darmento v Pacific Molasses Co.*, 81 NY2d 985, 988 [1993]). Based on the plain language of the statute, a violation is clear when a driver follows another too closely without adequate reason and that conduct results in a collision (*see id.*).

Plaintiffs made a prima facie showing that defendant Rodriguez violated Vehicle and Traffic Law § 1129 and that such violation was a proximate cause of their injuries.

In opposition to plaintiffs' prima facie showing of entitlement to judgment as a matter of law on the issue of his liability, defendant Rodriguez failed to raise a triable issue of fact. The affirmation of counsel alone is not sufficient to rebut plaintiff's prima facie showing of entitlement to summary judgment. In addition, bald, conclusory allegations, even if believable, are not enough to withstand summary judgment (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]).

Under the circumstances, the "innocent passenger" plaintiffs are entitled to dismissal of defendant Rodriguez' first affirmative defense of comparative fault (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]).

The aspect of plaintiffs' motion seeking the striking of defendant Rodriguez's answer is denied as moot.

Accordingly, it is

ORDERED, that the aspect of plaintiffs' motion seeking partial summary judgment on the issue of defendant Rodriguez's liability for causing the accident is granted; and it is further

ORDERED, that the aspect of plaintiffs' motion seeking dismissal of defendant Rodriguez's first affirmative defenses alleging plaintiff's culpable conduct is granted; and it is further

ORDERED, that plaintiffs' motion is otherwise denied.

The parties are reminded of the December 20, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 25, 2019

  
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John R. Higgin, A.J.S.C.