

**Toledo v Pascal**

2023 NY Slip Op 34995(U)

February 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 518572/2021

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 518572/2021  
Motion Date: 1-23-23  
Mot. Seq. No.: 1, 2

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JORGE TOLEDO,

Plaintiff,

-against-

**DECISION/ORDER**

RAUL PASCAL and ALMEIDA CONCRETE  
PUMPING AND EQUIPMENT INC.,

Defendants.

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Upon the following papers, listed on NYSCEF as document numbers 12-23, 55-59 were read on these motions:

In this action to recover damages for personal injuries, the plaintiff, JORGE TOLEDO, moves for Order (i) granting him summary judgment against the defendants, RAUL PASCAL and ALMEIDA CONCRETE PUMPING AND EQUIPMENT INC., on the issue of liability pursuant to CPLR § 3212; and (ii) striking Defendants’ second, fourth, sixth, seventh, eighth, tenth and fifteenth affirmative defenses and (iii) for such other and further relief as this Court deems just and proper (Motion Seq. # 1). By notice of cross- motion, defendants move for an order granting them summary judgment (Motion Seq. # 2). The two motions are consolidated for disposition<sup>1</sup>.

The plaintiff commenced this action alleging that he suffered personal injuries on May 13, 2021, when a motor vehicle operated by defendant, RAUL PASCAL, and owned by defendant, ALMEIDA CONCRETE PUMPING AND EQUIPMENT INC., struck the vehicle he was operating in the rear. In support of the motion, the plaintiff submitted his own affidavit in which he averred that on the day of the accident, he was the driver of a truck bearing New York license plate number, 81589NA and was traveling on Astoria Boulevard near its intersection with 94<sup>th</sup> Street in Queens, New York. He described Astoria Boulevard as a two-way road with traffic

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<sup>1</sup> When this matter initially appeared for oral argument, the court issued a short form order granting defendants’ motion for an order dismissing plaintiff’s claims of negligent hiring and negligent supervision.

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going west and east, with three lanes for traffic and a left turning lane in the direction he was travelling.

He stated that at the time of the accident, he was travelling in the middle lane, in the westbound direction, and that the weather was clear and the roads were dry. While travelling in the middle lane for approximately four to five minutes he came to a stop at a red light located on Astoria Boulevard, at its intersection with 94<sup>th</sup>. He maintains that he remained stopped for at least three (3) to five (5) seconds when a Mack truck, bearing a New York State license plate number 11032SM, struck his vehicle in the rear.

Plaintiff also submitted a copy of the police accident report which indicates that defendant, RAUL PASCAL, was operating the Mack truck and that the Mack truck was owned by defendant, ALMEIDA CONCRETE PUMPING AND EQUIPMENT INC.

In opposition to the motion, defendants' submitted the affidavit of Mr. Pascal, who admitted that he was operating the Mack truck at the time of the accident. He stated that shortly before the accident, he was traveling behind the plaintiff's vehicle in the middle lane and that there was a Metropolitan Transit Authority bus traveling in the right lane alongside plaintiff's truck. He observed plaintiff arguing with the bus driver who was leaning out of his open window, shouting at plaintiff. He heard voices of both drivers yelling at one-another and although he could not make out what was being said, it appeared to him that the bus driver was attempting to move from the right lane into the middle lane and plaintiff was not allowing him to do so.

Mr. Pascal maintained that the bus driver pulled ahead of plaintiff and proceed into the intersection after the traffic light turned from green to yellow. The front of plaintiff's truck then entered the intersection, and according to Mr. Pascal, plaintiff did not slow down. It appeared to Mr. Pascal that the plaintiff intended to follow the bus through the intersection before the light changed to red. Mr. Pascal maintained that the front of plaintiff's truck was in the intersection when the light changed from yellow to red, at which point plaintiff slammed on his brakes and abruptly stopped short. Mr. Pascal claimed that he was maintaining a safe distance behind plaintiff's vehicle but was unable to bring his truck to a stop in time to avoid making impact with the rear of plaintiff's truck.

While at the scene of the accident, Mr. Pascal was approached by a police officer who asked him for his license, registration and insurance identification card, which he gave to them. Immediately thereafter, the police officer walked away. Mr. Pascal maintained that police officer did not ask him any questions and that he offered no information concerning the circumstances of the accident. Incidentally, Mr. Pascal stated that Spanish is his native language and that he is not fluent in English.

“A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle” (*Scheker v. Brown*, 85 A.D.3d 1007, 1007, 925 N.Y.S.2d 528 [internal quotation marks omitted]). “As a general rule, ‘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 nonnegligent explanation for the collision’ ” (*Kastritsios v. Marcello*, 84 A.D.3d 1174, 1174–1175, 923 N.Y.S.2d 863, quoting *Plummer v. Nourddine*, 82 A.D.3d 1069, 1069–1070, 919 N.Y.S.2d 187). This is true whether the lead vehicle is stopped or stopping (*see Xian Hong Pan v. Buglione*, 101 A.D.3d 706, 707, 955 N.Y.S.2d 375).

Where the movant has established his or her entitlement to judgment as a matter of law, the burden shifts to the opposing party to provide sufficient evidence to raise a triable issue of fact as to the moving party's comparative fault (*see Lu Yuan Yang v. Howsal Cab Corp.*, 106 A.D.3d 1055, 966 N.Y.S.2d 167; *Sirot v. Troiano*, 66 A.D.3d 763, 764, 886 N.Y.S.2d 504). A bare allegation that the lead vehicle stopped short is insufficient to rebut the inference of negligence on the part of the driver of the following vehicle (*see Xian Hong Pan v. Buglione*, 101 A.D.3d at 707, 955 N.Y.S.2d 375; *Staton v. Ilic*, 69 A.D.3d 606, 606, 892 N.Y.S.2d 486).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting admissible proof that he was stopped for between three (3) to five (5) seconds before his vehicle was struck in the rear by defendants' vehicle (*see Moore v. Singh*, 108 A.D.3d 602, 603, 969 N.Y.S.2d 146; *Xian Hong Pan v. Buglione*, 101 A.D.3d at 707, 955 N.Y.S.2d

375; *Nozine v. Anurag*, 38 A.D.3d 631, 632, 831 N.Y.S.2d 511). In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff contributed to the happening of the accident (see *Williamson v. Coleman*, 114 A.D.3d 768, 768, 979 N.Y.S.2d 849; *Moore v. Singh*, 108 A.D.3d at 603, 969 N.Y.S.2d 146; *Nozine v. Anurag*, 38 A.D.3d at 632, 831 N.Y.S.2d 511).

Defendants' assertion that plaintiff's vehicle stopped short at a yellow light after he entered the intersection was insufficient to defeat plaintiff's summary judgment motion (see *Nikolic v. City-Wide Sewer & Drain Serv. Corp.*, 150 A.D.3d 754, 755, 53 N.Y.S.3d 684, 685). In *Nikolic v. City-Wide Sewer & Drain Service Corp.*, No. 7026842015, 2016 WL 9227939, also a rear-end collision case, the defendant driver submitted a similar affidavit in opposition to plaintiff's motion for summary judgment on the issue of liability stating that plaintiff's vehicle stopped short halfway into the intersection with a yellow. While the IAS Court held that the affidavit was sufficient to create a triable issue of fact as to whether there was a nonnegligent explanation for the accident, the Appellate Division reversed finding that defendants' submissions did not create a triable issue of fact (see also *Cheow v. Cheng Lin Jin*, 121 A.D.3d 1058, 1059, 995 N.Y.S.2d 186, 188 [defendant's explanation for striking the plaintiffs' vehicle in the rear, that the plaintiff stopped her vehicle suddenly at the yellow light at the crosswalk, was insufficient to raise a triable issue of fact as to whether plaintiff was negligent] ).

Plaintiff also demonstrated as a matter of law that defendants' second, fourth, sixth, eighth, tenth and fifteenth affirmative defenses are without merit, Defendants failed to raise a triable issue of fact.

Accordingly, it is hereby

**ORDERED** that the plaintiff is awarded partial summary judgment against the defendants on the issue of liability; it is further

**ORDERED** that defendants' second, fourth, sixth, eighth, tenth and fifteenth affirmative defenses are stricken; and it is further

**ORDERED** that defendants' cross-motion is denied.

This constitutes the decision and order of the Court.

Dated: February 23, 2023

**PPS**

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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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