

**Vaeth v Ashkenazy**

2022 NY Slip Op 34501(U)

January 25, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 615831/2020

Judge: Vincent J. Martorana

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This opinion is uncorrected and not selected for official publication.

Short Form Order

INDEX NO: 615831/2020

**Supreme Court of the State of New York**  
**IAS Part 23 - County of Suffolk**

PRESENT: Hon. Vincent J. Martorana\_\_\_\_\_  
JOHN A. VAETH,

Plaintiff,

- against-

SAMUEL F. ASHKENAZY and UBER  
TECHNOLOGIES, INC.,Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE:

01/04/21;01/21/21

ADJOURNED DATE: 11/04/21

MOTION SEQ. NO.: 001 - MotD  
002 - MGPLTF'S/PET'S ATTY:Law Offices of John Coco, PLLC  
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Plainview, New York 111803DEFT'S/RESP'S ATTY:Lewis Johns Avallone Aviles, LLP  
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Islandia, New York 11749

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Upon efiled documents numbered 12-19, 21-22, 26-31, 35-47; it is

**ORDERED** that Plaintiff's motion seeking partial summary judgment on the issue of liability is granted as against defendant Samuel F. Ashkenazy and his sixth affirmative defense of culpable conduct is dismissed. The portion of Plaintiff's motion seeking partial summary judgment against Uber Technologies, Inc. is denied. Defendant Uber Technologies, Inc.'s cross-motion seeking partial summary judgment dismissing Plaintiff's second cause of action alleging vicarious liability under Vehicle and Traffic Law §388 based upon ownership of the vehicle, is granted.

The within action seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 2, 2020. Issue has been joined as to both defendants and Plaintiff now seeks summary judgment on the issue of liability (001). Defendant Uber Technologies, Inc. ("Uber") cross-moves seeking summary judgment (002) dismissing Plaintiff's second cause of action which alleges vicarious liability as against Uber under Vehicle and Traffic Law §388, based upon Uber's alleged ownership of defendant Samuel F. Ashkenazy's ("Ashkenazy") vehicle.

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Plaintiff alleges by affidavit that Defendant Ashkenazy's vehicle impacted Plaintiff's vehicle in the rear when Plaintiff's foot was firmly on the brake and his vehicle was fully stopped in traffic for at least ten seconds. Plaintiff's moving papers assert no facts as against Uber. Belatedly, in reply, Plaintiff asserts that at the time of the accident Ashkenazy was in the process of making an Uber Eats delivery. The accident occurred at or near the intersection of Sunrise Highway and Bayview Avenue in the Town of Babylon. Defendant Ashkenazy alleges by affidavit that just prior to the accident,

As both vehicles approached the intersection in the right-hand lane, a tractor-trailer headed in an eastbound direction began to execute a U-turn across all three westbound lanes on Sunrise Highway. At that time, my vehicle was traveling at approximately 30 miles per hour and approximately two to three car lengths behind the vehicle being driven by the plaintiff, John Vaeth. During that time, I continued to keep Mr. Vaeth's vehicle under my constant observation. As the tractor-trailer began to block all three lanes of travel on westbound Sunrise Highway, I observed the brake lights of the black Hyundai illuminate with Mr. Vaeth's vehicle decelerating and coming to an abrupt and almost immediate stop. In response thereto, I immediately applied my brakes and attempted to navigate my vehicle to avoid Mr. Vaeth's rapidly decelerating SUV. Approximately only two to three seconds passed from the time that Mr. Vaeth undertook this abrupt deceleration and immediate stop to the time my vehicle made contact with Mr. Vaeth's SUV.

Although Ashkenazy was aware that a tractor trailer was obstructing the roadway ahead, he asserts that Plaintiff stopped short and is therefore culpable in the happening of the accident. There is no indication that Plaintiff's vehicle stopped an unreasonable distance from the tractor trailer or that there was any other reasonable course of action to avoid colliding with the truck.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Stonehill Capital Mgmt., LLC v. Bank of the West.*, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016])(quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff, and that the defendant's negligence was a proximate cause of the alleged injuries (see *Rodriguez v City of New*

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*York*, 31 NY3d 312, 319, 76 NYS3d 898 [2018]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]; *Wray v. Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept. 2019]; *Hai Ying Xiao v. Martinez*, 185 AD3d 1014, 126 NYS3d 369 [2d Dept. 2020] ). To be entitled to partial summary judgment, Plaintiff does not bear the burden of proving the absence of his or her own comparative fault (*Rodriguez, supra*; *Outar v. Sumner*, 164 AD3d 1356, 81 NYS3d 751 [2d Dept. 2018]; *Lopez v. Dobbins*, 164 AD3d 776, 79 N.Y.S.3d 566 [2d Dept. 2018]; *Balladares v. City of New York*, 177 AD3d 942, 944, 114 NYS3d 448, 451 [2d Dept. 2019]). Culpable conduct on the part of Plaintiff would not preclude recovery, it would only proportionally reduce the amount of damages that could be recovered (CPLR§ 1411; *Rodriguez, supra*). Therefore, an assertion that Plaintiff is comparatively negligent has no impact on Plaintiff's *prima facie* claim of negligence and cannot act as a bar to summary judgment (*Rodriguez, supra*; *Poon, supra*; *Wray, supra*; *Maliakel v. Morio*, 185 AD3d 1018, 129 NYS3d 99 [2d Dept. 2020]).

Vehicle and Traffic Law §1129(a) provides that, “The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.” Every driver has a common law duty to see that which should be seen through the proper use of his or her senses and to exercise reasonable care to avoid colliding with another vehicle (*Cicalese v Burier*, 123 AD3d 1078, 1 NYS3d 210 [2d Dept 2014]; *Bennett v Granata*, 118 AD3d 652, 987 NYS2d 424 [2d Dept 2014]; *Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 948 NYS2d 124 [2d Dept 2012]; *Pollack v Margolin*, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]; *Francavilla, supra*; *Shvydkaya, supra*; *Laurent v. Bass*, 177 AD3d 724, 724–25, 113 NYS3d 252, 253–54 [2d Dept. 2019]). It is the duty of the operator of a motor vehicle to not follow other vehicles more closely than is reasonable and prudent and to maintain awareness of surroundings to avoid colliding with another vehicle. (*Vehicle and Traffic Law § 1129*; *Vavoulis v Adler*, 43 AD3d 1154, 842 NYS2d 526 [2d Dept 2007]; *Maxwell v Lobenberg*, 227 AD2d 598, 643 NYS2d 186 [2d Dept. 1996]; *Nsiah-Ababio v Hunter*, 78 AD3d 672, 913 NYS2d 659 [2d Dept. 2010]; *Cicalese v Burier*, 123 AD3d 1078, 1 NYS3d 210 [2d Dept 2014].) “A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle.” (*Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 726, 918 NYS2d 156, 157 [2d Dept. 2011] (*quoting Nsiah-Ababio v Hunter*, 78 AD3d 672, 672, 913 NYS2d 659); *see also Strickland v. Tirino*, 99 AD3d 888, 952 NYS2d 599 [2d Dept. 2012]; *Hauswirth v. Transcare New York, Inc.*, 97 AD3d 792, 949 NYS2d 154 [2d Dept. 2012]; *Martinez v. Martinez*, 93 AD3d 767, 941 NYS2d 189 [2d Dept. 2012]). A rear end collision with a stopped or stopping vehicle gives rise to a claim of *prima facie* negligence on the part of the rear vehicle, shifting the burden to the rear vehicle driver to establish a non-negligent cause for the collision (*Hauswith v Transcare New York, Inc.*, 97 AD3d 792, 949 NYS2d 154, [2d Dept 2012]; *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept. 1996]).

Here, Plaintiff has made a *prima facie* case of entitlement to judgment as a matter of law with respect to the liability of Ashkenazy. In the context of the version of events set forth by Ashkenazy, the claim that Plaintiff “stopped short” is insufficient to raise a triable issue of fact. Summary judgment is granted to Plaintiff on the issue of Ashkenazy’s liability and Ashkanazy’s sixth affirmative defense of culpable conduct is dismissed. The portion of Plaintiff’s motion seeking summary judgment as against Uber is denied. Plaintiff alleged no facts whatsoever as against Uber

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in its initial moving papers with respect to its two vicarious liability claims or its negligent hiring and retention claim. Plaintiff failed to make a prima facie case of entitlement to judgment as a matter of law in this regard. Any arguments offered for the first time in reply or in opposition to Uber's cross-motion will not be considered to bolster Plaintiff's motion. Furthermore, the evidence in the record establishes that Uber did not own Ashkenazy's vehicle, Ashkenazy owned it. Accordingly, Uber's motion seeking summary judgment dismissing Plaintiff's second cause of action which alleges liability based upon Uber being the owner of the vehicle, pursuant to Vehicle and Traffic Law §388, is granted.

Dated: January 25, 2022  
Riverhead, New York

  
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VINCENT J. MARTORANA, J.S.C.

CHECK ONE:     FINAL DISPOSITION     NON-FINAL DISPOSITION