

**Bagan v Tomer**

2014 NY Slip Op 33628(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 100958/2012

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

EA  
9/5/14  
FE

PRESENT: HON. ARLENE P. BLUTH  
Justice

PART **22**

Index Number : 100958/2012  
BAGAN, TRACY  
vs  
TOMER, ONKAR S.  
Sequence Number : 001  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 6, were read on this motion to/for various relief

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1  
Notice of Cross Motion  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 345  
Replying Affidavits \_\_\_\_\_ No(s). 6

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

RECEIVED  
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Note of Issue Stricken

Next Conf: Pt 22 DCM 11/3/14  
**FILED**

SEP 05 2014

COUNTY CLERK'S OFFICE  
NEW YORK

HON. ARLENE P. BLUTH

J.S.C.

Dated: 9/2/14

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

- 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

HON. ARTHUR B. BURNETT

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HON. ARTHUR B. BURNETT

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

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**Index No.:100958/12  
Mot. Seq. 001**

**Tracy Bagan,**

*Plaintiff,*

*-against-*

**Onkar Tomer, Mostafa Elsrogy and Lucky Barb  
Cab Corp.,**

*Defendants.*

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**DECISION/ORDER**

**HON. ARLENE P. BLUTH, JSC**

Defendant Tomer's motion for (1) summary judgment dismissing the complaint and the cross-claims against him is denied, (2) an order striking the answers of co-defendants Elsrogy and Lucky Barb Cab Corp. is denied, and (3) dismissing the complaint on the grounds plaintiff did not sustain a serious injury is denied without prejudice to a new motion. Plaintiff's cross-motion for leave to amend the bill of particulars is granted.

Plaintiff was a passenger in a cab driven by Elsrogy and owned by Lucky Barb Cab Corp. which was proceeding north on Park Avenue. Tomer's vehicle, proceeding south on Park Avenue, made a left turn across the northbound lanes of Park Avenue, without yielding the right of way to Elsrogy, and a collision occurred. By order dated July 12, 2013, defendants Elsrogy and Lucky Barb Cab Corp. were precluded from testifying at trial for failing to appear for their examinations before trial.

At the outset, the Court notes that Tomer's motion, served on 2/21/14 is timely. By so-ordered stipulation dated 12/9/13, the Court extended the parties' time to file dispositive motions until 2/21/14.

**FILED**

In order to prevail on a motion for summary judgment, the movant must make a prima

**SEP 05 2014**

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]).

Defendant's burden on this motion for summary judgment is to establish, through admissible evidence, that the subject motor vehicle accident was not proximately caused by any negligence on his part (*see Rogers v City of New York*, 52 AD3d 589 [2d Dept 2008]; *Alvarez v Prospect Hosp.* 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]).

In support, Tomer cites to his deposition testimony that he had a green light when he began his left turn from Park Avenue onto East 82<sup>nd</sup> Street, looked for oncoming traffic but did not see anything, and that he was obeying the traffic laws at the time of the accident. While

Tomer may not have seen anything, the uncontroverted evidence establishes that Elsrogy's vehicle was indeed approaching and Tomer should have yielded to Elsrogy, who was going straight and who had the right of way (Vehicle and Traffic Law §1141). On these facts, the Court cannot find that Tomer has no liability for the happening of the accident; the branch of Tomer's motion seeking summary judgment as to liability is denied. *See Calcano v Rodriguez*, 91 AD3d 468, 936 NYS2d 185 (1st Dept 2012).

As for the branch of the motion seeking to strike the answer of Elsrogy and Lucky Barb Cab Corp., that relief is also denied. Those defendants have already been precluded from testifying on their behalf at trial or submitting an affidavit on motion. See so-ordered stipulation dated 7/12/13. Tomer has not demonstrated why preclusion is not a sufficient remedy.

Plaintiff's cross-motion for leave to serve an amended bill of particulars to include a nasal fracture is granted. This amendment does not come as a surprise to Tomer. In her original bill (para. 12), plaintiff alleged, inter alia, nasal septum deviation, permanent dislocation of septal cartilage and facial disfigurement; the word "fracture" was not there. However, in his moving papers, Tomer annexes (1) the IME report an otolaryngologist Dr. Arick (exh O) who stated that he was not given any records to show a nasal fracture but that the "nasal bones are deviated to the right", (2) Dr. Dahl's note (exh J) where she writes "nasal fracture" in the assessment section, and (3) the New York-Presbyterian Emergency Room records which also mention a nasal fracture (exh H). Simply because plaintiff's attorneys failed to include the words "nasal fracture" in the original bill, their client, the living and breathing person behind all this paperwork, should not be prejudiced.

Accordingly, it is

ORDERED that plaintiff's cross-motion for leave to serve and file an amended bill of particulars is granted, and it is deemed filed and served in the form attached to plaintiff's cross-moving papers as exhibit A; and it is further

ORDERED that to prevent any prejudice, the Note of Issue is hereby stricken and defendants may promptly serve any discovery demand(s) limited to the nasal fracture.

The branch of Tomer's motion dismissing the action on the grounds that plaintiff has not demonstrated she suffered a serious injury is denied without prejudice to making a new motion in accordance with the rules of Part 22.

The branch of Tomer's motion seeking summary judgment on liability is denied as he has not made his prime facie showing that he bears no liability for the happening of the accident. The branch of his motion for an order striking the answers of co-defendants Elsrogy and Lucky Barb Cab Corp. is also denied.

The parties are directed to appear for a DCM compliance conference on November 3, 2014, 80 Centre Street, Room 103 at 9:30AM.

This is the Decision and Order of the Court.

Dated: September 2, 2014  
New York, New York



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

**FILED**

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NEW YORK