

Essmidi v Sherburne

2023 NY Slip Op 32600(U)

June 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 527383/2022

Judge: Francois A. Rivera

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STATE OF NEW YORK
COUNTY OF KINGS

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 June 2023

HONORABLE FRANCOIS A. RIVERA

MEHDI ESSMIDI, NADA ESSMIDI,
and MIRYAM SALEH

Plaintiff,

DECISION & ORDER

Index No. 527383/2022

- against -

BRODIE W. SHERBURNE,

Defendants.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 21, 2023 under motion sequence number one, by Mehdi Essmidi (hereinafter the injured drive), Nada Essmidi and Miryam Saleh (hereinafter collectively the plaintiffs) for an order pursuant to CPLR 3212: (1) granting summary judgment in the plaintiffs' favor on the issue of liability; (2) striking the first and second affirmative defenses alleging culpable conduct and failure to use a seat belt; and (3) dismissing the counterclaim of defendant Brodie W. Sherburne (hereinafter the defendant) alleging that the injured driver was in whole or part responsible for causing the subject accident. This motion is opposed.

- Notice of Motion
- Affirmation in Support
 - Exhibits 1-8
- Statement of Material Facts
- Memorandum of Law in Support
- Affirmation in Opposition
- Affirmation in Reply

BACKGROUND

On September 20, 2022, the plaintiffs Mehdi Essmidi (hereinafter Mehdi E.), Nada Essmidi (hereinafter Nada E.) and Miryam Saleh (hereinafter Saleh) commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's Office (KCCO). On October 7, 2022, the defendant interposed and filed an answer with the KCCO asserting a single counterclaim. On October 26, 2022, the plaintiffs filed a reply to the counterclaim with the KCCO.

The verified complaint alleges the following salient facts. On March 7, 2021, Mehdi E, the injured driver, was driving a 2015 Toyota on Route 6, approximately 50 feet East of Long Mountain Circle in Orange County, New York with Nada E. and Saleh as passengers. On that date, time and places, Mehdi E. was struck by a motor vehicle owned and operated by the defendant (hereinafter the subject accident). The force of the collision caused each one of the plaintiffs to sustain serious physical injuries.

The subject accident was caused by the defendant's negligent ownership, operation, and control of the defendant's vehicle. At that time, the defendant was driving while impaired by drugs or alcohol in violating Vehicle and Traffic Law § 1192 (2).

LAW AND APPLICATION

The plaintiffs seek an order granting summary judgment in their favor on the issue liability, striking of the affirmative defense of culpable conduct and failure to use a seat belt, and dismissing the defendant's counterclaim.

A plaintiff moving for summary judgment on the issue of liability in a negligence action must establish, a prima facie showing that the defendant breached a duty owed to the plaintiff and the defendant's negligent actions were a proximate cause of the alleged

injuries (*Hall v Powell*, 183 AD3d 576 [2d Dept 2020]). A rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Witonsky v New York City Transit Authority*, 145 AD3d 938 [2d Dept 2016]; *Hall*, 183 AD3d at 576; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033 [2d Dept 2018]).

A motion for summary judgment shall be supported by an affidavit, by a copy of the pleadings and by other available proof, such as, depositions and written admissions (CPLR 3212 (b); *Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Marriot v Jackson*, 67 Misc 3d 1211 [A] [Sup Ct, Kings County 2020]).

In support of their motion, the plaintiffs submitted, a statement of material facts, the pleadings, an affirmation of their counsel, the affidavit of the injured driver, a certified police report of the subject accident, and a certificate of disposition from the Town of Highland Justice County Justice.

The plaintiffs' statement of material facts has alleged the following facts. At the time of the subject accident, Mehdi E. was driving with Nada E. and Saleh as passengers in Mehdi E.'s vehicle. All three of them were wearing their respective seat belts. During the happening of the subject accident, the defendant was operating a motor vehicle while intoxicated and was arrested at the scene of the accident. On or around August 3, 2021, because of the defendant's involvement in the subject accident, the defendant pled guilty to driving while intoxicated in violation of Vehicle and Traffic Law 1192 (3).

22 NYCRR 202.8-g (e) of the Uniform Civil Rules for the Supreme Court and the County Court provides in pertinent part as follows:

“In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent’s statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate.”

The defendant did not submit a counterstatement of material facts to the plaintiffs’ statement of material facts, and therefore, pursuant to 22 NYCRR 202.8-g (e), each statement made by the plaintiffs in their statement of material facts is deemed admitted.

Regarding the motion by Nada E. and Saleh for summary judgment the following principle applies. The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (*Ochoa v Townsend*, 209 AD3d 867, 83 [2d Dept 2022]).

The affidavit of Mehdi E. has alleged the following facts. On or about March 7, 2021, at approximately 7:18 p.m., Mehdi E. was driving a 2015 Toyota motor vehicle, which, while stopped, was struck in the rear, twice, by a 2016 Jeep motor vehicle being driven by the defendant. During the happening of the subject accident, Mehdi E. was wearing a seatbelt properly, utilizing both the lap belt and shoulder belt. The accident occurred solely due to the defendant’s negligence. The certified police report confirmed the time date and involvement of the two vehicles in the subject accident. The certificate

of disposition from the Town of Highland Justice County Justice certified that the defendant pled guilty to Vehicle and Traffic Law 1192 (3) and was sentenced to a conditional discharge in connection with the subject accident.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision to rebut the inference of negligence (Vehicle and Traffic Law § 1129 [a]; *Jimenez v Ramirez*, 171 AD3d 902 [2d Dept 2019]).

The defendant did not submit an affidavit setting forth a non-negligent explanation for the rear end collision of the plaintiffs' vehicle. Instead, the defendant's counsel argued that the motion was premature. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]). The mere hope or speculation that evidence to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny a motion for summary judgment (*Paul v Village of Quogue*, 178 AD3d 942, 944 [2d Dept 2019]). *Kagan v Ameriprise Financial Services Inc* 191 A.D.3d 654 [2d Dept 2021].

The plaintiffs' evidentiary submissions established entitlement to judgment as a matter of law. The defendant's negligent operation of a motor vehicle was the sole proximate cause of the subject accident. Accordingly, the plaintiffs are entitled to summary judgment on the issue of liability in their favor; a striking of the affirmative

defense of culpable conduct and a seat belt defense; and dismissal of the counterclaim alleging that plaintiff Mehdi E. was responsible for the subject accident.

CONCLUSION

The motion by by Mehdi Essmidi, Nada Essmidi and Miryam Saleh for an order pursuant to CPLR 3212 granting summary judgment in the plaintiffs' favor on the issue of liability is granted.

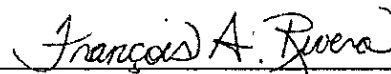
The motion by Mehdi Essmidi, Nada Essmidi and Miryam Saleh for an order pursuant to CPLR 3212 striking the first and second affirmative defenses alleging culpable conduct and failure to use a seat belt is granted.

The motion by Mehdi Essmidi, Nada Essmidi and Miryam Saleh for an order pursuant to CPLR 3212 dismissing the counterclaim of defendant Brodie W. Sherburne alleging that plaintiff Mehdi Essmidi was in whole or part responsible for causing the subject accident is granted.

In accordance with CPLR 3212(c), this matter shall proceed to a trial by jury to determine the amount and extent of the plaintiffs' damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



J.S.C.

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