McSweeney v Deme Hacling Corp
2021 NY Slip Op 34299(U)
September 23, 2021
Supreme Court, Queens County
Docket Number: Index No. 719537/20
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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EVA MCSWEENEY,

Plaintiff(s),

- against -

DEME HACLING CORP, KINGSLEY MBILLAAGURI, EMPIRE INTERNATIONAL LTD and ASEM ABU-SALIM,

Defendant(s).

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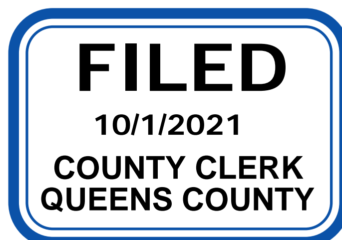
Index No.: 719537/20

Motion Date: 8/10/21

Motion Cal. No.: 14

Motion Seq. No.: 02



The following papers numbered 1 - 16 read on this motion by defendants Empire International Ltd and Asem Abusalim s/h/a Asem Abu-Salim, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against them, and on this cross-motion by plaintiff for summary judgment against defendants Deme Hacling Corp and Kingsley Mbillaaguri on the issue of liability.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service............	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits-Service......	5 - 8
Affirmation in Opposition-Exhibits-Service..............	9 - 11
Reply Affirmation-Exhibits-Service.......................	12 - 14
Affirmation in Support of Cross-Motion-Service...........	15 - 16

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This action sounds in personal injury, arising from a motor vehicle collision which occurred on August 18, 2019 at or near the intersection of Central Park West and West 61st Street, County, City, and State of New York. It is alleged that plaintiff was injured when the motor vehicle in which she was a passenger, which was owned and operated by defendants Deme Hacling Corp and Kingsley Mbillaaguri, respectively, "sideswiped" the motor vehicle owned and operated by defendants Empire International Ltd and Asem Abusalim (hereafter, collectively, "the moving defendants").

The moving defendants now move for summary judgment dismissing the complaint and all cross-claims as against them. Plaintiff now cross-moves for summary judgment against the remaining defendants on the issue of liability. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (*see id*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n * [2007]).

At the outset, the court denies plaintiff's cross-motion as procedurally improper. It is well-settled that a cross-motion is "an improper vehicle for seeking affirmative relief from a nonmoving party" (*Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]). Although plaintiff has cross-moved against the motion made by the moving defendants, she seeks summary judgment only against defendants Deme Hacling Corp and Kingsley Mbillaaguri (hereafter, collectively, "the co-defendants"). Since the co-defendants are non-moving parties, plaintiff cannot cross-move for relief against them. The cross-motion is, thus, denied.

The moving defendants seek dismissal of all claims against them on the ground that co-defendant Mbillaaguri was negligent as a matter of law by moving his vehicle into their lane of traffic without first ensuring that it was safe to do so, and this was the sole proximate cause of the accident. It is well-settled that "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]), and VTL § 1128 (a) provides that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made safely."

In support of summary judgment, the moving defendants submit, *inter alia*, an affidavit from Mr. Abusalim, who avers that he was driving along Central Park West in the left lane at approximately 12 miles per hour when he suddenly felt an impact to the rear passenger side of his vehicle. He then looked to the right and saw the other defendants' yellow taxi cab vehicle moving immediately alongside his. Mr. Abusalim further avers that he had been travelling in the left lane for approximately one to two blocks,

and his vehicle had remained entirely in the left lane prior to the impact. The moving defendants also submit a certified copy of the police accident report, wherein the responding officer memorialized that co-defendant Mbillaaguri "states that he was changing lane [*sic*] from right into left lane while travelling northbound on Central Park West and did not see vehicle 2." The moving defendants' submissions adequately establish Mr. Mbillaaguri's *prima facie* negligence in making an unsafe lane change, and that this was the sole proximate cause of the collision (*see e.g. Marks v Rieckhoff*, 172 AD3d 847, 848-849 [2d Dept 2019]; *Harrison v Bailey*, 79 AD3d 811, 812-813 [2d Dept 2010]).

In opposition, the co-defendants argue, *inter alia*, that summary judgment is premature because depositions have not been held. Although summary judgment may be denied should it appear that facts essential to justify opposition may exist but cannot then be stated (*see* CPLR 3212 [f]), "[t]he mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis for denying the motion" (*Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013] [internal quotation marks and brackets omitted]). Rather, the opponent must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the [proponent]" (*Martinez v Kreychmar*, 84 AD3d 1037, 1038 [2d Dept 2011] [internal quotation marks omitted]). Notwithstanding their contention that co-defendant Mbillaaguri presently offers a different version of events, which is addressed below, the co-defendants have not explained how party depositions would reveal additional facts tending to negate his negligence in causing the collision (*see Park v Sanchez*, 155 AD3d 970, 971 [2d Dept 2017] ["The plaintiff's professed need to conduct discovery did not warrant denial of the defendants' motion, since he already had personal knowledge of the relevant facts, as evidenced by his own affidavit in opposition to the motion"]). The court, thus, rejects the co-defendants' contention that summary judgment is premature.

The co-defendants also argue that there is an issue of fact as to proximate cause. They submit an affidavit from codefendant Mbillaaguri, in which he avers that before he attempted to merge from the right lane into the left, he put on his turning signal, looked in his left side view mirror, and saw Mr. Abusalim's vehicle at a distance of about four parked cars. According to Mr. Mbillaaguri, he then proceeded to change lanes, but without warning, he was sideswiped by Mr. Abusalim. The co-defendants argue that the version of events presented in Mr. Mbillaaguri's affidavit not only raises triable issues of fact as to which driver's conduct was proximate cause of the accident, but also shows that Mr. Abusalim was the lone negligent actor. However, Mr. Mbillaaguri's present account contradicts his statement to the responding officer that he did not see Mr. Abusalim's vehicle when

he executed the lane change, and Mr. Mbillaaguri has not denied speaking with the responding officer, nor has he challenged the accuracy of the statement attributed to him in the report.[1] Hence, the version of the accident described in the affidavit presents as a feigned issue of fact designed to avoid the consequences of Mr. Mbillaaguri's admission contained in the certified police accident report, which is insufficient to deny summary judgment (*see e.g. Kerolle v Nicholson*, 172 AD3d 1187, 1188-1189 [2d Dept 2019]; *Park*, 155 AD3d at 971; *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 1053 [2d Dept 2012]).

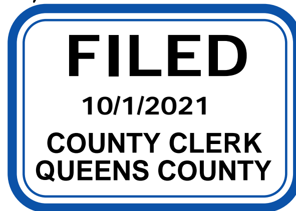
Accordingly, the above-referenced motions are decided to the extent that it is

ORDERED that the motion by defendants Empire International Ltd and Asem Abusalim s/h/a Asem Abu-Salim for summary judgment dismissing the complaint and all cross-claims as to them is **GRANTED**.

ORDERED that the cross-motion by plaintiff for summary judgment against defendants Deme Hacling Corp and Kingsley Mbillaaguri on the issue of liability is **DENIED**.

The foregoing shall constitute the decision and order of this court.

Dated: September 23, 2021



JANICE A. TAYLOR, J.S.C.

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[1] In his affidavit, Mr. Mbillaaguri disputes the notation in the police accident report that plaintiff was removed from the scene by an ambulance.