| **Smalls v Cipriano Excavation Inc.** |
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| 2020 NY Slip Op 30364(U) |
| January 2, 2020 |
| Supreme Court, Kings County |
| Docket Number: 6399/2015 |
| Judge: Devin P. Cohen |
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**Supreme Court of the State of New York**
**County of Kings**

Part 91

KENNETH SMALLS

Plaintiff,

against

CIPRIANO EXCAVATION INC. AND DAVIDE VICARI,

Defendants.

**Index Number 6399/2015**
SEQ# 007

# DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

| Papers Numbered | |
|---|---|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Order to Show Cause and Affidavits Annexed... | |
| Answering Affidavits..... | |
| Replying Affidavits..... | |
| Exhibits..... | |
| Other ..... | |



Upon the foregoing papers, plaintiff's motion for summary judgment on the issue of liability is decided as follows:

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff brought this action against defendants for damages he contends were caused when defendants' vehicle hit plaintiff's vehicle in the rear. "[A] rear-end collision with a stopped vehicle creates a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Carhuayano v J&R Hacking,* 28 AD3d 413, 414 [2d Dept 2006]). Additionally, plaintiff is not required to demonstrate his freedom from comparative fault in order to establish his prima facie entitlement

to judgment as a matter of law on the issue of liability (see *Rodriguez v City of New York,* 31 NY3d 312 [2018]).

Plaintiff, in support of his motion, provides a certified, but unsigned transcript of his June 8, 2017 deposition testimony. Under CPLR 3116(a), such a transcript is admissible because it was submitted by plaintiff, the party deponent (*Baptiste v Ditmas Park LLC,* 171 AD3d 1001, 1002 [2d Dept 2019]).

According to his deposition transcript, plaintiff was stopped on Great Neck Road near its intersection with Jayson Avenue, in Great Neck New York[1]. Plaintiff testified that Great Neck Road has two lanes of travel in each direction. Additionally, he testified that there are parking lanes on both sides of the road. He testified that the intersection of Great Neck Road and Jayson Avenue is controlled by a traffic light. Plaintiff testified that the contact between defendants' construction vehicle and his vehicle occurred while he was stopped at the red traffic light[2]. Specifically, plaintiff testified that the accident occurred when the defendants' construction vehicle backed up into his rear bumper and spare tire. He also testified that the impact was very strong and occurred very quickly. Plaintiff further that prior to the accident, while he was stopped at the red light, he saw defendants' construction vehicle to his right.

In addition, plaintiff submits defendant driver's (hereinafter "Mr. Vicari") deposition testimony. Although Mr. Vicari's transcript is not signed, it is similarly signed by the court reporter, and defendants rely on the testimony in opposing the motion, thus acknowledging its accuracy (*Gallway v Muintir, LLC.,* 142 AD3d 948, 949 [2d Dept 2016]). Mr. Vicari testified

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[1]Also known as Great Neck Plaza.

[2]There were three cars in between plaintiff's vehicle and the traffic light. Those cars were also stopped at the red light.

that he had no independent memory of contact between his vehicle and plaintiff's vehicle. He testified that he did not feel or hear anything indicating a collision occurred. He also testified that he was wearing ear plugs at the time of the subject accident. Mr. Vicari claims that the two vehicles were never in the same lane. Specifically, he testified that he only operated his construction vehicle in the parking lane adjacent to the right lane of traffic, where the dirt container was located. He also testified that he saw plaintiff's vehicle prior to the accident adjacent to the dirt container, in the right lane of traffic, crawling towards the traffic light.

Plaintiff also submits an uncertified police accident report. This report is not certified and therefore constitutes hearsay (*Hazzard v Burrowes,* 95 AD3d 829 [2d Dept 2012]). However, the limited portions of the police accident report which contain party admissions are admissible as an exception to the rule against hearsay (see, *Jackson v Trust,* 103 AD3d 851, 852 [2d Dept 2013]). Mr. Vicari testified that the police officer arrived at the scene a half hour after the accident and took statements from both himself and plaintiff. Mr. Vicari admitted to the police officer that while he was backing up, he struck the rear of plaintiff's vehicle, causing damage to the rear spare tire.

In this case, the plaintiff has demonstrated his prima facie entitlement to judgment as a matter of law by rely on his deposition testimony regarding the circumstances of the accident, as well as Mr. Vicari's admission, made immediately following the accident and memorialized in the police accident report, that his vehicle, while backing up, struck plaintiff's vehicle in the rear (*Nieves v JHH Transportation LLC.,* 40 AD3d 1060 [2d Dept 2007]). In opposition, the defendants failed to proffer sufficient evidence to rebut the inference of their own negligence. Specifically, in light of his admission to police, Mr. Vicari's testimony that he does not think the accident occurred because he did not hear or feel such collision occur, is insufficient to raise a

triable issue of fact (*Conning v Dietrich,* 105 AD3d 884 [2d Dept 2013]). Also, Mr. Vicari's testimony that plaintiff's vehicle was crawling at the time of the subject accident does not provide a non-negligent explanation for the accident (*Skura v Wojtlowski,* 165 AD3d 1196, 1198 [2d Dept 2018]).

For the foregoing reasons, plaintiff's motion for summary judgment is granted. The matter shall proceed as to damages.

This constitutes the decision and order of the court.

January 2, 2020
**DATE**

**DEVIN P. COHEN**
Supreme Court Justice

KINGS COUNTY CLERK
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