135 A.D.3d 616
Supreme Court, Appellate Division, First Department, New York.

ESTATE OF Valentin **MIRJANI**, deceased, by its Administratrix Haleh Kerendian, et al., Plaintiffs–Appellants,
v.
Carlene **DeVITO**, et al., Defendants–Respondents,
Behrouz Benyaminpour, et al., Defendants.

No. 16389.
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Index No. 400437/13.
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Jan. 26, 2016.

Synopsis
Background: Passengers of eastbound motor vehicle that was involved in collision with westbound motor vehicle brought negligence action against vehicle operators. The Supreme Court, New York County, Arlene P. Bluth, J., entered order granting summary judgment in favor of westbound motor-vehicle operator, and dismissed all cross-claims against him. Passengers appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] testimony of operator of eastbound vehicle was insufficient to raise genuine issue of material fact as to cause of accident;

[2] passengers failed to raise triable issue of fact as to negligence of operator of westbound motor vehicle; and

[3] negligence of operator of eastbound vehicle was sole proximate cause of collision.

Affirmed as modified.

West Headnotes (4)

[1]	**Judgment** Operation and Effect of Affidavit
	Statements made by a party in an affidavit, a police report, or a deposition that are not denied by the party constitute an admission, and later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact. Cases that cite this headnote

[2]	**Judgment** Operation and Effect of Affidavit
	At summary judgment stage of negligence action, brought by passengers of eastbound motor-vehicle against operator of eastbound vehicle and westbound vehicle, eastbound motor-vehicle operator's testimony that westbound-motor vehicle had crossed into his lane, causing accident, was insufficient to raise genuine issue of material fact as to cause of accident, and, at most, presented only feigned issue of fact, where, at time of accident, operator of eastbound vehicle told police at scene that he had no memory of how accident happened and claimed that he regained his memory several months later when he visited scene, and his testimony was contradicted by testimony of westbound motor-vehicle operator and others, that eastbound motor-vehicle crossed double-yellow line and entered westbound lane of traffic. Cases that cite this headnote

[3]	**Automobiles** Acts in Emergencies **Automobiles** Care Required as to Persons Violating Law of the Road
	Westbound motorists faced an emergency situation and were not required to anticipate that eastbound vehicle would cross a double yellow line and enter their lane of traffic, and thus were not negligent in failing to take action to avoid collision with that vehicle. Cases that cite this headnote

[4]	**Automobiles** Efficient Cause of Injury in General **Automobiles** Proximate Cause of Injury
	Negligence of operator of eastbound vehicle that crossed double yellow line into westbound lane was sole proximate cause of collision with westbound motor vehicle. Cases that cite this headnote

Attorneys and Law Firms

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Bruno, Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for Carlene **DeVito**, respondent.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Courtney Riso and Francis Riso, respondents.

Russo, Apoznanski & Tambasco, Melville (Gerard Ferrara of counsel), for Joseph Fulcoly and Therese Fulcoly, respondents.

TOM, J.P., SWEENY, RENWICK, MANZANET–DANIELS, JJ.

Opinion

***1** Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 13, 2014, which granted the Riso and the Fulcoly defendants' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously modified, on the law, to grant defendant **DeVito**, upon a search of the record, summary judgment dismissing the complaint and all cross claims against her, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants Carlene **DeVito**, Courtney Riso, and Joseph Fulcoly all told the police at the scene and later testified at their depositions that the vehicle driven by defendant Behrouz Benyaminpour, in which plaintiffs were passengers, crossed the double yellow line and entered the westbound lane of traffic, even though the Benyaminpour vehicle was traveling in the eastbound lane. Behrouz told police at the scene that he had no memory of how the accident happened. All of these statements were memorialized in the MV–104 accident report prepared by the police officer investigating the accident. Behrouz now contends that two or three months after the accident, his memory returned, wherein at his deposition, Behrouz testified that the vehicles driven by **DeVito**, Riso and Fulcoly crossed the yellow line into his lane, causing the accident. This, plaintiffs argue, creates a material issue of fact and defendants' motions for summary judgment should have been denied.

[1] It is axiomatic that statements made by a party in an affidavit, a police report, or a deposition that are not denied by the party constitute an admission, and that later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact (*see Garzon–Victoria v. Okolo,* 116 A.D.3d 558, 983 N.Y.S.2d 718 [1st Dept.2014]; *Garcia–Martinez v. City of New York,* 68 A.D.3d 428, 429, 891 N.Y.S.2d 21 [1st Dept.2009]).

[2] Here, the certified police report and the officer's deposition testimony unequivocally state Behrouz did not remember how the accident happened. Indeed, Behrouz, at his deposition, acknowledged telling this to the police but went on to testify that he regained his memory several months later when he visited the scene. His testimony regarding how the accident occurred was flatly contradicted by that of **DeVito**, Riso and Fulcoly, as well as by plaintiff Kerendian, who was a passenger in Behrouz's vehicle. Behrouz's testimony therefore "appears to have been submitted to avoid the consequences of his prior admission to the police officer, and, thus, is insufficient to defeat [defendants'] motion for ... partial summary judgment" (*Garzon–Victoria v. Okolo,* 116 A.D.3d at 558, 983 N.Y.S.2d 718; *see also Buchinger v. Jazz Leasing Corp.,* 95 A.D.3d 1053, 944 N.Y.S.2d 316 [2d Dept.2012]; *Nieves v. JHH Transp., LLC,* 40 A.D.3d 1060, 836 N.Y.S.2d 697 [2d Dept. 2007]). The motion court properly rejected this testimony since the totality of [Behrouz's] submissions create only a feigned issue of fact, and they are therefore insufficient to defeat defendants' motions (*Harty v. Lenci,* 294 A.D.2d 296, 743 N.Y.S.2d 97 [1st Dept.2002]).

***2** **[3]** The motion court correctly found that plaintiffs failed to present evidence sufficient to raise a triable issue of fact as to the negligence of Riso and Fulcoly. Whether either could have taken actions to have avoided the accident is insufficient to defeat their motions for summary judgment, as the evidence established that they faced an emergency situation and were not required to anticipate that Behrouz's vehicle would cross over into their lane of traffic (*Williams v. Simpson,* 36 A.D.3d 507, 508, 829 N.Y.S.2d 51 [1st Dept.2007]; *Caban v. Vega,* 226 A.D.2d 109, 111, 640 N.Y.S.2d 58 [1st Dept.1996]).

[4] Upon a search of the record (*see Dunham v. Hilco Constr. Co.,* 89 N.Y.2d 425, 429–430, 654 N.Y.S.2d 335, 676 N.E.2d 1178 [1996]), we grant **DeVito** summary judgment, since the evidence establishes that Behrouz's negligence was the sole proximate cause of the accident.

We have considered plaintiffs' remaining contentions and find them unavailing.

All Citations

--- N.Y.S.3d ----, 135 A.D.3d 616, 2016 WL 299486, 2016 N.Y. Slip Op. 00448