

**Toure v Joseph**

2013 NY Slip Op 30307(U)

February 4, 2013

Sup Ct, New York County

Docket Number: 111162/11

Judge: Arlene P. Bluth

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: \_\_\_\_\_  
Justice

PART 22

Index Number : 111162/2011  
TOURE, NABY  
vs  
JOSEPH, BYRT  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion to/for motion for summary judgment

|  |                 |
|--|-----------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). <u>1</u> |
| Answering Affidavits — Exhibits _____                              | No(s). <u>2</u> |
| Replying Affidavits _____  | No(s). _____    |

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

**FILED**

FEB 11 2013

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 2.4.13

\_\_\_\_\_  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

-----X

Naby Toure, Nnaisate Diawara and Seny Fofana,

Plaintiffs,

Index No. 111162/11  
Mot. Seq. 001

-v-

Byrt Joseph and Dyan Joseph,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of plaintiffs' motion for summary judgment on the issue of liability:

**FILED**

| <u>Papers</u>   | <u>Numbered</u>        |
|---|------------------------|
| Notice of Motion and Affidavits/Affirmations Annexed..... | FEB 11 2013<br>1 _____ |
| Answering Affirmation.....                                | NEW YORK<br>2 _____    |
| COUNTY CLERKS OFFICE                                      |                        |

Upon the foregoing cited papers and after oral argument, plaintiffs Toure and Diawara, the occupants of a car which was hit in the rear by a car operated by defendant Byrt Joseph and owned by defendant Dyan Joseph, move for summary judgment on the issue of liability only. Plaintiff Seny Fofana is plaintiff Diawara's husband and asserts a derivative claim. For the following reasons, plaintiffs' motion for summary judgment on liability is granted.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872,

433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

*Zuckerman v. City of New York*, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]).

In support of the motion, plaintiffs submit Toure's affidavit and defendant Byrt Joseph's deposition transcript. Toure swears that, after being stopped at a red light on East 25<sup>th</sup> Street near Third Avenue in Manhattan for approximately 30 seconds, his car was struck in the rear by defendant's car. At his deposition, defendant Byrt Joseph admitted that he hit the rear of plaintiff's vehicle (T. 13); he claimed that plaintiff's vehicle came to an abrupt stop while he was approximately a car length away (T. 17) or two car lengths away (T. 19) and that he was going about 5 miles per hour (T. 19). Mr. Joseph also testified that the weather was "fine" and the roads were dry (T. 10).

It is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 955 NYS2d 336 [1st Dept 2012], *Agramonte v City of New York*, 288 AD2d 75, 732 NYS2d 414

[1st Dept 2001]). The moving plaintiffs, through Toure's affidavit and Byrt Joseph's deposition testimony, made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the vehicle driven by plaintiff Toure was stopped when it was struck in the rear by the vehicle driven by defendant Byrt Joseph and owned by defendant Dyan Joseph.

In opposition, defendants failed to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Profita v Diaz*, 100 AD3d 481, 954 NYS2d 40 [1st Dept 2012]). Defendants do not submit an affidavit; their counsel relies upon Byrt Joseph's deposition transcript wherein he claims that plaintiff's vehicle unexpectedly came to a sudden stop in mid-block. The law is clear: the claim that the vehicle in front stopped suddenly is insufficient to raise a triable issue of fact (see *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]). Moreover, Vehicle and Traffic Law § 1129 imposes "a duty to be aware of traffic conditions, including vehicle stoppages" (*Johnson v Phillips*, 261 AD2d 269, 271, 690 NYS2d 545 [1st Dept 1999]). Nowhere is there any explanation as to why defendant Byrt Joseph failed to maintain a safe distance between his vehicle and plaintiffs' vehicle (see *Dattilo v Best Transp. Inc.*, 79 AD3d 432, 913 NYS2d 163 [1st Dept 2010]; *Soto-Marquin v Mellet*, 63 AD3d 449, 449-450, 880 NYS2d 279 [1st Dept 2009]). Therefore, because defendants have failed to raise a triable issue of fact, plaintiffs' motion for summary judgment on liability is granted.

Defendants' counsel argues that the counterclaim should stand because, by stopping mid-block (according to Byrt Joseph's testimony), plaintiff may bear some responsibility for the accident and "there can be more than one proximate cause to an accident". However, even if plaintiff did stop suddenly mid-block, defendant still failed to maintain a safe distance between his car and the car in front. As defendants are solely liable for this accident, the counterclaim is

dismissed.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the issue of liability is granted; and it is hereby

ORDERED that the counterclaim is dismissed.

This is the Decision and Order of the Court.

Dated: **February 4, 2013**  
New York, NY

  
\_\_\_\_\_  
ARLENE P. BLUTH, JSC

**FILED**  
FEB 11 2013  
NEW YORK  
COUNTY CLERK'S OFFICE