

<b>Demelo v Rye Ford Inc.</b>
2021 NY Slip Op 33408(U)
March 31, 2021
Supreme Court, Westchester County
Docket Number: Index No. 54190/2019
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
ANTONIO DEMELO, a/k/a ANTONIO MELO,  
Plaintiff,

**DECISION & ORDER**  
Index No. 54190/2019  
Seq# 1

-against-

RYE FORD INC., and E.J. KAMVISIOS,

Defendants.  
-----X

The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-J  
Affirmation in Opposition/Affidavit/Exhibits A-B  
Reply Affirmation/Exhibits K-L

The plaintiff, Antonio DeMelo a/k/a Antonio Melo ("DeMelo"), commenced this action against the defendants by filing a summons and complaint on March 19, 2019, seeking money damages for alleged injuries sustained on February 1, 2019, as a result of a motor vehicle accident. The plaintiff alleges that he drove his 1985 Dodge dump truck to the defendant, Rye Ford, Inc. ("Rye Ford"), located on Post Road in Rye, New York, to trade it in for a new one. DeMelo parked the truck in the driveway, turned off the ignition, exited the truck, entered Rye Ford's showroom. He approached the defendant, E.J. Kamvisios ("Kamvisios"), a Rye Ford employee, who then went out to the truck to appraise it. DeMelo and a salesperson stood outside the truck near the front on the driver's side. There was a brick wall behind DeMelo. Kamvisios did not get into the driver's seat, but opened the door, but reached into the truck, put the key into the ignition and turned it. The

truck had a manual transmission and jumped forward, pinning DeMelo against the brick wall, fracturing multiple ribs on his right side and injuring his right shoulder.

The plaintiff, by his attorney, now files the instant motion for summary judgment, on the issue of liability. The plaintiff's attorney argues that the defendant stated that he was not aware of what he was doing when he turned the ignition key and admitted that he did not know that the vehicle was a manual transmission until after the vehicle jumped, thereby missing the obvious. The attorney argues that a reasonably prudent person would not simply lean into a heavy truck while attempting to operate its controls such as keys and ignition and being half in and half out of a vehicle when inserting and turning the ignition is negligent. The attorney further argues that Kamvisios failed to observe the standards imposed by the Vehicle and Traffic Law and such unexcused failure is negligence per se. Specifically, the attorney asserts that Kamvisios violated VTL § 1146 (Drivers to exercise due care) and VTL § 1162 (Starting Parked Vehicle). The plaintiff's attorney also asserts that the plaintiff has further established a rebuttable inference of negligence under the theory of *res ipsa loquitur*.

In opposition, the defendants, by their attorney, argue that the defendants have a non-negligent explanation for the accident, in that, there is clear evidence of a mechanical failure or malfunction of the truck, which sufficiently rebuts the inference of negligence. The attorney also asserts that the police report offered is uncertified and therefore, not admissible.

In reply, the plaintiff's attorney argues that the *prima facie* case was not challenged and the defendants failed to address what the driver/operator did prior to turning the ignition key and the plaintiff's claim that the operator failed his duty to see, be aware, and

to warn and be careful. The attorney contends that the defendants did not contradict his expert who opined with regard to the negligent, careless and unsafe operation of a vehicle and the defendants have offered nothing to contradict such. The plaintiff asserts that the defendants' expert did not address any of these points and did not offer an opinion stating that Kamvisios operated the vehicle safely and in a careful manner.

The plaintiff's attorney also contends that the police report submitted was a certified copy of the report and the defendants' counsel simply failed to see the certification stamp. The attorney further contends that the police report does not mention or cite any mechanical failure as a cause.

The attorney next argues that the defendants' expert opinion is speculative and conclusory, since the truck was not examined by the expert, nor anyone at the defendant Ford dealership. The attorney argues that the expert provides possibility reflected by the word "may" and offers no documentary proof to support his conclusion. The attorney also submits a supplemental expert affidavit to contest the defendants' expert's assertions.

Lastly, the plaintiff's attorney also objects to the defendants' expert and contend that they failed to disclose the expert prior to the note of issue being filed and only disclosed the expert one minute after the answering papers to the motion was served and raised the possibility of mechanical failure for the first time with this expert. The attorney argues that such a delay is prejudicial to the plaintiff and had the plaintiff been informed, requests to preserve the truck could have been made, so that both defendant and plaintiff could have had the experts inspect the truck.

## Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986])). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (see *McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (see *Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853).

'Pursuant to Vehicle and Traffic Law § 113, A "[d]river" is defined as "[e]very person who operates or drives or is in actual physical control of a vehicle.'" (*Matter of Cervoni v Commissioner of N.Y. State Dept. of Motor Vehs.*, 96 AD3d 742, 743 [2d Dept 2012]; NY VTL § 113).

New York Vehicle and Traffic Law § 1146(a) states in pertinent part that:

Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary. (NY VTL § 1146[a])

Further, New York Vehicle and Traffic Law § 1162, states that:

No person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety. (NY VTL § 1162).

A driver is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the other driver's violation of the vehicle traffic law (see *Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]).

In this case, the plaintiff, relying upon, *inter alia*, the testimony of the parties, the certified police report, and an expert affidavit,, which even when viewed in the light most favorable to the defendants, established, prima facie, that Kamvisios' actions were the sole proximate cause of the accident, since, as the driver (operator) of the parked vehicle, he failed to exercise due care. Kamvisios testified that he thought he was putting the truck into an accessory mode, but he was not careful in determining whether the truck had an accessory mode, he failed to inquire whether the truck had an accessory mode.

The plaintiff's expert opined that Kamvisios leaning into a vehicle, while standing outside and turning the ignition key was a dangerous and unsafe operation of the vehicle; that it was negligent to turn the ignition key without knowing whether the vehicle was a manual transmission; that Kamvisios' was negligent in failing to make certain that the vehicle was in neutral and that he was negligent in failing to give warning to the plaintiff, by sounding the horn and by moving the vehicle without reasonable safety.

In opposition, the defendants failed to raise a triable issue of fact (*Peluso v Martinez*, 138 AD3d 769 [2d Dept 2016]). The defendants failed to rebut the plaintiff's expert's opinions provided and instead provided their own expert, who opined that the truck experienced mechanical failure. However, such opinion is not based on any evidence or documentation in the record and is based on pure speculation. The expert fails to provide the truck's maintenance records and did not inspect the vehicle himself. The expert surmises that the ignition lock cylinder was worn, based on testimony, but fails to point to

the testimony that supports this statement. Further, the plaintiff's expert's supplemental affidavit addresses the arguments made by the defendants' expert, stating that the opinion proffered would have required two mechanical failures to occur in the same vehicle, in two different mechanical parts of the vehicle, at the same time, and at that particular moment and he has never seen such an instance in his forty years of mechanical repair work. Therefore, the defendants have failed to rebut the plaintiff's prima facie showing.

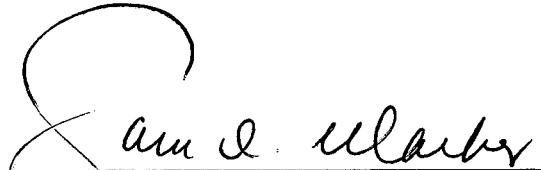
Accordingly, upon the foregoing, it is

ORDERED that the motion for summary judgment on the issue of liability is granted.

The parties are directed to appear before the Settlement Conference Part on a date to be determined.

The following constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 31, 2021



HON. SAM D. WALKER