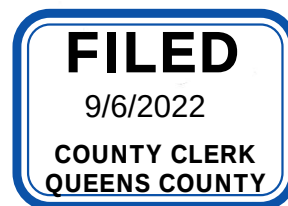


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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Santiago v Castillo</b>                                                                                                                                                                                                     |
| 2022 NY Slip Op 35103(U)                                                                                                                                                                                                       |
| September 2, 2022                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 717163/2021                                                                                                                                                                                           |
| Judge: Maurice E. Muir                                                                                                                                                                                                         |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

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RICARDO J. SANTIAGO,

Plaintiff,

-against-

GLADYS CASTILLO,

Defendant.

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IAS Part - 42

Index No.: 717163/2021

Motion Date: 6/30/22

Motion Cal. No. 17

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Richard J. Santiago (“Mr. Santiago” or “plaintiff”) for an order: a) granting the plaintiff summary judgment pursuant to CPLR § 3212 on the issue of liability against the defendants; and b) striking the defendant’s affirmative defense of culpable conduct; c) striking the defendant’s affirmative defense of failure to use available seatbelt; and d) granting summary judgment on the issue of liability, setting this matter down for an assessment of damages pursuant to CPLR § 3212(c); and e) granting such other and further relief as to this Court may seem just and proper.

|                                                        | Papers<br>Numbered |
|--------------------------------------------------------|--------------------|
| Notice of Motion-Affirmation in Support-Exhibits-..... | EF 08 - 16         |
| Affirmation in Opposition-Exhibits.....                | EF 19 - 20         |
| Reply Affirmation-Exhibits.....                        | EF 22              |

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

This is an action to recover damages for personal injuries allegedly sustained by Mr. Santiago due to a motor vehicle collision with Gladys Castillo (“Ms. Castillo” or “defendant”), which occurred on July 8, 2021 at 1:20 a.m. As a result, on July 29, 2021, the plaintiff commenced the instant action; and on September 7, 2021, issue was joined, wherein Ms. Castillo interposed an answer with four (4) affirmative defenses (i.e., comparative negligence, seatbelt,

assumption of risk and collateral source rule, respectively). In particular, the defendant's first affirmative defense states the following:

The personal injuries and/or property damage alleged to have been sustained by the plaintiff(s) were caused entirely or in part through the culpable conduct attributable to the plaintiff(s) and the defendant seeks a dismissal or reduction in any recovery had by the plaintiff in the proportion which the culpable conduct attributable to the plaintiff(s) bears to the culpable conduct which caused the damages.

On September 27, 2021, the court issued a Preliminary Conference Order ("PCO"), which ordered the parties to conduct their examinations before trial ("EBTs") within ninety (90) days of the PCO. Thereafter, on April 27, 2022, the plaintiff filed the instant motion for summary judgment seeking the above-described relief. In support of the instant motion, the plaintiff avers that "[t]he accident occurred at the Burger King drive-thru located at 220-10 Northern Boulevard in the County of Queens, City and State of New York. At the time of the accident, my vehicle was completely stopped waiting on the drive-thru line. While my vehicle was completely stopped, I was heavily rear-ended by the Defendant's vehicle."

According to the Court of Appeals, a plaintiff is no longer required to show freedom from comparative fault in order to establish his or her *facie* entitlement to judgment as a matter of law on the issue of a defendant's liability (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Sooklall v. Morisseav-LaFague*, 185 AD3d 1079 [2d Dept 2020]; *Merino v. Tessel*, 166 AD3d 760 [2d Dept 2018]; *Dolores v. Grandpa's Bus Co., Inc.*, 189 AD3d 1539 [2d Dept 2020]). "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" (*Catanzaro v. Edery*, 172 AD3d 995 [2d Dept 2019], quoting *Witonsky v. New York Tr. Auth.*, 145 AD3d 938 [2d Dept 2016]; *see* Vehicle and Traffic Law § 1129(a)). Furthermore, "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]).

Here, the plaintiff established his *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting, *inter alia*, his own uncontroverted affidavit, which demonstrated that Ms. Castillo struck his vehicle in the rear while he was stopped in the Burger King Drive-Thru. (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Xiao v. Martinez*,



185 AD3d 1014 [2d Dept 2020]). It is well settled law that “[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” (*Catanzaro v. Ederly*, 172 AD3d 995 [2d Dept 2019]; *Sooklall v. Morisseav-LaFague*, 185 AD3d 1079 [2d Dept 2020]; Vehicle and Traffic Law § 1129(a)). In opposition, Ms. Castillo failed to provide a non-negligent explanation for the subject rear-end accident sufficient to raise a triable question of fact. In fact, Ms. Castillo failed to submit affidavit refuting the plaintiff’s contentions; and her attorney’s affirmation lacks probative value because, it is not based on personal knowledge or supported by documentary evidence. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Amato v. Fast Repair, Inc.*, 15 AD3d 429 [2d Dept 2005]).

Contrary to defendant’s contentions, the instant motion for summary judgment is not premature, as the defendants failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion is exclusively within the knowledge and control of the plaintiff. (*Harrinarain v. Sisters of St. Joseph*, 173 AD3d 983 [2d Dept 2019]; *Lopez v. Suggs*, 186 AD3d 589 [2d Dept 2020]; *Theresa Striano Revocable Trust v. Hoffman*, 71 AD3d 993 [2d Dept 2010]). As such, the court finds that the defendants’ contention that discovery is required is meritless. (*Sooklall v. Morisseav-Lafague*, 185 AD3d 1079 [2d Dept 2020]; *Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]). As the Appellate Division has repeatedly held “[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion.” (*Kimyagarov v. Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept 2007]; *see also Martinez v. Kuhl*, 165 AD3d 7784 [2d Dept 2018]; *Niyazov v. Hunter, EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]). Moreover, the defendant failed to comply with the PCO, which required the parties to conduct EBTs on or before December 27, 2021. As such, the court finds that the instant motion is not premature; and the defendant is liable for the subject accident.

Lastly, that branch of the plaintiff’s motion to strike the defendant’s affirmative defenses based upon the plaintiff’s alleged culpable conduct and his failure to wear a seatbelt is granted in part and denied in part. “CPLR § 3211(b) 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 defendant’s affirmative defense, based upon comparative negligence and/or culpable conduct, lacks merit. As such, the defendant’s first affirmative defense must be dismissed.

Accordingly, it is hereby

ORDERED that branch of plaintiff’s motion for summary judgment in his favor and against the defendant, on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

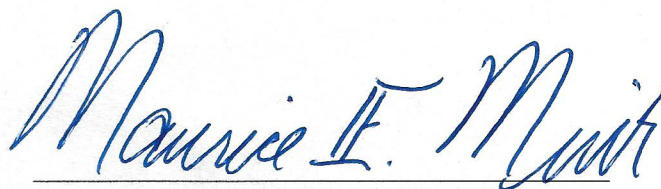
ORDERED that branch of plaintiff’s motion to strike the defendant’s affirmative defenses, pursuant to CPLR § 3211(b), is granted only to the extent that the defendant’s first affirmative defense based upon culpable conduct is dismissed in its entirety, with prejudice; and it is further,

ORDERED that branch of plaintiff’s motion to set this matter down for an assessment of damages pursuant to CPLR § 3212(c) is denied; and it is further,

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

The foregoing constitutes the Decision and Order of the court.

Dated: September 2, 2022  
Long Island City, New York

  
MAURICE E. MUIR, J.S.C.