

**Green v Vargas**

2020 NY Slip Op 35598(U)

August 10, 2020

Supreme Court, Queens County

Docket Number: Index No. 706049/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**FILED**

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

**8/12/2020**

**9:16 AM**

**COUNTY CLERK  
QUEENS COUNTY**

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

DEBRA GREEN,  
  
Plaintiff,  
  
- against -

AMENDED ORDER  
Index No.: 706049/2019  
Motion Date: 8/6/2020  
Motion No.: 28  
Motion Seq.: 3

ELMER VARGAS, SOHANY RODRIGUEZ and  
MADGE JONES,  
  
Defendants.

- - - - - x

MADGE JONES,  
  
Third-Party Plaintiff,  
  
- against -

DONNA JEAN MCCAIN,  
  
Third-Party Defendant.

- - - - - x

This decision is amended only to the extent that two typographical errors are now corrected.

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff on the issue of liability and dismissing the affirmative defenses of comparative negligence and assumption of risk; and on this cross-motion by third-party defendant DONNA JEAN MCCAIN, for an Order pursuant to CPLR 3212, granting third-party defendant summary judgment: Papers Numbered

Notice of Motion-Affirmation-Exhibits.....	EF 42 - 49
Affirmation in Opposition-Exhibits.....	EF 50 - 51
Affirmation in Reply.....	EF 53
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 59 - 63
Affirmation in Opposition to Cross-Motion-Exhibits...	EF 64 - 67

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of two separate motor vehicle accidents. The first accident occurred on July 6, 2016 on Elmont Road, in Nassau County, New York. The second accident occurred on November 11, 2018 on the Belt Parkway, in Queens County, New York.

This action was commenced by the filing of a summons and complaint on April 5, 2019. Defendants Elmer Vargas and Sohany Rodriguez joined issue by service of an answer on June 11, 2019. Defendant Madge Jones joined issue by service of an answer June 21, 2019. Plaintiff now seeks partial summary judgment on the issue of liability. Third-party defendant seeks summary judgment as well.

Plaintiff submits an affidavit dated February 6, 2020, affirming that she was involved in the subject accidents. The first accident occurred on July 6, 2016 when she was a restrained passenger in the vehicle owned and operated by Donna Jean McCain. The vehicle was traveling northbound on Elmont Road, approaching the intersection at Baylis Avenue. The traffic light at the intersection was red. Donna Jean McCain brought the vehicle to a stop. Approximately ten seconds after the vehicle came to a stop at the light, she felt an impact to the rear of the vehicle. The second accident occurred on November 11, 2018 when she was a restrained passenger in the vehicle owned and operated by Donna Jean McCain. The vehicle was traveling westbound in the right lane in stop and go traffic on the Belt Parkway when suddenly, it was struck from behind by the vehicle driven by defendant Madge Jones. The vehicle she was traveling in did not apply its brakes abruptly immediately prior to the subject accident. The vehicle she was traveling in was gradually slowing down in traffic and there was nothing that could have been done to avoid the subject accident.

Based on plaintiff's affidavit, plaintiff's counsel contends that defendant drivers violated Vehicle and Traffic Law 1129(a) by striking the rear of the vehicle plaintiff was a passenger in. Thus, plaintiff is entitled to summary judgment. Third-party defendant's counsel contends that Donna Jean McCain is also entitled to summary judgment as the vehicle she was operating was struck in the rear.

In opposition, counsel for defendants Vargas and Rodriguez contends that reading the record in the light most favorable to the nonmoving parties, summary judgment is not warranted. Counsel also contends that plaintiff's motion is premature and plaintiff should be compelled to appear for a deposition.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

It is well established that when a driver "approaches another vehicle from the rear, he is bound to maintain reasonably safe rate of speed, maintain control of his vehicle, and use reasonable care to avoid colliding with the other vehicle" (Barile v Lazzarini, 222 AD2d 635 [2d Dept. 1995]; see Williams v Spencer-Hall, 113 AD3d 759 [2d Dept. 2014]; Taing v Drewery, 100 AD3d 740 [2d Dept. 2012]).

Here, it is undisputed that the vehicle plaintiff was a passenger in was struck in the rear by defendants' vehicles. Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving party to raise a triable issue of fact as to whether the moving party was also negligent, and if so, whether that negligence contributed to the happening of the accidents (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

In opposition, no evidence has been submitted demonstrating a non-negligent explanation for the happening of the accidents or that plaintiff passenger was in any way negligent. This Court finds that defendant drivers, who each have relevant knowledge of the facts and did not submit an affidavit in opposition to the motion, failed to provide evidence of a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp., 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Defendants submit only an attorney's affirmation which is insufficient to defeat a summary judgment motion (see Zuckerman, 49 NY2d at 563).

Additionally, defendants' counsel's contention that this motion for summary judgment is premature is without merit. Defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d

850[2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

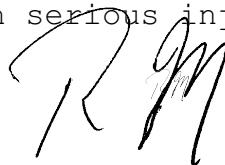
Accordingly, and based on the above reasons, it is hereby,

ORDERED, that the motion is granted, plaintiff shall have partial summary judgment on the issue of liability and defendants' affirmative defenses of comparative negligence and assumption of risk are dismissed; and it is further

ORDERED, that the cross-motion is granted, and the third-party complaint is dismissed.

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the court, this action shall be placed on the trial calendar of the court for a trial on serious injury and damages.

Dated: August 10, 2020  
Long Island City, N.Y



**ROBERT J. MCDONALD**  
**J.S.C.**

**FILED**

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**9:16 AM**

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**QUEENS COUNTY**