

Inga v Ktistakis
2023 NY Slip Op 30157(U)
January 3, 2023
Supreme Court, New York County
Docket Number: Index No. 161253/2019
Judge: James G. Clynes
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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OSCAR INGA,	INDEX NO. <u>161253/2019</u>
	MOTION DATE <u>04/26/2021</u>
Plaintiff,	MOTION SEQ. NO. <u>001</u>

- v -

JOHN KTISTAKIS, KATHLEEN KTISTAKIS, CRE EXPERT
CLEANING INC, JOHN ZALEWSKI

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 51, 53, 58

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendants CRE Expert Cleaning Inc (CRE Expert) and John Zalewski (Zalewski) for summary judgment on the issue of liability in their favor and against Defendants John Ktistakis and Kathleen Ktistakis (the Ktistakis Defendants) and for dismissal of the complaint and all cross-claims against them is decided as follows. Plaintiff did not file written opposition to the motion.

In this action, Plaintiff seeks recovery for injuries allegedly sustained as a result of a March 19, 2019 accident between a vehicle owned the Ktistakis Defendants and operated by John Ktistakis, and a vehicle owned by Defendants CRE Expert and operated by Zalewski, in which Plaintiff was a passenger.

When presented with a motion for summary judgment, the Court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If triable issues of fact exist, summary judgment is not warranted (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Summary judgment will be granted if it is clear that no triable issue of

fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez*, at 324). 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 [1985]). Because summary judgment deprives a litigant of the party's day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]).

Movant Defendants CRE Expert and Zalewski establish a *prima facie* showing of entitlement to summary judgment on the issue of liability. Movants' submission includes the examination before trial (EBT) testimony of Defendant Driver Zalewski, Defendant Driver John Ktistakis, and Plaintiff, as well as the uncertified Police Accident Report.

In Zalewski's EBT testimony, he testifies that he was driving a passenger van with three rows of seating, going straight within the speed limit, when his van was struck on the right side, causing the van to spin around. Zalewski testimony does not clearly establish whether or not he saw the Ktistakis Defendants' vehicle prior to the impact.

In his EBT, Plaintiff testified that he was seated in the last row of the van driven by Zalewski, he was not wearing a seat belt because there was not one in available in the van, the vehicle within which he was a passenger was driving straight, it did not change lanes at any point

prior to the impact, Plaintiff was looking out the window, saw the Ktistakis vehicle approximately three seconds before the impact during which time he screamed and turned his face away from the window, when the front of the Ktsistakis vehicle made contact with the rear tire of the vehicle in which Plaintiff was travelling. In the three seconds before the impact, Plaintiff testified that he did not see any traffic light or stop sign for the Ktistakis Defendants' vehicle, although he "believed" they had a stop sign.

In his EBT, Defendant Driver John Ktistakis, states that he was driving within the speed limit, took his foot off the gas pedal because the road sloped downwards and he wanted to maintain the speed limit, as he neared the intersection, he pressed on the brake, the car slowed, and as he reached the stop sign, he pressed the break gently to come to a complete stop, but the car accelerated instead through the stop sign into the van owned by CRE Expert and operated by Zalewski in which Plaintiff was a passenger.

Movants also rely on the uncertified Police Accident Report, which indicates that Defendant Driver John Ktistakis "stated he stepped on the accelerator when he went to break by mistake." However, uncertified police reports are inadmissible, even those which contain admissions against interest by a party, as here, and are thus lacking in probative value (*see* CPLR 4518[a]). Conversely, certified police reports are admissible, and to the extent they contain admissions against interest by parties, which constitute an exception to the hearsay rule, those statements are admissible. In their opposition, the Ktistakis Defendants do not object to the admissibility of the report. Accordingly, the evidence is presumed to have been unobjectionable and any error is considered waived (CPLR 4017; *Matter of Govt. Empls. Ins. Co. v Martin*, 102 AD3d 523 [1st Dept 2013]). Defendant Driver John Ktistakis' admission in the police accident report that he had pressed on the accelerator instead of the brake pedal is admissible, since the

Ktistakis Defendants also relied upon the report and waived any hearsay or authentication objection (*see e.g., Cruz v Skeritt*, 140 AD3d 554, 554 [1st Dept 2016] [where defendant driver's admission within the police report was admissible because he also relied on the report and waived any objection]).

Based on the above, Movant Defendants CRE Expert and Zalewski have established a prima facie showing of entitlement to summary judgment on the issue of liability and the burden then shifts to the Ktistakis Defendants to provide a nonnegligent explanation sufficient to raise a triable issue of fact.

In opposition, the Ktistakis Defendants contend that there are material issues of fact and thus summary judgment must not be granted. The Ktistakis Defendants rely on the EBT testimony of Defendant Driver John Ktistakis in which he testifies that the statement within the Police Accident Report is inaccurate, and that he went to the precinct two days after the accident to pick up the report, read it, and asked to have the report changed because it was inaccurate, but the officer told him it was too late since it was already filed. The officer then directed him to file an MV-104, which he did. Defendant Driver John Ktistakis testified that he never told anyone that he put his foot on the accelerator instead of the brake, and that the electronic data recorder could not be read because it was damaged by the accident. The Ktistakis Defendants also attach the MV-104 Report, which states that "MV1 (the Ktistakis Defendants' vehicle) when approximately 40 ft off the intersection accelerated while stepping on the brakes and collided with MV2." While the MV-104 Report is traditionally inadmissible, hearsay evidence can be considered in opposition to summary judgment where it is not the sole basis for the opposition (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]).

To further support Defendant Driver John Ktistakis' EBT account of the accident, the Ktistakis Defendants also include information about the Toyota recall of the make and model of vehicle Defendant Driver John Ktistakis was driving. The Ktistakis Defendants contend that the unintended acceleration is the non-negligent reason for the accident.

Given the inconsistencies between the statements in Defendant Driver John Ktistakis' EBT and the Police Accident Report, there are material questions of fact as to Defendant Driver John Ktistakis' liability. The resolution of conflicting evidence is for the jury to determine in assessing the credibility of the witnesses (*Gartech Elec. Contr. Corp. v Coastal Elec. Constr. Corp.*, 66 AD3d 463 [1st Dept 2009]).

Accordingly, it is

ORDERED that Defendants CRE Expert Cleaning Inc and John Zalewski's motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Defendants John Ktistakis and Kathleen Ktistakis shall serve a copy of this Decision and Order upon all parties with Notice of Entry.

This constitutes the Decision and Order of the Court.

1/3/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

☒
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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

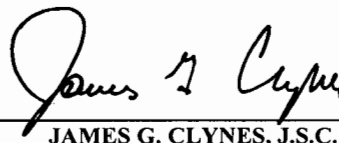
FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE


JAMES G. CLYNES, J.S.C.