

**Omogun v Flores**

2020 NY Slip Op 35708(U)

January 3, 2020

Supreme Court, Queens County

Docket Number: Index No. 708163/18

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

-----X  
**JOSEPH OMOGUN,**

**Plaintiff,**

**Index No.: 708163/18**

**Mot. Date: 12/10/19**

**-against-**

**Mot. Seq. 1**

**RAMON Z. FLORES and MARK**  
**RAYMOND FLORES,**  
**Defendants.**

**FILED**  
**JAN - 8 - 2020**  
**COUNTY CLERK**  
**QUEENS COUNTY**

-----X  
The following papers were read on this motion by defendants for an order: vacating the Note of Issue and Certificate of Readiness, and striking the matter from the trial calendar; precluding the plaintiff from testifying or offering any medical evidence regarding injury for failing to provide discovery; and extending defendants' time to file a motion for summary judgment to one-hundred twenty (120) days from the completion of discovery; and on the cross-motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing plaintiff's affirmative defense of culpable conduct, and setting the matter down for an inquest as to damages.

**PAPERS**  
**NUMBERED**

Notice of Motion-Affidavits-Exhibits .....	EF 12-20
Notice of Cross-Motion-Affidavits-Exhibits .....	EF 21-27
Answering Affidavits (Motion)-Exhibits.....	EF 28-30
Answering Affidavits (Cross-Motion)-Exhibits.....	EF 31-33

Upon the foregoing papers, it is ordered that the motion is denied and the cross-motion is granted.

This is an action for personal injuries allegedly sustained by plaintiff Joseph Omogun when the vehicle operated by him came into contact with a vehicle owned by defendant Ramon Z. Flores and operated by defendant Raymond Flores, on February 7,

2018, on the Long Island Expressway, westbound near the Clearview Expressway Exit, in Queens, New York. Plaintiff maintains that he sustained serious personal injuries due to the negligence of defendant.

Turning first to the cross-motion, the cross-motion is granted.

Plaintiff cross-moves for an order, pursuant to CPLR 3212, granting summary judgment on the issue of liability and dismissing the defendants' affirmative defense of culpable conduct, and setting the matter down for an inquest as to damages.

Plaintiff established a *prima facie* showing that there are no triable issues of fact on the issue of liability. In support of the motion, plaintiff submits, *inter alia*: the examination before trial transcript testimony of plaintiff himself, wherein he testifies, *inter alia*, that: at the time of the subject accident, he was traveling westbound on the Long Island Expressway and was approaching the exit for the Clearview Expressway, in Queens County, New York, when his vehicle was struck on the passenger side by the defendants' motor vehicle, spun around, and forced into the center median; and the examination before trial transcript testimony of defendant/operator Mark Raymond Flores, wherein he testifies, *inter alia*, that: he lost control of his vehicle, causing it to skid from the curve in the on-ramp through the end of the ramp, across three lanes of traffic, and strike the plaintiff's vehicle.

Defendants fail to raise a triable issue of fact in opposition. Defendants submit in opposition the examination before trial transcript testimony of defendant/operator Mark Raymond Flores, wherein he testifies, *inter alia* that: it was "snowing harshly" at the time of the accident; he was traveling on the ramp at a safe speed of 10 to 20 mph; his vehicle began to skid as he was traveling on the ramp from the Clearview Expressway to the Long Island Expressway, while he was traveling at a speed of 10 to 20 mph; and he was unable to control his vehicle since it was skidding due to the snowy conditions. Such explanation is insufficient to create a triable issue of fact. Defendants attempt to invoke New York's Emergency Doctrine. The emergency doctrine recognizes "that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the

context of the emergency" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]). Skidding on a snowy/slushy roadway does not constitute an emergency situation in the instant case, since defendant/operator was required to conform his driving accordingly. Road and weather conditions, such as snow and slush were foreseeable, not unexpected or sudden. The emergency condition was created by Mr. Flores' disregard for the existing road and weather conditions, and his failure to modify his driving accordingly (see *Marsicano v Dealer Storage Corp.*, 8 AD3d 451, 452-453 [2d Dept 2004]; *Caristo v Sanzone*, 96 NY2d 172 [2001]). Mr. Flores, an inexperienced driver, who had just gotten his drivers' license three months prior, should have been driving at a slower rate of speed on the curve of the exit ramp, given the extreme weather conditions. "Motorists are obligated to drive at a sufficiently safe rate of speed. . . ." (*Renteria v Simakov*, 109 AD3d 749 [1st Dept 2013]). Furthermore, a driver is negligent if he or she failed to see that which, through the proper use of senses, should have been seen (see *Kucar v Town of Huntington*, 81 AD3d 784, 785-786 [2d Dept 2011]; *Laino v Lucchese*, 35 AD3d 672, 672 [2d Dept 2006]; *Berner v Koegel*, 31 AD3d 591, 592 [2d Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686, 687 [2d Dept 2005]).

As there are no triable issues of fact, a trial is unwarranted.

As such, summary judgment shall be granted to the plaintiff on liability grounds.

Turning now to the main motion by defendants for an order: vacating the Note of Issue and Certificate of Readiness, and striking the matter from the trial calendar; precluding the plaintiff from testifying or offering any medical evidence regarding injury for failing to provide discovery; and extending defendants' time to file a motion for summary judgment to one-hundred twenty (120) days from the completion of discovery. Said motion is denied.

Defendants maintain that the plaintiff has not responded to the Defendants' "Demand for Discovery," dated August 20, 2019, requesting HIPAA Compliant authorizations. However, via his affirmation in opposition, the plaintiff maintains that he has responded to all of the defendants' discovery demands and provides a document dated November 1, 2019 entitled "Response to Discovery Demands," which document provides authorizations. No reply papers have been submitted.

Accordingly, it is

**ORDERED** the motion by defendants is denied; and it is further

**ORDERED** that the cross-motion is granted; and it is further

**ORDERED** that plaintiff is granted summary judgment as against defendants on the issue of liability; and it is further

**ORDERED** that the matter shall be set down for an inquest on the issue of damages.

**ORDERED** that any applications not specifically addressed herein are denied.

The foregoing constitutes the decision and order of the Court.

**Dated: January 3, 2020**

  
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TIMOTHY J. DUFFICY, J.S.C.

