

**Gvozdetski v Aslam**

2022 NY Slip Op 34541(U)

July 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 518802/2017

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 518802/2017  
**Seq.** 004

Part 91

**DECISION/ORDER**

OLEKSANDR GVOZDETSKI,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed . . . .	<u>        </u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Exhibits . . . . .	<u>Var.</u>
Other . . . . .	<u>        </u>

WASIM ASLAM,

Defendants.

Upon the foregoing papers, plaintiff's motion for summary judgment on liability and to strike the defendant's answer or, in the alternative, to preclude the defendant from offering evidence at trial (seq. 004) is decided as follows:

**Procedural History**

This personal injury action was commenced by the filing of a summons and complaint on September 28, 2017. Issue was joined when defendant Aslam served a verified answer on or about December 18, 2017. On October 17, 2018, Plaintiff moved for partial summary judgment on the issue of liability. Plaintiff's motion was denied, without prejudice to renew after completion of discovery, by Justice Johnny Lee Baynes. Two discovery orders were issued subsequently. First, the preliminary conference order, signed by Justice Lizette Colon on June 13, 2019, instructs the examination before trial of both parties to be held on September 24, 2019. Second, the Central Compliance Part order, signed by Justice Martin Schneier on October 7, 2019, directed that the deposition of all parties was to be held on or before November 14, 2019.

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The plaintiff was deposed on April 8, 2020. The defendant was scheduled for his deposition on October 23, 2020, but failed to appear, and has not been produced to date. Plaintiff filed his note of issue on January 27, 2020.

### **Factual Background**

This action arises out of a motor vehicle accident which occurred on July 31, 2017 at approximately 10:00pm. The plaintiff, Oleksandr Gvozdetski, testified as follows: He was driving in the right-hand lane on Ocean Parkway in Brooklyn, NY (Gvozdetski EBT at 22). Near the intersection of Ocean Parkway and Avenue V, a vehicle operated by defendant Wasim Aslam merged from the middle lane of Ocean Avenue into the right lane, where it struck the plaintiff's vehicle (*id.* at 26). The plaintiff has attached a dashcam video from the plaintiff's vehicle that allegedly captures the accident; unfortunately, the court is unable to access this video. However, the plaintiff attaches to his moving papers stills from the video, which clearly show the defendant's vehicle turning from the middle lane in front of the plaintiff, whose vehicle was approaching the intersection in the rightmost lane.

### **Analysis**

The drastic remedy of striking a pleading pursuant to CPLR 3126 (3) is inappropriate absent a showing that the failure to comply with court-ordered disclosure, or to disclose information which the court finds ought to have been disclosed, was willful and contumacious (*Parker Waichman, LLP v. Laraia*, 131 AD3d 1215, 1216 [2d Dept 2015]). "The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" (*Crupi v Rashid*, 157 AD3d 858, 859 [2d Dept 2018]).

The plaintiff contends that the defendant's failure to appear for his deposition demonstrates a willful and contumacious disregard for the court's discovery orders. The plaintiff points to a transcript from the date when the defendant was supposed to appear where defendant's counsel affirmed that he "called the number we have for our client Mr. Aslam. I called it twice. He did not answer, he did not respond to the messages" (Oct. 23, 2020 transcript at 3). The plaintiff avers that this failure is evidence that Mr. Aslam was willfully and contumaciously disregarding his obligation to appear. In response, defendant's counsel affirms that the "office has assigned an in-house investigator who established contact with defendant," and that Mr. Aslam "is ready, willing, and able to appear for a deposition, provided an Urdu interpreter is made available" (Aff. in Opp. at 3).

As an initial matter, the plaintiff does not include a separate affirmation of good faith, which the defendant argues is in violation of 22 NYCRR 202.7. However, while a separate affirmation "may be the better practice," the requirements of the rule can be "satisfied by the primary affirmation of counsel" if that affidavit details the movants efforts to obtain compliance with discovery obligations (*Encalada v Riverside Retail, LLC*, 175 AD3d 467, 468–469 [2d Dept 2019]). Here, the plaintiff's affirmation sufficiently relates the efforts made to effect compliance with the previous discovery orders.

The previous conditional preclusion orders are the dispositive signposts for the procession of discovery in this case, and these preclusion orders became "absolute" when the defendant failed to appear pursuant to those orders (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 83 [2010]). Additionally, the defendant has not provided evidence of efforts to schedule new depositions, instead only asserting that Mr. Aslam is "ready, willing, and able to appear." Therefore, as a commensurate remedy for the defendant's failure to appear for his deposition,

Mr. Aslam is hereby precluded from testifying at all, and from offering evidence at the time of trial on the issue of liability.

As to the second prong of the plaintiff's motion, on a motion for summary judgment, the moving party bears the initial burden of making a prima facia showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facia showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Motor vehicle operators are required to exercise due care when changing lanes; to both approach and to make right turns as closely as is practicable to whatever demarcates the rightmost part of the roadway; and to ascertain that it is safe to do so before "[moving] a vehicle to the right or left upon a roadway" or engaging in any other turning maneuver (VTL § 1128 [a]; VTL § 1160 [a]; VTL § 1163 [a]). Motorists are entitled to presume that other drivers will abide by the rules of the road, and violations of the VTL may serve as a predicate for a finding of negligence (*see e.g. Jacino v Sugerman*, 10 AD3d 593, 595–5596 [2d Dep't 2004]).

Here, the plaintiff has made out his prima facie burden by producing evidence that while he was traveling in the rightmost lane on Ocean Parkway, Mr. Aslam negligently turned right from the middle lane and struck the plaintiff's vehicle. As Mr. Aslam has been precluded, he is unable to offer evidence in resistance to the plaintiff's motion. The plaintiff's motion is, therefore, granted.

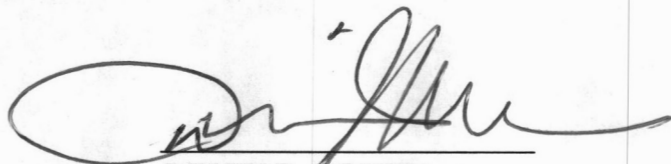
### **Conclusion**

The plaintiff's motion (seq. 004) is granted to the extent of precluding the defendant from offering evidence on the issue of liability and from testifying at all. Further, the plaintiff is granted summary judgment on the issue of liability.

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This constitutes the decision and order of the court.

July 21, 2022  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

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