

**Xique v Fisco**

2023 NY Slip Op 31823(U)

May 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 519690/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
YORMAN XIQUE

Plaintiff,

**DECISION & ORDER**

-against-

Index No.: 519690/2021

GREGORY J. FISCO.

Defendant.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by defendant Gregory J. Fisco (hereinafter defendant) on September 22, 2022, under motion sequence number one for an order pursuant to CPLR 3212 granting summary judgment in the defendant's favor and dismissing the complaint of the plaintiff Yorman Xique (hereinafter the plaintiff). This motion is opposed by the plaintiff.

- Notice of Motion
- Petition
- Affirmation in Support
- Statement of Material Facts
- Affidavit in Support
- Exhibits C-E
- Central Compliance Order
- Defendant's Response to Discovery Demands
- Affidavit in Opposition
- Affirmation in Opposition
- Response to Statement of Material Facts
- Exhibit A (Affidavit of Plaintiff)
- Affirmation in Reply

## BACKGROUND

On August 5, 2021, the plaintiff commenced the instant action for damages for personal injury by filing a summons and complaint with the Kings County Clerk's office. The complaint alleges the following salient facts. On June 25, 2021, the plaintiff was lawfully riding a bicycle at or about or adjacent to Maurice Avenue and 55 Drive, in the County of Queens, State of New York. On the same date, time and place, the defendant was operating his motor vehicle, a 2016 Hyundai motor vehicle bearing New York license plate. On the same date and place, the defendant's motor vehicle contacted the plaintiff's bicycle causing the plaintiff to sustain serious physical injury (hereinafter the subject accident). The subject accident was caused by the defendant's negligent operation of his motor vehicle.

## LAW AND APPLICATION

Defendants moving for summary judgment in a personal injury action must demonstrate, prima facie, that they did not proximately cause the plaintiff's injuries (*Valdez v MTA Bus Co.*, 210 AD3d 821, 821 [2d Dept 2022], citing *Fargione v Chance*, 154 AD3d 713, 714 [2d Dept 2017]). Since there can be more than one proximate cause of an accident, a defendant seeking summary judgment must establish freedom from comparative fault as a matter of law (*Valdez v MTA Bus Co.*, 210 AD3d 821, 821 [2d Dept 2022], citing *Wilson v Mazewski*, 175 AD3d 1352, 1353 [2d Dept 2019]).

An accident can have more than one proximate cause, and although it is generally for the trier of fact to determine the issue of proximate cause, it may be decided as a

matter of law where only one conclusion may be drawn from the established facts (*Elusma v Jackson*, 186 AD3d 1326, 1328 [2d Dept 2020]). The defendant failed to make a prima facie showing of entitlement to judgment as a matter of law. In support of the motion, the defendant submitted, among other things, his own affidavit, the affidavit of an eyewitness and a police report. The police report was not certified or authenticated and is therefore inadmissible and disregarded (*Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]). The affidavit of the defendant and of his eyewitness were inconsistent in the description of how the subject accident occurred. The plaintiff submitted an affidavit in opposition which directly conflicted with the affidavits submitted by the defendant as to how the subject accident occurred.

Given the conflicting versions of how the subject accident occurred, it is for the trier of fact to evaluate the credibility of the witnesses and determine what happened (*see Gray v Air Excel Serv. Corp.*, 171 AD3d 1026, 1028 [2d Dept 2019]). Since there are material issues of fact regarding how the subject accident occurred, it cannot be determined as a matter of law whether the defendant driver was not at fault for the accident (*see Nesbitt v Gallant*, 149 AD3d 763 [2d Dept 2017]).

Thus, the defendant has failed to meet the initial burden of demonstrating the absence of material issues of fact regarding the cause of the accident, and the motion is denied, regardless of the sufficiency of the plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

**CONCLUSION**

The notice of motion filed by defendant Gregory J. Fisco for an order pursuant to CPLR 3212 granting summary judgment in the defendant's favor and dismissing the complaint of the plaintiff Yorman Xique is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francois A. Rivera*

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J.S.C.

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**