SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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MARVIN GARCIA,

INDEX NO.:15136/03

Plaintiff,

MOTION DATE:12-5-06
SUBMIT DATE:2-13-06
SEQ. NUMBER - 002

-against-

LUIS CASTRO, DORA MARTINEZ and LAURA IRBY,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-14-05..... 1
Affirmation in Opposition, dated 2
Reply Affirmation, dated 2-8-06..... 3

Upon the foregoing papers it is ordered that this motion by the defendant Laura Irby pursuant to CPLR 3212 for summary judgment is granted and the complaint is dismissed as to this defendant.

The Court agrees with the defendant Irby that she is entitled to judgment as a matter of law on the issue of liability. It is undisputed that the plaintiff was a passenger in an automobile being driven by co-defendant Luis Castro as they proceeded through the Village

of Hempstead. Irby's deposition testimony reveals that she was stopped at a red light behind two other vehicles, and when it turned green she proceeded straight into the intersection. Two seconds later, her vehicle was struck on the driver's side near the lights by the Castro vehicle, which was making a left turn from the other direction of travel. [1]

Further, her attorney points to the examination before trial of the plaintiff, in which he had testified that he did not see the Irby car before or after impact, the latter because he lost consciousness – the clear implication being that Irby's story cannot be contradicted.[2] Because the evidence submitted demonstrates that the plaintiff had the right of way, was not operating her vehicle in violation of any law, and was not otherwise careless, she has made out a *prima facie* showing of entitlement to judgment as a matter of law (Vehicle and Traffic Law § 1141; *see Galvin v Zacholl,* 302 AD2d 965 [2003]; *Welch v Norman,* 282 AD2d 448 [2001]), shifting the burden to the plaintiff to come forward with proof that issues of fact exist meriting a trial (*see, e.g., Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). The plaintiff, as the non-moving party, must lay bare all of the facts at his disposal regarding the issues raised in the motion (*Mgrditchian v. Donato*, 141 AD2d 513 [1988]). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and there must be evidentiary proof in support of the allegations (*Fleet Credit Corp. v. Harvey Hutter & Co.,*

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[1] The Court notes that certain portions of the Irby transcript relied upon and described in counsel's affirmation were not found among the moving papers. However, the opposing papers did contain such pages and do not raise any technical deficiencies with the defendant's submissions. Accordingly, the Court declines to reject the motion on that ground.

[2] Irby's co-defendants, Castro and Martinez (owner of the Castro vehicle) have defaulted, and are the subject of alternative relief sought by Irby on this motion, as described below.

Inc., 207 A.D.2d 380 [1994]; *Toth v. Carver Street Associates*, 191 AD2d 631 [1993]).

In the present case the plaintiff has failed to meet his burden. His affidavit, in which he now avers that he did see the defendant's car, heard her brakes screeching, and that she appeared to be going about 45 miles per hour in a congested area – and that he yelled out as her vehicle collided with his – flatly contradicts his deposition testimony. The Court cannot consider this belated attempt to escape the effect of his own admissions at the examination before trial (*see Cuce v Bell Atl. Corp.*, 299 AD2d 387 [2002]; *Hernandez v Seven Fried Food,* 292 AD2d 343 [2002]; *Prunty v Keltie's Bum Steer,* 163 AD2d 595 [1990]). His explanation for this wholesale change – that he had misinterpreted the examiner's question - finds no support in the record, as the questions and answers concerning plaintiff's recollection of the accident were quite clear. The Court therefore concludes that his assertion that some question exists as to Irby's liability finds no support in the record. Finally, the fact that the moving defendant may have been confused about the name of the street she was driving on or her direction of travel does nothing alter the essentials of her motion, as set forth above.

In view of this determination, the Court does not reach the other ground for dismissal asserted by Irby, that the plaintiff has not suffered a "serious injury" as that term is defined in the Insurance Law. Finally, the Court also does not reach her application for a default judgment against her co-defendants on her cross claim for contribution or indemnification, the same having been rendered academic.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 2, 2006

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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