

**Asgarally v Zelenetz**

2020 NY Slip Op 35607(U)

February 11, 2020

Supreme Court, Queens County

Docket Number: Index No. 710696/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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AJAZ ASGARALLY,
Plaintiff,

- against -

MICHAEL J. ZELENETZ,
Defendant.

Amended Order:

Index No.: 710696/2019

Motion Date: 1/23/20

Motion No.: 3

Motion Seq.: 2

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The decision dated January 23, 2020 and filed on January 29, 2020 is hereby amended only to the extent that the sequence number is corrected. The decision dated January 23, 2020 and filed on January 29, 2020 shall remain in full force and effect.

The following electronically filed documents read on this motion by plaintiff for an order pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability and striking defendant's second, third and ninth affirmative defenses:

Table with 2 columns: Document Name and Papers Numbered. Rows include Notice of Motion-Affirmation-Memo. of Law-Exhibits, Affirmation in Opposition-Exhibits, and Affirmation in Reply.

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on March 15, 2019 on the northbound Van Wyck Expressway, in Queens County, New York.

Plaintiff commenced this action by filing a summons and complaint on June 19, 2019. Defendant joined issue by service of an answer on August 16, 2019. Plaintiff now moves for summary judgment on the issue of liability.

In support of the motion, plaintiff submits an affidavit dated October 19, 2019, affirming that on March 15, 2019 at

approximately 5:40 p.m., he was driving his vehicle northbound on the Van Wyck Expressway. Traffic was moderate to heavy and was moving at a fairly consistent flow between 30 mph to 40 mph. He was traveling with the flow of traffic in the right lane when suddenly and without warning, he felt an impact to the rear of his vehicle. He did not hear any screeching tires, horns, or receive any other indication of an impending collision prior to feeling the impact. He did not see the vehicle that struck him until after the accident. Prior to the accident, he was traveling straight within his lane of travel without any significant changes in speed or direction. At the time of the impact, he was looking forward in the direction he was traveling. At the time of the accident, he was wearing his seatbelt. Defendant's negligence was the sole cause of the accident.

Plaintiff also submits a certified copy of the Police Accident Report (MV-104AN). In the accident description portion, the responding officer noted, in relevant part:

VEHICLES WERE TRAVELING NORTH BOUND ON THE VAN WYCK EXPRESSWAY IN THE RIGHT LANE. VEHICLE 1 (plaintiff) WAS SLOWING IN TRAFFIC WHEN REAR ENDED BY VEHICLE 2 (defendant).

Based on the submitted evidence, plaintiff's counsel contends that the accident was caused solely by defendant's negligence in that defendant's vehicle struck the rear of plaintiff's vehicle in violation of Vehicle and Traffic Law 1129(a).

In opposition, defendant submits an affidavit dated December 13, 2019, affirming that he was involved in the subject accident. He was traveling northbound in the middle lane on the Van Wyck Expressway. Traffic was stop and go as it was rush hour. The vehicle in front of him came to a sudden stop, and the front of his bumper lightly tapped the rear bumper of plaintiff's vehicle. Plaintiff's vehicle unexpectedly and without warning came to an abrupt stop in the roadway so he was unable to bring his vehicle to a stop in time to avoid a collision.

Based on the discrepancies in the affidavits, defendant's counsel contends that issues of fact preclude summary judgment. Additionally, counsel contends that the motion is premature.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must

show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

It is well established that when a driver "approaches another vehicle from the rear, he is bound to maintain reasonably safe rate of speed, maintain control of his vehicle, and use reasonable care to avoid colliding with the other vehicle" (Barile v Lazzarini, 222 AD2d 635 [2d Dept. 1995]; see Williams v Spencer-Hall, 113 AD3d 759 [2d Dept. 2014]; Taing v Drewery, 100 AD3d 740 [2d Dept. 2012]).

Here, it is undisputed that defendant's vehicle struck plaintiff's vehicle in the rear. Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving party to raise a triable issue of fact as to whether the moving party was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

In opposition, defendant failed to present a non-negligent explanation for the accident. A bare claim that the driver of the lead vehicle suddenly stopped, standing alone, is insufficient to rebut the presumption of negligence, especially where, as here, defendant driver fails to explain why she did not maintain a safe following distance (see Ramirez v Konstanzer, 61 AD3d 837 [2d Dept 2009]; Morgan v Browner, 138 AD3d 560 [1st Dept. 2016]; Malone v Morillo, 6 AD3d 324 [1st Dept. 2004]). The argument that plaintiff's vehicle stopped suddenly, does not explain defendant driver's failure to maintain a safe distance from the vehicle in front of her (see Dicturel v Dukureh, 71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Zdenek v Safety Consultants, Inc., 63 AD3d 918 [2d Dept. 2009]).


Additionally, defendant's counsel's contention that this motion for summary judgment is premature is without merit. Defendant failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and for the reasons stated above, it is hereby,

ORDERED, that the motion by plaintiff for summary judgment is granted, plaintiff shall have partial summary judgment on the issue of liability against defendant, defendant's second, third and ninth affirmative defenses are stricken, and the Clerk of Court is authorized to enter judgment accordingly; and it is further

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the court, this action shall be placed on the trial calendar of the court for a trial only on serious injury and damages.

Dated: February 11, 2020  
Long Island City, N.Y.

  
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ROBERT J. McDONALD  
J.S.C.

**FILED**  
**FEB 24 2020**  
**COUNTY CLERK**  
**QUEENS COUNTY**