

<b>Aaronson v Maglione</b>
2019 NY Slip Op 30562(U)
March 6, 2019
Supreme Court, New York County
Docket Number: 151356/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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ALAN AARONSON, BILLYE AARONSON

Plaintiff,

- v -

MICHAEL MAGLIONE,

Defendant.

INDEX NO. 151356/2018

MOTION DATE 01/02/2019

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is for ORDERED that plaintiffs, Alan C. Aaronson and Billye Ann Aaronson, motion for summary judgment, pursuant to CPLR 3212, on the issue of liability in favor of plaintiff and against defendant is granted. Plaintiff’s motion contends that on September 9, 2017, plaintiffs were passengers in a vehicle operated by defendant Michael A. Maglione when defendant’s vehicle lost control and collided with a guard rail on State Street in the County of Jefferson, Village of Clayton, State of New York.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Summary Judgment is appropriate when a vehicle in which plaintiff is a passenger loses control and is involved in a one car accident (*Pane v Cisilino*, 144 AD3d 567 [1st Dep't 2016]). A passenger of a vehicle is entitled to summary judgment on liability for an accident that occurred "while it was snowing heavily, defendant driver suddenly and without warning made a sharp turn and lost control of the taxicab, which left the roadway and struck a wall" (*Al-Nashash v Soutra Limousine, Inc.*, 115 AD3d 534 [1st Dep't 2014]).

Pursuant to New York Vehicle and Traffic Law (VTL) 1128 "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Departing from defendants designated lane of travel and striking the guard rail is a violation of VTL 1128. Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]).

In support of their motion, plaintiffs submit the affirmation of plaintiff Alan C. Aaronson, and the certified police report regarding the underlying accident (Mot, Exh A &B). Plaintiff states in his affirmation that "defendant, Michael A. Maglione fell asleep while operating his vehicle. Unfortunately, the car collided with the guardrail and flipped completely over . . . I was sitting in the back seat and was not interfering with Mr. Maglione's operation of the vehicle in any manner" (*id.*, Exh A). The certified police report attached by plaintiffs notes that defendant's vehicle "was traveling East on State Street, when he fell asleep and hit a guard rail flipping the vehicle into a yard" (*id.*, Exh B). Thus, plaintiffs have demonstrated that defendant violated the VTL and have made out a prima facie case of negligence. The burden shifts to defendant to raise

a triable issue of fact or provide a non-negligent explanation as to how the accident occurred (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 (1980); *Pane*, 144 AD3d 567; *Al-Nashash*, 115 AD3d 534).

Defendant's opposition claim that defendant has provided a non-negligent explanation for the accident. Defendant alleges that the police report is devoid of information and constitutes as hearsay (Aff in Op, ¶8). In the instant motion, the Court need not address whether the report constitutes as hearsay or if it is a business record exception to the hearsay rule. Defendant concedes that he fell asleep while operating the motor vehicle at issue (Aff in Op, ¶10). Defendant notes that in his Verified Answer it is asserted that the "Defendant was not negligent as latent medical condition of defendant was diagnosed for the first time post-accident" (Mot, Exh D). Defendant claims that plaintiffs have not sought discovery relating to defendants alleged medical condition (Aff in Op, ¶7). Defendant submits his own affidavit and that of his treating physician Pulmonologist Dr. Stasia Wieber (*id.*, Exh 1 &2).

Defendant affirms that he was diagnosed with Sleep Apnea for the first time after the September 9, 2017 accident and that he had never fallen asleep while involved in any activity prior to the accident (*id.*, Exh 1). Dr. Wieber avers that she examined defendant for the first time on November 20, 2017 performed a Nocturnal Polysomnography test, a sleep study test used to diagnose sleep disorders, and concluded that defendant has Obstructive Sleep Apnea (*id.*, Exh 2). Defendant avers that the "accident was an unforeseen an unanticipated result of the sleep apnea diagnosis after the incident and not one involving tortious liability" (Aff in Op, ¶10).

The First Department Appellate Division has found that it is for the jury to decide whether a driver's loss of consciousness was 'a sudden and unforeseen emergency not of the

actors own making (*Rivera v New York City Tr. Auth.*, 54 AD3d 545, 549 [1st Dep't 2008] citing *McGinn v New York City Tr. Auth.*, 240 AD2d 378, 379 [2nd Dep't 1997] [finding that "[a]n operator of an automobile who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen" [internal citations omitted]).

Here, defendant provides the affidavit of Dr. Wieber who simply diagnoses defendant with sleep apnea. The affidavit makes no mention of defendant's sleep apnea as being the proximate cause for the accident at issue. Defendant's argument that sleep apnea caused him to suddenly fall asleep is a veiled attempt to create a nonnegligent excuse for the accident where none exists. Thus, defendant has failed to raise an issue of fact or provide a nonnegligent excuse. Plaintiffs' motion for summary judgment on the issue of liability against defendant is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment for an order pursuant to CPLR 3212, entering summary judgment in favor of plaintiff, Alan C. Aaronson and against defendant Michael A. Maglione, as to the issue of liability only is granted; and it is further

ORDERED that all parties appear for a compliance conference in room 103 of 80 Centre Street at 9:30 AM on May 6, 2019; and it is further

ORDERED that within 30 days of entry defendant shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

ADAM SILVERA, J.S.C.

3/6/2019  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

151356/2018 AARONSON, ALAN C. vs. MAGLIONE, MICHAEL A.  
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