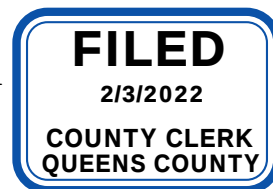


Huda v Smith
2022 NY Slip Op 35133(U)
February 3, 2022
Supreme Court, Queens County
Docket Number: Index No. 718919/2020
Judge: Robert J. McDonald
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD
 Justice

- - - - - x

NAZMUL HUDA,

Index No.: 718919/2020

Plaintiff,

Motion Date: 2/3/22

- against -

Motion Nos.: 12 & 13

DOREEN SMITH, MOUSSA AGBORRIO and
 YZAICI & OZSU SERVICE CORP.,

Motion Seqs.: 1 & 2

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants MOUSSA AGBORRIO and YZAICI & OZSU SERVICE CORP.

(**seq. no. 1**) for an Order pursuant to CPLR 3212, granting summary judgment in favor of said defendants and dismissing the complaint and all cross-claims against said defendants; and on this motion by plaintiff (**seq. no. 2**) for an Order pursuant to CPLR 3215, directing that a default judgment be entered against defendant Doreen Smith and setting this matter down for an inquest:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion(seq. no. 1)-Affirmation-Exhibits...EF	6 - 12
Affirmation in Opposition.....EF	20 - 22
Affirmation in Reply.....EF	27 - 28
Notice of Motion(seq. no. 2)-Affirmation-Exhibits...EF	13 - 19
Affirmation in Partial Opposition-Exhibits.....EF	23 - 26

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a three car accident that occurred on November 7, 2017 on 8th Avenue in between its intersections with 51st and 52nd Street, in New York County, New York.

Plaintiff commenced this action by filing a summons and complaint on October 16, 2020. Moussa Agborrio and Yzaici & Ozsu Service Corp. (collectively hereinafter defendants) joined issue

by service of a verified answer with cross-claims on January 20, 2021. Defendants now move for summary judgment.

Co-defendant Doreen Smith was served on November 12, 2020 pursuant to CPLR 308(4) by affixing a copy of the summons and verified complaint to the door of her residence. Defendant Smith's time to appear and answer the complaint has elapsed, and defendant Smith has not served an answer to the complaint or moved to extend her time to answer. Plaintiff now seeks a default judgment against the defendant Doreen Smith.

In support of the default motion, plaintiff submits an affidavit affirming that he was caused to sustain injuries as a result of the subject accident.

Based on plaintiff's affidavit of merit and the process server's affidavit of service, plaintiff is entitled to a default judgment against defendant Smith.

In support of their summary judgment motion, defendant Agborrio submits an affidavit dated November 19, 2021, stating that just prior the accident, his vehicle was fully stopped in its lane on 8th Avenue due to a red traffic light located at 8th Avenue and its intersection with 51st Street. Prior to the accident with his stopped vehicle, there was a collision behind him on 8th Avenue. His vehicle was struck in the rear by plaintiff's vehicle. Just prior to the accident, he did not hear any sound of any approaching vehicles. He did not stop short, suddenly stop, make a sudden lane change, or suddenly accelerate or decelerate. Plaintiff's vehicle only collided with his vehicle because of the prior collision.

Based on the submitted evidence, defendants contend that as their vehicle was stopped when it was struck in the rear by plaintiff's vehicle, they are entitled to summary judgment.

In opposition, plaintiff contends that the motion is premature as all party depositions and significant discovery remain outstanding.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macaulley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v New York City Transit Auth., 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]).

Here, defendants submitted sufficient evidence to demonstrate that their vehicle was stopped at the time of the accident. Thus, defendants satisfied their prima facie burden of establishing their entitlement to judgment as a matter of law on the issue of liability by demonstrating that their vehicle was stopped when it was struck in the rear (see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3D 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving parties to raise a triable issue of fact as to whether movants were also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

It is undisputed that defendants' stopped vehicle was struck in the rear. Moreover, while plaintiff does submit an affidavit in support of the default motion, plaintiff does not submit an affidavit opposing defendants' motion for summary judgment or contesting the facts as stated by defendant Agborrio. Plaintiff's contention that this motion for summary judgment is premature is without merit. Plaintiff failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and based on the above, it is hereby,

ORDERED, that the summary judgment motion by defendants MOUSSA AGBORRIO and YZAICI & OZSU SERVICE CORP. (**seq. no. 1**) is granted, the complaint and all cross-claims are dismissed as against defendants MOUSSA AGBORRIO and YZAICI & OZSU SERVICE CORP. (**seq. no. 1**), and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED, that the motion by plaintiff (**seq. no. 2**) for a default judgment against defendant DOREEN SMITH and setting this matter down for an inquest is granted; and it is further

ORDERED, that this matter is set down for an assessment of damages on **May 4, 2022 at 9:30 a.m.**, in the Trial Scheduling Part, 88-11 Sutphin Boulevard, Jamaica, NY 11435, Courtroom 25; and it is further

ORDERED, that plaintiff shall file a note of issue, together with proof of service of a copy of this order upon defendant DOREEN SMITH and on or before **April 4, 2022**.

Dated: February 3, 2022
Long Island City, N.Y.

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.