

<b>Duvalsaint v Yupe-Garcia</b>
2019 NY Slip Op 34798(U)
September 17, 2019
Supreme Court, Rockland County
Docket Number: Index No. 031403/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MARC E. DUVALSAINT,

*Plaintiff,*

-against-

JORGE M. YUPE-GARCIA and DAVID H. ROLLS,

*Defendant.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

**DECISION & ORDER**

Index No.: 031403/2017

(Motion # 2)

The following papers, numbered 1-4, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting partial summary judgment in favor of Plaintiff on the issue of liability, and for such other and further relief as this Court deems just and proper:

**PAPERS**

**NUMBERED**

NOTICE OF MOTION/AFFIRMATION IN OPPOSITION/EXHIBITS "A-B"	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS "A-J"	3
AFFIRMATION IN REPLY	4

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The action arises from an accident which occurred on July 1, 2016, at the intersection of Route 45 and East Eckerson Road, in the Town of Ramapo, County of Rockland. Plaintiff, who was traveling on East Eckerson Road, claims that Defendant's vehicle traveling on Route 45, struck his vehicle when it ran a steady red light. Plaintiff previously made a summary judgment motion prior to discovery, which was granted by this Court in an Order dated January 23, 2018. The Appellate Division, Second Department, reversed said decision in an Order dated February 20, 2019. In finding that the affidavit submitted by Defendant demonstrated a triable

issue of fact, the Appellate Court noted that Defendant's statement to the police that "he thought the light turned green so he began to proceed through the intersection," was not an admission of negligence on his part.

Upon completion of discovery, Plaintiff moves again for summary judgment in his favor. Plaintiff argues that he is entitled to summary judgment because at Defendant's deposition, he testified that he cannot read or write English and when he was presented with his prior affidavit, he was not familiar with it, did not recall reading it and said that no one had read it to him. As such, Plaintiff submits that "the entire basis for the Appellate Division reversing summary judgment is circumspect." Plaintiff further argues that Defendant testified that he did not see the plaintiff's vehicle before the subject motor vehicle collision, thus creating a presumption of negligence. Moreover, he claims that Defendant's failure to refute his admission contained in the police report that "he thought the light turned green so he began to proceed through the intersection," establishes Plaintiff's entitlement to summary judgment .

In opposition thereto, Defendant argues that the Appellate Division has already found that Defendant's earlier statement to the police is not an admission of negligence. Defendant further argues that this is not the proper forum for Plaintiff to take issue with the Second Department's decision. Additionally, Defendant contends that Plaintiff has mischaracterized Defendant's testimony with respect to whether defendant driver saw plaintiff's vehicle prior to the impact because immediately prior to that answer, Defendant testified that he saw Plaintiff coming very fast at him and hit him. Lastly, Defendant submits the executed examination before trial transcript of non-party witness Adolfinia Martinez. Ms. Martinez, who does not know either party, witnessed the subject accident through her apartment window. She testified that she observed Plaintiff's Mercedes enter the subject intersection with a red light at the time of the intersection and that Defendant's white van entered the intersection with a green light at the time of the accident.

The proponent of a summary judgment motion must establish his or her claim or

defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

In the instant matter, this Court finds that Plaintiff has not met his prima facie burden upon summary judgment. In support of his motion, Plaintiff submits and relies upon the examination before trial transcript of Defendant Jorge Yupe Garcia. However, at his examination before trial, Defendant testified that he first observed the subject traffic light about fifty feet away when it was yellow; that he brought his vehicle to a stop before the intersection because the traffic light for his direction was turning red; that he was stopped for approximately 15-16 seconds at the light; and that he only moved his vehicle after the traffic light turned green in his favor. Additionally, Defendant did testify that he saw Plaintiff's vehicle "was coming very fast at him" and then struck him. This testimony, in and of itself, demonstrates triable issues of fact as to whether Plaintiff or Defendant entered the subject intersection without the traffic light in their favor.

Additionally, Defendant is correct that the Appellate Division has already determined that Plaintiff's statement that "he thought the light turned green so he began to

proceed through the intersection," does not constitute an admission of negligence on the part of defendant driver, and that determination is binding on this Court. Lastly, even assuming *arguendo* that Plaintiff had met his prima facie burden, Defendant has raised a triable issue of fact by virtue of the eye-witness testimony of Adolfina Martinez, who testified that it was Plaintiff's vehicle which entered the intersection with the traffic light against him.

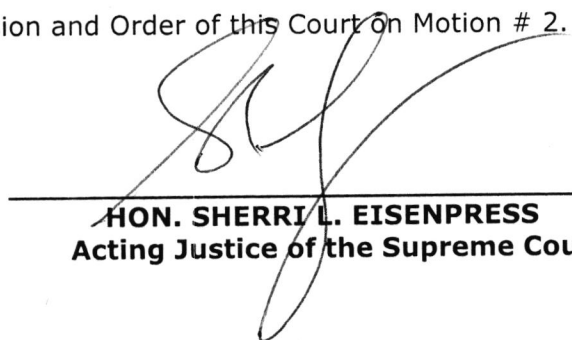
Accordingly, it is hereby

**ORDERED** that Plaintiff's Notice of Motion for Summary Judgment on the issue of liability is DENIED in its entirety; and it is further

**ORDERED** that counsel for the parties shall appear in Trial Readiness Part, as previously scheduled, on **MONDAY, SEPTEMBER 23, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 2.

Dated: New City, New York  
September 17, 2019



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**HON. SHERRIL L. EISENPRESS**  
**Acting Justice of the Supreme Court**

To: All parties via NYSCEF