| **Halligan v Blue Hawaii Transport LLC** |
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| 2014 NY Slip Op 33338(U) |
| November 6, 2014 |
| Supreme Court, Queens County |
| Docket Number: 700291/13 |
| Judge: Howard G. Lane |
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** IAS Part 6
**Justice**

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MIN-CHOL HALLIGAN,
Plaintiff,

-against-

BLUE HAWAII TRANSPORT LLC, et al.,
Defendants.

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Index No. 700291/13

Motion
Date October 20, 2014

Motion
Cal. No. 48

Motion
Seq. No. 6

FILED
NOV 10 2014
COUNTY CLERK
QUEENS COUNTY

| | Papers Numbered |
|---|---|
| Notice of Motion..... | EF 37 |
| Aff. In Opposition..... | EF 39 |
| Reply..... | EF 41 |

Upon the foregoing papers it is ordered that the branch of the motion by defendants, Xekoliares LLC and Mohammed K. Uddin for an order granting leave to file a late summary judgment motion is granted.

Pursuant to CPLR 3212, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown". It is undisputed that the instant motion is made untimely. Any summary judgment motion made later than one hundred twenty days after the filing of the note of issue, requires court approval and a showing of "good cause". In *Brill v. City of New York*, the Court of Appeals held that: "'good cause' in CPLR 3212(a) requires a showing of good cause for making the delay in the motion - - a satisfactory explanation for the untimeliness - - rather than simply permitting meritorious, non judicial findings, however tardy." 2 NY3d 648 (NY 2004). "[S]tatuory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts,

are taken up with deadlines that are simply ignored" (*Micelli v. State Farm Automobile Insurance Company*, 3 NY3d 725 [2004] [internal citations omitted]; *see also, Dettmann v. Page*, 18 AD3d 422 [2d Dept 2005]; *First Union Auto Finance, Inc. v. Donat*, 16 AD3d 372 [2d Dept 2005]).

The Court finds that moving defendants have presented good cause shown for the delay in filing the late summary judgment motion. Moving defendants established that they were under the impression that their previous cross motion for summary judgment was considered by the Court when the Court considered plaintiff's main motion for summary judgment on liability grounds and moving defendants only realized that this was not the case upon receipt of this court's decision on plaintiff's summary judgment motion. Moving defendants established that upon discovering that their cross motion was not considered by the Court, they quickly moved to correct issue. The Court finds that defendants have provided good cause.

Accordingly, moving defendants' motion for leave to serve a late summary judgment motion is granted.

That branch of the motion by defendants, Xekoliares LLC and Mohammed K. Uddin for an order granting them summary judgment pursuant to CPLR 3212 on the issue of liability is granted.

Plaintiff, Min-Chol Halligan alleges he suffered personal injuries as a result of a motor vehicle accident that occurred on on Fifth Avenue near its intersection with 33rd Street, New York County, New York on October 31, 2011, while a passenger in a taxicab vehicle owned by defendant, Blue Hawaii Transport LLC and operated by defendant, Seydi M. Seck, which vehicle struck the rear of a second taxicab which was owned by defendant, Xekoliares LLC. and operated by defendant, Mohammed K. Uddin.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68

NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

It is well-established law that a rear-end collision with a stopped or stopping vehicle 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 (*Reed v. New York City Transit Authority*, 299 AD2 330 [2d Dept 2002]; *see also, Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004], stating that: "[a] rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident)."

Moving defendants established a prima facie case that there are no triable issues of fact regarding their liability. In support of the motion, moving defendants submitted, inter alia, the affidavit of plaintiff himself, wherein he avers that: the front of the taxi in which he was a passenger hit the rear of another taxi at the intersection of Fifth Avenue and 33rd Street, which collision resulted in him colliding with the partition between the front and back seats and sustaining injuries; and a certified police accident report which report indicates that the vehicle operated by defendant Seck rear-ended the vehicle operated by defendant Uddin. Moving defendants established that pursuant to Vehicle and Traffic Law § 1129(a), co-defendants Blue Hawaii Transport LLC and Seydi M. Seck were under a duty to maintain a safe distance between their vehicle and the moving defendants' vehicle, and their failure to do so in the absence of an adequate, non-negligent explanation is deemed negligence as a matter of law (*Leal v. Wolff*, 224 AD2d 392 [2d Dept 1996]; *Silberman v. Surrey Cadillac Limousine Service, Inc.*, 109 AD2d 833 [2d Dept 1985]).

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff has unsuccessfully opposed the instant motion, in that he merely submits an attorney's affirmation which makes the blanket assertion that: the motion is premature in that no depositions of the motor vehicle operators have been held.

CPLR 3212(f) states:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

In the instant case, plaintiff has failed to demonstrate that facts essential to opposition may exist but cannot then be stated. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion" (*Plotkin v. Franklin*, 179 AD2d 746 [2d Dept 1992] [internal citations omitted]).

Accordingly, the motion is granted.

This constitutes the decision and order of the Court.

Dated: November 6, 2014

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**Howard G. Lane, J.S.C.**