

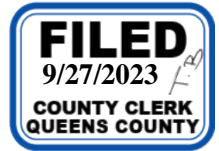
<b>Shu Xian Zhou v Marrasquin</b>
2023 NY Slip Op 35088(U)
September 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 702810/23
Judge: Timothy J. Dufficy
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**



-----X  
**SHU XIAN ZHOU,**

**Plaintiff,**

**-against-**

**JESSICA MARRASQUIN,**

**Defendant.**

**Index No. 702810/23**

**Mot. Date: 9/5/23**

**Mot. Seq. 1**

-----X  
The following papers were read on this motion by plaintiff for an order granting summary judgment on the issue of liability in his favor, pursuant to CPLR 3212; and, dismissing the affirmative defenses of comparative negligence and culpable conduct, pursuant to CPLR 3211.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	EF 5-11
Answering Affidavit.....	EF 15-17
Replying Affidavit.....	EF 22

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted.

This is an action for personal injuries arising out of a two-car motor vehicle, that occurred on November 9, 2022, on Melbourne Avenue, in Queens, New York, at approximately 8:13 a.m.

Plaintiff moves for an order granting summary judgment in his favor, pursuant to CPLR 3212; and striking the defendant’s affirmative defenses of comparative negligence and culpable conduct, pursuant to CPLR 3211(b).

In support of his motion, the plaintiff submits, *inter alia*, his affidavit and pleadings. Plaintiff states that he was driving on Melbourne Avenue towards the intersection of Melbourne Avenue and 149th Street, at a speed of “approximately 15 to 20 mile[s] per hour,” when the vehicle owned and operated by the defendant “abruptly”

attempted to merge into traffic from a curbside parking spot and struck plaintiff's vehicle on the passenger-side of his vehicle, in violation of VTL 1162 (*see Zhou Aff.*, ¶¶ 10,7).

In opposition, the defendant alleges that she activated her left-turn indicator, checked for oncoming traffic, and slowly exited the parking spot when plaintiff's vehicle, "at a high rate of speed," "made contact with the driver's side front corner" of defendant's vehicle (*see Marrasquin Aff.*, ¶4). Defendant further alleges that the plaintiff was unable to communicate with her, and she needed the assistance of an interpreter, while calling the police, who ultimately decided not to send police officers to the scene of the accident due to lack of any injuries (*see Marrasquin Aff.*, ¶5). Defendant argues, *inter alia*, that: the plaintiff's affidavit is inadmissible, as it is not supported with an Affidavit of Translation, pursuant to CPLR 2101(b); plaintiff's "unreasonable speed," and failure to "see what was there to be seen or take appropriate measures to avoid the accident" precludes them from being entitled to summary judgment (*see Moreira Affr.*, ¶15); and, plaintiff's motion is premature as EBT's and meaningful discovery have yet to be conducted.

In reply, plaintiff's counsel submits sworn affidavits of the plaintiff and counsel's legal assistant, stating that translation services were not needed for the plaintiff.

A plaintiff moving for summary judgment in a negligence action on the issue of the defendant's liability must establish that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the plaintiff's alleged injuries (*see Detoma v Dobson*, 214 AD3d 948, 949 [2d Dept. 2023]). "A plaintiff's comparative fault, or lack thereof, is not a consideration in determining whether the plaintiff has made a prima facie showing on the issue of the defendant's liability" (*Id.*). However, 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 Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]).

Here, the plaintiff established his *prima facie* entitlement to judgment as a matter of law.

Defendant correctly notes that, pursuant to CPLR 2101(b), an Affidavit of Translation is required where an affidavit is in a foreign language. However, the sworn affidavits submitted in reply indicate that the plaintiff's submissions do not require an Affidavit of Translation. The Court finds that the plaintiff's affidavit is in admissible form and that the supporting affidavits, annexed as part of the plaintiff's reply were in response to allegations raised for the first time in the opposition papers (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 48 [2d Dept 2020]).

Defendant, in her affidavit, admits that she was exiting from the parking spot when her vehicle came into contact with plaintiff's vehicle. Pursuant to VTL 1162, "[n]o person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety." "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Sanchez v Ageless Chimney, Inc.*, 2023 NY Slip Op 04329 [2d Dept 2023]).

Here, the defendant fails to raise a triable issue of fact. "The driver with the right of way is entitled to anticipate that the other motorist will obey traffic laws which require him or her to yield" (*Williams v Hayes*, 103 AD3d 713, 714 [2d Dept 2013]). "Although a driver with a right of way also has a duty to use reasonable care to avoid a collision, ... a driver with the right of way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*see Yelder v Walters*, 64 AD3d 762, 764 [2d Dept 2009]). Defendant's arguments regarding the unreasonable speed of the plaintiff are conclusory and speculative, and as such are insufficient to raise a triable issue of fact (*see Jiang-Hong Chen v Heart Tr., Inc.*, 143 AD3d 945 [2d Dept 2016]). Additionally, since "[t]he driver with the right of way is entitled to anticipate that the other motorist will obey traffic laws which require him or

her to yield” (*Williams v Hayes*, 103 AD3d at 714), the plaintiff was not comparatively negligent.

Further, the defendant’s argument that the plaintiff’s motion should be denied, as premature, is unavailing. Defendant failed to demonstrate that facts essential to oppose the motion may exist but cannot then be stated. “Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion.” (*Plotkin v Franklin*, 179 AD2d 746 [2d Dept 1992]) (internal citations omitted). Thus, the prematurity argument is based on mere speculation (*see Lopez v WS Distrib., Inc.*, 34 AD3d 759 [2d Dept 2006]), which is insufficient to defeat the motion.

Accordingly, based upon the foregoing, it is

**ORDERED** that motion by plaintiff for summary judgment is granted; and it is further

**ORDERED** that defendant’s affirmative defenses comparative negligence and culpable conduct are stricken.

**Dated: September 20, 2023**



A handwritten signature in black ink, appearing to read "Timothy J. Dufficy".

**TIMOTHY J. DUFFICY, J.S.C.**