

**Zargari v Kerrigan**

2023 NY Slip Op 35057(U)

June 9, 2023

Supreme Court, Queens County

Docket Number: Index No. 713293/2022

Judge: Mojgan C. Lancman

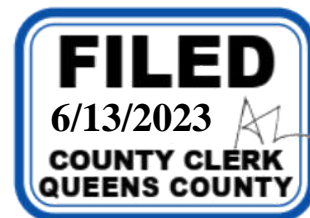
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20



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YARMAYA ZARGARI,

Index No.: 713293/2022

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 3.29.2023

JAMES KERRIGAN and VERIZON SERVICES CORP.,

Motion Cal. No.: 41

Defendants.  
-----X

The e-filed papers bearing NYSCEF Doc. Nos. 12-29 were read on the motion made by the plaintiff, Yarmaya Zargari (the "Plaintiff"), for an Order, *inter alia*, granting summary judgment "for the relief demanded in the complaint."

The Plaintiff commenced this cause seeking to recover damages for bodily injuries allegedly sustained in a motor vehicle accident that occurred on May 19, 2022 (the "Accident"). Presently before the Court is the Plaintiff's motion for: (1) "summary judgment in favor of the plaintiffs [sic] and dismissing all affirmative defenses asserted by the defendants ..."; and (2) an award of "costs, disbursements and reasonable attorney's [sic] to abide this motion." For the following reasons, the motion is granted in part and denied in part.

**I. Factual Background and Procedural History**

The Accident occurred at the intersection of South Middle Neck Road and Great Neck Road in Great Neck, New York. The Accident involved the Plaintiff, a pedestrian, and a motor vehicle, which was operated by James Kerrigan ("Kerrigan"), and owned by Verizon Services Corp. ("Verizon") (collectively, the "Defendants").

**A. The Plaintiff's Affidavit in Support**

In an affidavit in support, the Plaintiff avers: (1) that upon arriving at the corner of Great Neck Road and South Middle Neck Road, he waited until he had the right-of-way to begin crossing; (2) that when the pedestrian signal for those crossing over South Middle Neck Road displayed the walk signal, he checked left and right for moving traffic and did not see anything; (3) that he then began to cross Middle Neck Road within the crosswalk at a "regular, walking pace"; (4) that when he was less than halfway through the crosswalk, he was struck by the Defendants' vehicle; (5) that he saw said vehicle less than a second before impact; and (6) that he was unable to avoid being struck.

## B. The Kerrigan Affidavit in Opposition

In opposition, Kerrigan, an employee of Verizon, submits an affidavit. He avers, in relevant part, as follows: (1) that when he arrived at the intersection at issue, he waited for the light to turn green before initiating a left-hand turn onto South Middle Neck Road; (2) that he observed pedestrians in the crosswalk and waited for them to “completely cross” before completing his turn; (3) that after the “pedestrians had cleared the crosswalk, he made a left-hand turn onto South Middle Neck Road”; (4) that as he was “in mid-turn, a man [the Plaintiff] walked in front of my right front bumper at the last second and I slammed on my brakes to avoid a collision”; and (5) that he “was not asked to give any formal statement as a result of the alleged accident.”

## C. The Certified Police Accident Report

The certified police accident report states, *inter alia*, the following:

mv 1 [the Defendants’ vehicle] was involved in a collision with unit 2, a pedestrian [the Plaintiff]. operator of mv 1 [Kerrigan] stated he was making a left turn onto southbound s middle neck rd and did not see unit 2 [the Plaintiff]. witness 1 stated that unit 2 [the Plaintiff] was in the crosswalk crossing s middle neck rd with a green light at the time of the accident.

## II. Discussion

The familiar principles applicable to summary judgment motions are set forth below.

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden then shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49

NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

Vehicle and Traffic Law § 1111 (a) (1) states that:

Green indications:

Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.

Vehicle and Traffic Law § 1146 (a) provides as follows:

Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary. For the purposes of this section, the term “domestic animal” shall mean domesticated sheep, cattle, and goats which are under the supervision and control of a pedestrian.

The Plaintiff establishes *prima facie* entitlement to summary disposition on the issue of liability through his affidavit, which demonstrates that he was walking within a crosswalk with a pedestrian signal in his favor when the Defendants’ vehicle failed to yield the right of way and struck him (*Festagallo v Mandelbaum*, 213 AD3d 741 [2d Dept 2023]; *Gooden v EAN Holdings, LLC*, 189 AD3d 1552 [2d Dept 2020]; *Maliakel v Morio*, 185 AD3d 1018 [2d Dept 2020]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Gaston v Vertsberger*, 176 AD3d 919 [2d Dept 2019]).

As explained below, the Defendants’ opposition is without merit.

The first opposition argument is that this motion is premature because of outstanding discovery. In *Quintanilla v Mark*, 210 AD3d 713, 714-715 [2d Dept 2022], the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant ... to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant

denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion [internal quotation marks, brackets and citations omitted].

Here, the Defendants are aware of the relevant facts because Kerrigan was operating the vehicle involved in the Accident while in the course of his employment with Verizon (*see id.*)

Second, and in any event, “[t]o defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (*Rodriguez v Gutierrez*, 138 AD3d 964, 968 [2d Dept 2016] [citations omitted]). The Defendants make no such evidentiary showing.

Third, “[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiff’s motion” (*Festagallo v Mandelbaum*, 213 AD3d 741, 742) [internal quotation marks and citations omitted].

The Defendants’ second opposition argument is that the Plaintiff fails to establish *prima facie* entitlement to summary disposition. This argument is baseless because, as explained above, the Plaintiff’s affidavit establishes that he was walking within a crosswalk with a pedestrian signal in his favor when the Defendants’ vehicle failed to yield the right of way and struck him (*see Festagallo v Mandelbaum*, 213 AD3d 741; *Gooden v EAN Holdings, LLC*, 189 AD3d 1552; *Maliakel v Morio*, 185 AD3d 1018; *Hai Ying Xiao v Martinez*, 185 AD3d 1014; *Gaston v Vertsberger*, 176 AD3d 919).

The Defendants fail to raise any triable issues of fact in opposition. The certified police accident report reveals that Kerrigan stated that he did not see the Plaintiff before the Accident. This statement is an admission (*see Liu v Lowe*, 173 AD3d 946 [2d Dept 2019]). In light of Kerrigan’s admission that he did not see the Plaintiff before the Accident, the Plaintiff’s case is buttressed and there is no triable issue of fact as to the Plaintiff’s comparative negligence (*E.B. v Gonzalez*, 208 AD3d 618 [2d Dept 2022]; *Huang v Franco*, 149 AD3d 703 [2d Dept 2017]).

Kerrigan’s affidavit, which indicates that the Plaintiff “walked in front of my right front bumper at the last second and I slammed on my brakes to avoid a collision” contradicts his admission contained in the police accident report that he did not see the Plaintiff before the Accident and is “thus insufficient to raise a triable issue of fact” (*Kraynova v Lowy*, 166 AD3d 600, 602 [2d Dept 2018] [citations omitted]).

The next issue is whether the Plaintiff should be granted summary judgment dismissing the Defendants’ affirmative defense of culpable conduct. This issue is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion

where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (see *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; see also *Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted]).

The Plaintiff bears the burden of establishing *prima facie* that he is free from culpable conduct or comparative fault (see *Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788 [2d Dept 2019]); *Wray v Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *Paget v PCVST-DIL, LLC*, 186 AD3d 1162 [1st Dept 2020]). As explained, the Plaintiff establishes that he bears no legal responsibility for the Accident. A triable issue of fact is not raised in opposition. The affirmative defense of culpable conduct is therefore dismissed.

Although the notice of motion indicates that dismissal of all affirmative defenses is sought, the affirmation in support only addresses the affirmative defense of culpable conduct. The branch of the motion to dismiss all other affirmative defenses is therefore denied without prejudice.

Lastly, there is no valid factual or legal basis for the imposition of costs, disbursements and attorneys' fees on this motion. This branch of the motion is thus denied.

### III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted partial summary judgment against the Defendants on the issue of liability; and it is further,

ORDERED, that the Defendants' affirmative defense of culpable conduct is dismissed; and it is further,

ORDERED, that the Plaintiff's motion is otherwise denied; and it is further,

ORDERED, that the trial in this cause shall be held on the issue of damages only; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendants by July 31, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York  
June 9, 2023

  
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MOJGAN C. LANCMAN, J.S.C.

