

<b>Salamanca v Olayemis</b>
2012 NY Slip Op 30620(U)
March 7, 2012
Sup Ct, Queens County
Docket Number: 11/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

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

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

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ELBA SALAMANCA, Index No.: 11/2011  
Plaintiff, Motion Date: 02/27/12  
- against - Motion No.: 116  
PETER OLAYEMIS and ASAVA TRANS. CORP., Motion Seq.: 1  
Defendants.

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The following papers numbered 1 to 13 were read on this motion by plaintiff ELBA SALAMANCA for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Defendants' Affirmation in Opposition.....	7 - 9
Plaintiff's Reply Affirmation.....	10 - 13

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In this negligence action, the plaintiff, Elba Salamanca, seeks to recover damages for personal injuries that she sustained as a result of a motor vehicle accident that occurred on September 29, 2010.

The accident took place near the intersection of Northern Boulevard and 41<sup>st</sup> Avenue, Queens County, New York. Plaintiff alleges that she was injured when her motorcycle, which was stopped at a red traffic signal, was hit in the rear by the taxi cab owned by defendant Asava Trans Corp. and operated by defendant Peter Olayemis.

The plaintiff commenced this action by filing a summons and complaint on January 3, 2011. Issue was joined by service of defendants' verified answer dated February 28, 2011. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial

summary judgment on the issue of liability and setting this matter down for assessment of damages.

In support of the motion, the plaintiff submits an affidavit from counsel, Steven Adam Rubin, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; and a copy of the transcripts of the examinations before trial of the plaintiff and defendant Olayemis.

In her examination before trial, taken on November 14, 2011, Ms. Salamanca, age 56, testified that on the date of the accident she was operating a Honda motorcycle. At approximately 10:30 a.m. she was proceeding westbound on Northern Boulevard from her home in Queens County to the library in Manhattan. When she arrived at the intersection of 41<sup>st</sup> Avenue she stopped at the red traffic signal. She stated that her legs were both on the ground holding the motorcycle stable. While standing at the light she felt a heavy impact to the rear of her motorcycle causing her to be thrown off the bike. She stated that the cab driver who hit her vehicle came over and apologized to her. When the police arrived at the scene she told the officer that her motorcycle was rear-ended by the taxicab. The plaintiff testified that as a result of the accident she sustained a torn meniscus which required arthroscopic surgery.

In his deposition, also taken on November 14, 2011, defendant Olayemi S. Peter s/h/a Peter Olayemis, age 46, testified that he is a self-employed Yellow Cab driver. He stated that on the day of the accident he was operating his taxicab on westbound Northern Boulevard in the Queens Plaza area. He stated that he had just been at a TLC Center in Woodside where his vehicle had been inspected. He stated that the vehicle failed the quarterly inspection and he was headed to a mechanic on 47<sup>th</sup> Street and 11<sup>th</sup> Avenue in Manhattan. He stated that he observed the plaintiff's vehicle stopped but that the front of his vehicle came into contact with the rear of the plaintiff's motorcycle. He characterized the impact as very light. He testified that he told the officer at the scene that he had struck the motorcycle in the rear.

The plaintiff contends that Olayemi was negligent in the operation of his vehicle in striking plaintiff's vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that his vehicle was traveling too closely in violation of VTL § 1129 and that he failed to brake his vehicle in a timely and proper manner. In addition, plaintiff asserts that the defendant driver conceded that the plaintiff's vehicle was at a complete stop when he rear-

ended her vehicle and he failed to provide a reasonable explanation as to why he rear-ended the plaintiff's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendant's counsel, Francis M. Cerniglia, Esq., does not assert that the record raises any triable issues of fact with regard to the defendant's actions or with regard to any possible culpable conduct on the part of the plaintiff. However, the defendant argues that the motion must be denied because the transcripts of the examinations before trial of both parties, which were submitted with the plaintiff's motion, were not executed and therefore not in proper evidentiary form.

In reply the plaintiff's counsel submits proof showing that the defendant, Olayemi S. Peter signed his deposition testimony and errata sheet in front of a notary on December 28, 2011.

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 position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another [vehicle] from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macaulay v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiff testified that she was completely stopped at a red traffic signal when her vehicle was suddenly struck from behind by defendant's motor vehicle. Thus, the plaintiff satisfied her prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v

Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). This court finds that the defendant, who testified at his deposition that he struck the plaintiff's stopped vehicle, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see 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]).

The defendant's contention that the deposition transcripts are not in evidentiary form is without merit. Pursuant to CPLR 3116(a), the transcript of the deposition of a deponent must be provided to the deponent for his or her review and signature. If a deponent fails to sign his or her deposition under oath within 60 days, it may be used as if fully signed. Here the plaintiff provided satisfactory proof that a copy of the defendant's transcript was signed by the defendant. Plaintiff's deposition was not signed and returned within 60 days and may therefore be used as if it were signed (see Rodriguez v Ryder Truck, Inc., 937 NYS2d 602 [2d Dept. 2012]; Tine v Courtview Owners Corp., 40 AD3d 966 [2d Dept. 2007]).

As the evidence in the record demonstrates that the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is

ORDERED, that the plaintiff's motion is granted, and the plaintiff, ELBA SALAMANCA, shall have partial summary judgment on the issue of liability against the defendant PETER OLAYEMIS and the Clerk of Court is authorized to enter judgment accordingly; and it is further

ORDERED, that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for trial on the issue of damages.

Dated: March 7, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD

J.S.C.