

Hoang Gia Bang v Khan

2023 NY Slip Op 34947(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 509224/2020

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2023.

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PRESENT: HON. CARL J. LANDICINO, JSC

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HOANG GIA BANG,

Index No.: 509224/2020

Plaintiff,

-against-

DECISION AND ORDER

MIRAJ M. KHAN, GIANT CONSTRUCTION CORPORATION and WHOLESALE BUILDING SUPPLY CORPORATION,

Motions Sequence #4

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	71-77, 79,
Opposing Affidavits (Affirmations).....	98, 99,
Reply Affidavits (Affirmations)	100.

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Hoang Gia Bang (the "Plaintiff"), moves (motion sequence #4) for summary judgment on the issue of liability and dismissal of the defendants' affirmative defense(s) of comparative negligence. Plaintiff alleges that while stopped facing a red traffic light, the vehicle purportedly owned by defendants Giant Construction Corporation and Wholesale Building Supply Corporation and driven by defendant Miraj M. Khan collided with the rear of Plaintiff's vehicle. The collision allegedly occurred on November 13, 2018 at West Street near its intersection with Morton Street in New York County. By Order of the Honorable Lawrence Knipel, J.S.C., dated

August 17, 2022, the Defendants were precluded “from testifying at trial or submitting an affidavit in support or opposition to a dispositive motion” on the issue of liability.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from

comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

"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..." *Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. Also, "[w]hen 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." *Gaeta v. Carter*, 6 AD3d 576, 576, 775 N.Y.S.2d 86 [2d Dept. 2004]; see Vehicle and Traffic Law § 1129 [a]; *Fergile v. Payne*, 202 AD3d 928, 929, 163 N.Y.S.3d 216, 218 [2d Dept 2022]; *Williams v. Spencer-Hall*, 113 AD3d 759, 759-760, 979 N.Y.S.2d 157 [2d Dept 2014]; *Taing v. Drewery*, 100 AD3d 740, 741, 954 N.Y.S.2d 175 [2d Dept 2012].

Plaintiff has made a *prima facie* showing of negligence on the part of the Defendant driver, Khan, and Plaintiff's freedom from comparative negligence. In opposition, the Defendants have failed to raise a material issue of fact. Defendants provide an attorney affirmation and an uncertified police report. Even assuming that the report was certified and admissible for purposes of evidence that is an exception of the hearsay rule, the purported statement by Defendant Khan is not an admission, it is an exculpatory statement. Moreover, although Justice Knipel permitted Defendants to move, upon good cause shown, to seek to vacate the preclusion order, there is no indication that any such application has been made or is pending.

Accordingly, the motion is granted.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion for summary judgment on the issue of liability (motion sequence #4) is granted and Defendants' third affirmative defense relating to Plaintiff's culpable conduct is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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