

**Udho v Casey**

2019 NY Slip Op 35094(U)

June 24, 2019

Supreme Court, Queens County

Docket Number: Index No. 716942/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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RAVIN UDHO,

Index No.716942/2018

Plaintiff,

Motion

Date: May 15, 2019

-against-

Motion Cal. No.: 45

THOMAS P. CASEY, BROTHERS CHRISTIAN  
SCHOOL, and CHRISTIAN BROTHERS  
ACADEMY,

Motion Sequence No.: 1

Defendants.  
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The following e-file papers numbered 13-29 submitted and considered on this motion by plaintiff Ravin Udho (hereinafter referred to as "Plaintiff") and cross-motion by defendant Christian Brothers Academy (hereinafter referred to as "CBA") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment on the issue of liability and Plaintiff's motion pursuant to CPLR 3211 (b) striking the defendants' affirmative defenses alleging culpable conduct.

	Papers <u>Numbered</u>
Notice of Motion- Affirmation in Support .....	EF 13-20
Cross Motion- Exhibits.....	EF 21-28
Reply Affirmation.....	EF 29

This is a negligence action arising out of a three car collision that occurred on September 7, 2018 on the Belt Parkway at or near the Springfield Boulevard exit in Queens County. The parties do not dispute that they were all in the midst of moderate to heavy traffic. Defendant Thomas P. Casey ("Casey") was operating a motor vehicle owned by Brothers Christian School ("BCS") (collectively referred to as "Defendants"). Preceding the accident Casey was driving directly behind Plaintiff. According to Casey, "I quickly checked my blind spot to ascertain whether I could switch lanes. I glanced back over my shoulder for only a moment Plaintiff's vehicle suddenly and unexpectedly stopped in front of me causing the front of my vehicle to come into contact with the

rear of Plaintiff's vehicle". According to Plaintiff, he was "traveling" when his vehicle was struck by the car Casey was operating. Within his motion papers, Plaintiff alleges as a result of the initial collision with Casey his car was caused to collide with (non-party) Luanna Persaud's car.

### Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

### Cross-Motion by CBA

CBA alleges Plaintiff makes no allegations as to specific acts of negligence or vicarious liability against CBA. Casey was operating the vehicle. BCS is the owner of the vehicle and employer of Casey. Casey was acting within the scope of his employment for BCS.

CBA has established *prima facie* entitlement to summary judgment, the burden shifts to Plaintiff to raise a triable issue of fact. Plaintiff failed to address CBA's arguments in their motion papers therefore, summary judgment is granted as to CBA. The caption shall now read as set forth below.

Plaintiff's motion pursuant to CPLR 3212

Plaintiff cites *Marlene Le Grand v. Zaev Silberstein*, 123 A.D.3d 773, 774 [2<sup>nd</sup> Dept 2014] where plaintiff and defendants were involved in a motor vehicle accident. Plaintiff was the passenger in a vehicle that was struck in the rear by defendant Silberstein as both were traveling eastbound on the Staten Island Expressway in heavy traffic. (*Id*). The owner and operator of the vehicle that plaintiff was traveling in moved for summary judgment. "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Id*). In opposition defendant Silberstein stated that the moving defendant made a sudden stop. The court found that plaintiff and defendant Silberstein failed to raise a triable issue of fact. (*Id* at 775). The court cites *Maria Chepel v. Meyers*, 306 A.D.2d 235, 237 [2<sup>nd</sup> Dept 2003] "One of several non-negligent explanations for a rear-end collision [may be] a sudden stop of the lead vehicle" (*Id* at 774). Additionally the court cites *Dawn Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565 [2<sup>nd</sup> Dept 2001] "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead". (*Id* at 775).

Here, neither Casey nor BCS dispute that Plaintiff was hit in the rear. Therefore, Plaintiff has established prima facie entitlement to summary judgment. The burden now transfers to Defendants to raise a triable issue of fact. Defendants assert Plaintiff's motion is premature pursuant CPLR 3212 (f). Furthermore, Defendants point out a distinction can be drawn because here the Plaintiff was the middle car in a three-car collision. Defendants suggest Plaintiff's affidavit neglects to address whether Plaintiff's car hit the Persaud car prior to the collision with the Defendants. Defendants request the opportunity to obtain testimony concerning whether the Plaintiff was maintaining a safe distance from the Persaud vehicle.

In *Bournazos v. Malfitano*, 275 A.D.2d 437 [2d Dept 2000], three vehicles were involved in a motor vehicle accident. The first car came to a full stop due to a malfunction. (*Id*). The second and third cars dispute what occurred next. The third car asserts the second car came into contact with the first before it came into contact with the second. (*Id*) The second car asserts that it was stopped before the third car came into contact with it, which subsequently caused its collision with the first car. The third car failed to dispute that the second car was stopped before it came into contact with the second car. The court held that the second car established their entitlement to summary judgment. (*Id* at 438) The court reasoned the evidence was undisputed that the second car was stopped before it was struck in the rear (*Id*). Therefore, it was the third car's burden to rebut the inference of its own negligence created by the rear-end collision, or to demonstrate that negligence on the part of the second car contributed to the collision between the two. (*Id*) The court held, whether or not the second vehicle struck the first vehicle before the collision between the second and third car was irrelevant in determining the third car's liability. (*Id*).

Here, Defendants are akin to the third car in *Bournazos*. Defendants do not raise an issue of fact as to whether or not Plaintiff was stopped. Alternatively, Defendants allege that prior to Defendants' contact with the Plaintiff's car Plaintiff may have come into contact with the Persaud vehicle. Notably, Casey stated he looked away from the road and when he turned around Plaintiff stopped short. Similar to the holding in *Bornazos*, this Court finds the Defendants have not rebutted the presumption of their own negligence. Defendants' own affidavit admits traffic was moderate to heavy. "[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (*Shamah* at 565). The Plaintiff's motion for summary judgment as to Defendants' liability is granted. Therefore it is,

**ORDERED**, that the branch of Plaintiff's motion under CPLR 3212 is granted as it relates to Defendants (Casey and BCS only); and it is further

**ORDERED**, that the branch of Plaintiff's motion under CPLR 3212 as it relates to CBA is denied; and it is further

**ORDERED**, that defendant CBA's cross-motion under CPLR 3212 is granted; and it is further

**ORDERED**, that Plaintiff's motion pursuant to CPLR 3211(b) is denied; and it is further

**ORDERED**, that the caption shall be amended to read as follows:

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RAVIN UDHO

Index No.716942/2018

Plaintiff,

-against-

THOMAS P. CASEY and BROTHERS CHRISTIAN  
SCHOOL,

Defendants.

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The foregoing constitutes the decision and Order of this Court.

Dated: June 24, 2019



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Hon. Chereé A. Buggs, JSC

FILED  
JUL -1 2019  
COUNTY CLERK  
QUEENS COUNTY