

**Desir v Seck**

2023 NY Slip Op 33543(U)

October 11, 2023

Supreme Court, New York City

Docket Number: Index No. 160873/2021

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JAMES G. CLYNES PART 22M

*Justice*

-----X	<b>INDEX NO.</b>	<u>160873/2021</u>
NANCY DESIR,	<b>MOTION DATE</b>	<u>09/13/2022</u>
	<b>MOTION SEQ. NO.</b>	<u>002</u>

NANCY DESIR,

Plaintiff,

- v -

SORY SECK, LEENAI GARCIA

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendant Leenai Garcia for summary judgment dismissing the complaint and any and all cross claims against her as she did not breach any duty owed to Plaintiff and therefore is not a proximate cause of the subject accident and Plaintiff's cross-motion for summary judgment against Defendant Sory Seck on the issue of liability and to strike and dismiss Defendant Seck's Second, Fourth, Sixth Affirmative Defenses of culpable conduct, contributory negligence, and assumption of risk are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a February 16, 2020 motor vehicle accident between a vehicle operated by Defendant Garcia and a vehicle operated by Defendant Seck, within which Plaintiff was a passenger.

Defendant Garcia contends that she did not breach any duty owed to Plaintiff and as such is not a proximate cause of the accident. In support of her motion, Defendant Garcia relies on her affidavit, in which she avers that she was stopped at a red light for 10-15 seconds when suddenly and without warning, she felt an impact to the rear of her vehicle by a vehicle bearing New York State License Plate number T636268C, causing her vehicle to hit the car in front of her. It is undisputed that the vehicle bearing New York State License Plate number T636268C was operated by Defendant Seck.

Defendant Garcia also submits an uncertified police report. However, the Court will not consider it, as it constitutes inadmissible hearsay (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]; *Laguerre-Fuentes v Acevedo*, 162 AD3d 613 [1st Dept 2018]).

Through her affidavit, Defendant Garcia establishes a prima facie case of negligence against co-Defendant Seck.

A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the rear-end collision (*Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]; *Beloff v Gerges*, 80 AD3d 460 [1st Dept 2011]). The burden therefore shifts to Defendant Seck to raise a triable issue of fact (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

In opposition to Defendant Garcia's motion, Defendant Seck relies only on an attorney affirmation. New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion (*see GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]). Without more, such as an affidavit or testimony from a person with first-hand knowledge, Defendant Seck's opposition fails to raise an issue of fact sufficient to preclude a determination of summary judgment on liability in favor of Defendant Garcia and against Defendant Seck. Defendant Seck contends that the motion is premature because his deposition has not yet taken place. However, deposition testimony is not the only way to raise an issue of fact. Defendant Seck also fails to specify what discovery, if any, would provide a non-negligent explanation for Defendant Seck failing to see Defendant Garcia and thereafter striking her vehicle in the rear (*Rosario v Vasquez*, 93 AD3d 509 [1st Dept 2012]). The Court finds this contention unavailing. Defendant Garcia's motion is granted.

In support of her cross-motion for partial summary judgment against Defendant Seck on the issue of liability and dismissing his Second, Fourth, and Sixth Affirmative Defenses of culpable conduct, contributory negligence, and assumption of the risk, Plaintiff relies on Defendant Garcia's affidavit and the uncertified police report. Plaintiff contends that summary judgment against Defendant Seck was previously granted in the related matter *Garcia v. Seck*, New York County Index Number 1577/2020. Plaintiff further contends that Defendant Garcia's affidavit and the uncertified police report conclusively demonstrate that Defendant Seck failed to maintain a safe

distance between his vehicle and that of Defendant Garcia and rear-ended Defendant Garcia's legally stopped and stationary vehicle.

In support of Plaintiff's cross-motion for summary judgment on the issue of liability against Defendant Seck, Defendant Garcia contends that Plaintiff places no liability on Defendant Garcia, and as such there is no liability attributable to Defendant Garcia.

In opposition to Plaintiff's cross-motion, Defendant Seck submits only an attorney affirmation. As stated above, New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion (*see GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]). Defendant Seck's opposition fails to raise an issue of fact sufficient to preclude a determination of summary judgment on the issue of liability in favor of Plaintiff and against Defendant Seck.

That branch of Plaintiff's cross-motion to strike Defendant Seck's Second, Fourth, and Sixth Affirmative Defenses of culpable conduct, contributory negligence, and assumption of the risk is denied. Plaintiff has failed to submit any evidence to show that she was free of comparative negligence. A plaintiff may be entitled to partial summary judgment as to a defendant's liability even where a defendant raises a question of fact regarding a plaintiff's negligence (*Carlos Rodriguez, Appellant, v City of NY, Respondent.*, 31 NY3d 312 [2018]). Thus, Plaintiff's cross-motion is granted as to liability only. Accordingly, it is hereby

**ORDERED** that the motion of Defendant Garcia for summary judgment and to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said Defendant, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

**ORDERED** that the action is severed and continued against the remaining Defendant; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for Defendant Garcia shall serve a copy of this order with Notice of Entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

**ORDERED** that Plaintiff's cross-motion for summary judgment on the issue of liability in favor of Plaintiff and against Defendant Seck is granted; and it is further

**ORDERED** that the branch of Plaintiff's cross-motion to strike Defendant Seck's Third Affirmative Defense alleging Plaintiff's culpable conduct, including contributory negligence and assumption of the risk is denied; and it is further

**ORDERED** that Defendant Seck is entitled to a full trial on the issue of damages, and has the right to cross-examine Plaintiff's medical experts, proffer the testimony of his own medical experts, and proffer testimony and offer proof in mitigation of damages; and it is further

**ORDERED** that all other requests for relief not specifically addressed herein are denied; and it is further

**ORDERED** that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

*James G. Clynes*

JAMES G. CLYNES, J.S.C.

10/11/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE