

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 22**

Scan

**Present: HON. WILLIAM R. LaMARCA
Justice**

NAHUM LOZANO,

**Motion Sequence # 001, # 002
Submitted April 20, 2006**

Plaintiff,

-against-

INDEX NO: 5069/04

**ALBERT R. JEFFRIES, PORFIRIO MELENDEZ,
and CENTRO AMERICA CORP.,**

Defendants.

The following papers were read on these motions:

Notice of Motion (# 001).....	1
JEFFRIES Affirmation in Opposition.....	2
Plaintiff's Notice of Cross-Motion (# 002).....	3
JEFFRIES Affirmation in Opposition.....	4

Requested Relief

Defendants, PORFIRIO MELENDEZ and CENTRO AMERICA CORP., move for an order, pursuant to CPLR §3212(a), dismissing the complaint and all cross-claims against them on the ground that no triable issue of fact exists concerning the liability of these defendants. Co-defendant, ALBERT R. JEFFRIES s/h/a ALBERT R. JEFFRIES, opposes the motion. Subsequently, plaintiff, NAHUM LOZANO, cross-moves for an order, pursuant to CPLR §3212, granting him summary judgment against defendant JEFFRIES on the issue of liability. ALBERT R. JEFFRIES s/h/a ALBERT R. JEFFRIES, opposes said

motion. The motion and cross-motion are determined as follows:

Background

Plaintiffs commenced this action for injuries allegedly sustained in an automobile collision that occurred on February 2, 2002 at approximately 5:20 P.M. at or near the intersection of West John Street and the Entrance to the Broadway Mall in Hicksville, New York. Counsel for movants' claims that the accident occurred when the vehicle owned and operated by defendant, JEFFRIES, struck the side of the vehicle owned by CENTRO AMERICA CORP. and operated by PORFIRIO MELENDEZ, while it was stopped at a traffic light. Counsel states the plaintiff was a passenger in the CENTRO AMERICA/MELENDEZ vehicle and that the collision involved the front of the JEFFRIES vehicle and the side of the CENTRO AMERICA/MELENDEZ vehicle. It is the movants' position that none of the evidence adduced in this matter suggests that the CENTRO AMERICA/MELENDEZ defendants were in any way negligent in the ownership and operation of the vehicle on the day of the accident and they are entitled to summary judgment.

In support of the motion, movants annex the deposition transcript of plaintiff, NAHUM LOZANO, wherein he testified that he was a passenger in the CENTRO AMERICA/MELENDEZ vehicle, a taxi, on his way to work when the taxi stopped for a red light at the entrance to the Broadway Mall. He testified that the taxi was in the left lane of West John Street and was about to make a left turn into the Mall when the accident occurred. He stated that the taxi did not start moving after it was stopped for the light.

Additionally, movant's annex the deposition transcript of defendant, PORFIRIO MELELNDEZ, who testified that he was traveling East on West John Street in the left lane

near the entrance to the Broadway Mall when he stopped for a red light at the entrance to the Mall. He stated that his vehicle was stopped at the moment of impact and that the light was red and remained so until the accident occurred. Moreover, movant annexes the deposition transcript of defendant JEFFRIES and contends that he testified that he was coming from the Post Office across from the Broadway Mall and turned right to travel East on West John Street and stated that he never saw the other vehicle prior to impacting it and that it "came out of nowhere. Came out of a blind spot". Counsel for movants urge that no contradictory testimony exists as to the manner in which the accident occurred and summary judgment is appropriate as there are no triable issues of fact in that no evidence has been presented that moving defendants caused or contributed to the accident in any respect.

In opposition to the motion, counsel for JEFFRIES points out that counsel for movants has misstated JEFFRIES testimony as the deposition transcript reflects that JEFFRIES testified that the light was green for him and he intended to go, pass the intersection, and continue on West John Street when he was involved in a collision with another car. When asked, "Where was the other car when you first saw it?", JEFFRIES responded, "After it hit me?" and went on to clarify that the vehicle "Came out of nowhere. Came out of a blind spot". He further testified that the light was green when his vehicle was struck. Counsel for JEFFRIES urges that the motion in chief should be denied as JEFFRIES never conceded that his car hit the movants' vehicle and, therefore, a question of fact exists as to the happening of the accident which precludes the granting of summary judgment.

On the cross-motion, plaintiff adopts the legal arguments set forth in the moving papers of CENTRO AMERICA and MELENDEZ in the motion in chief and asserts that plaintiff is entitled to summary judgment against JEFFRIES as there are no factual disputes as to how the accident occurred. It is plaintiff's position that the sworn testimony of the parties establish that the negligence of the defendant, JEFFRIES, was the sole proximate cause of the accident. In opposition, counsel for JEFFRIES contends that a question of fact exists that requires the case to go to a jury on the issue of liability.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]); see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*).

Conclusion

After a careful reading of the submissions herein, it is the judgment of the Court that movants have not established their right to judgment as a matter of law. The deposition testimony of the parties leaves questions of fact as to how the accident occurred and questions of credibility are for the trier of facts to determine. Accordingly, it is hereby

ORDERED, that defendants, MELENDEZ/CENTRO AMERICA CORP's., motion for summary judgment is denied; and it is further

ORDERED, that plaintiff, LOZANO's cross-motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 9, 2006

WILLIAM R. LaMARCA, LS
ENTERED

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JUL 12 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE