

Habib v O & Y Limo Serv.

2022 NY Slip Op 34633(U)

November 1, 2022

Supreme Court, Queens County

Docket Number: Index No. 702629/2019

Judge: Maurice E. Muir

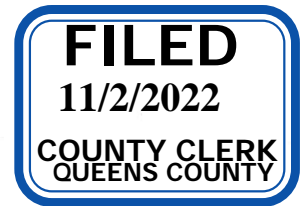
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



MOHAMMED A. HABIB,

IAS Part - 42

Plaintiff,

Index No.: 702629/2019

-against-

Motion Date: 7/21/22

O & Y LIMO SERVICE and TAHA M. TAHA,

Motion Cal. No. 18

Defendants.

Motion Seq. No. 2

The following electronically filed (“EF”) documents read on this motion by Mohammed A. Habib (“Mr. Habib” or “plaintiff”) for an Order granting Summary Judgment pursuant to CPLR § 3212 in favor of the plaintiff as against the defendant and striking the affirmative defense of culpable conduct and for such other and further relief as to this Court may deem just, proper and equitable.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits-Service.....	EF 34 - 44
Affirmation in Opposition-Exhibits-Service.....	EF 46 - 48
Affirmation in Reply-Service.....	EF 49 - 50

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Mr. Habib allegedly sustained in a motor vehicle collision. The plaintiff alleges that on November 29, 2018, the motor vehicle owned by O & Y Limo Service (“O&Y”) and operated by Taha M. Taha (“Mr. Taha”) can into contact with plaintiff’s motor vehicle on 31st Avenue at or near its intersection with 54th Street, in the County of Queens, City and State of New York (“subject accident”). As a result, on February 13, 2019, the plaintiff commenced the instant action against the defendants; and on or about July 16, 2019, issue was joined, wherein the defendants interposed an answer with six (6) affirmative defenses (e.g., culpable conduct, assumption of risk, serious injury, economic loss, mitigation of damages, emergency doctrine, etc.). On or about December 8, 2021, the parties

agreed to preclude the defendants from either testifying at trial or submitting evidence as to liability unless defendant Taha M. Taha appeared for an examination before trial (“EBT”) on or before February 14, 2022: The stipulation was so-ordered by the court. However, the defendants failed to appear for an EBT as agreed. As a result, the defendants are precluded from submitting any evidence in opposition to the instant, wherein the plaintiff seeks a judgment on liability. On June 21, 2022, the plaintiff filed the instant motion for summary judgment, pursuant to CPLR § 3212.

In support of the instant motion, the plaintiff testified that on October 7, 2020, the accident happened mid-block between 54th Street and 55th Street. Prior to the accident, he had stopped at a red light on 54th Street and 31st Avenue; and after the light changed and as he was crossing 54th Street, he saw the defendant’s vehicle double parked on the other side of the street with its flashers on. Moreover, the plaintiff testified that while he was travelling 15-18 miles per hour, the defendant then began to make a U-turn and struck his car. Even though the defendants are precluded from submitting evidence as to liability, defense counsel submitted an affirmation in opposition. However, defense counsel’s affirmation is neither based on personal knowledge nor supported by documentary evidence. As such, said affirmation has no probative value. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Flagstar Bank, FSB v. Titus*, 120 AD3d 469 [2d Dept 2014]).

Here the court finds that the plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability. It is well settled law that “[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” (*Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020] [internal quotation marks omitted]; *Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018]). “To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault” (*Rodriguez v. City of New York*, 31 NY3d at 324-325); instead, “[a] violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence as a matter of law” (*Marks v. Rieckhoff*, 172 AD3d 847, 848 [2d Dept 2019]). In support of the instant motion, the plaintiff submitted an uncontroverted testimony that while he was driving on 31st Avenue, Mr. Taha made a U-turn, crossed the double yellow line, and struck his car. The plaintiff’s testimony demonstrates that the defendants violated VTL § 1126(a) by crossing the

yellow double lines and entering the opposite lane of traffic. (*see Shah v. MTA Bus Company*, 201 AD3d 833 [2d Dept 2022]; *Gute v. Grease Kleeners, Inc.*, 170 AD3d 676, 677 [2d Dept 2019]; *Pearson v. NorthStar Limousine, Inc.*, 123 AD3d 991 [2d Dept 2014], violated VTL § 1128(a) by failing to drive, to the degree practicable, within a single lane. (*see Pipinias v. Ferreira*, 155 AD3d 1073, 1074 [2d Dept 2017]), and violated his common-law duties to see what there is to be seen (*see Peluso v. Martinez*, 136 AD3d 769, 770 [2d Dept 2016]) and to keep a proper lookout to avoid a collision (*see Canales v. Arichabala*, 123 AD3d 869, 870 [2d Dept 2014]). Since the plaintiff's uncontroverted testimony establishes the defendants' prima facie negligence. Moreover, the defendants failed to raise a triable issue of fact. As such, the court must grant the plaintiff's motion for summary judgment on the issue of liability.

Furthermore, that branch of the plaintiff's motion to strike the defendants' affirmative defenses based upon the plaintiff's alleged culpable conduct is also granted. Pursuant to CPLR § 3211(b), it provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]; *see also Lewis v. U.S. Bank National Association*, 186 AD3d 694 [2d Dept 2020]). Additionally, on a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed." (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Here, the court finds that the defendants' affirmative defense, based upon culpable conduct, lacks merit. As such, the defendants' first affirmative defense is dismissed with prejudice.

Accordingly, it is hereby

ORDERED that the branch of the plaintiff's motion for summary judgment on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED, that the branch of the plaintiff's motion to strike the defendants' affirmative defenses pursuant to CPLR § 3211(b), is granted only to the extent that the defendants' first affirmative defense is dismissed, in its entirety, with prejudice; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants on or before November 30, 2022.

The foregoing constitutes the decision and order of the court.

Dated: November 1, 2022
Long Island City, New York

A handwritten signature in blue ink that reads "Maurice E. Muir". The signature is written in a cursive style with a horizontal line underneath the name.

MAURICE E. MUIR, J.S.C.