

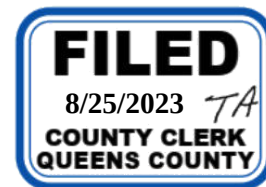
Erhard v Kulasekarar
2023 NY Slip Op 35298(U)
August 24, 2023
Supreme Court, Queens County
Docket Number: Index No. 719362/2022
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

IAS Part 20

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EDWARD J. ERHARD, IV,

Index No.: 719362/2022

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 5.3.2023

PADMESHREE KULASEKARAR and
GOVINDARAJAN LOKAIYAN,

Motion Cal. No.: 8

Defendants.
-----X

The papers bearing NYSCEF Doc. Nos. 8-19 were read on the motion made by the plaintiff, Edward J. Erhard, IV (the “Plaintiff”), for an Order, *inter alia*, granting partial summary judgment on the issue of liability against the defendants, Padmeshree Kulasekarar (“Kulasekarar”) and Govindarajan Lokaiyan (“Lokaiyan”) (collectively, the “Defendants”).

The Plaintiff commenced this cause seeking to recover monetary damages for personal injuries allegedly sustained in a motor vehicle accident (the “Accident”). Presently before the Court is the Plaintiff’s motion for an Order: (1) granting partial summary judgment against the Defendants on the issue of legal liability; (2) striking the Defendants’ affirmative defense of culpable conduct, including comparative negligence and assumption of risk; and (3) setting this cause down for an immediate assessment of damages. For the following reasons, the motion is granted to the extent indicated below.

I. Factual Background

The Plaintiff avers in his affidavit in support as follows: that the Accident occurred on June 2, 2022; that the Accident took place on the Long Island Expressway at or near Francis Lewis Boulevard in Queens, New York; that the vehicle he was operating was stopped at the time of the Accident; that while stopped, his vehicle was rear-ended by the vehicle operated by Lokaiyan and owned by Kulasekarar; and that there was nothing he could do to avoid the Accident.

II. Discussion

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

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

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]). However, 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 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 §1129 [a] states that:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

“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. Thus, 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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Quintanilla v Mark*, 210 AD3d 713-714 [2d Dept 2022] [internal quotation marks, brackets and citations omitted]).

The Plaintiff establishes *prima facie* entitlement to summary disposition because his affidavit demonstrates that the Defendants’ vehicle rear-ended his stopped vehicle (*see id.*, *Modena v M & S Mechanical Services, Inc.*, 181 AD3d 802 [2d Dept 2020]). There are no triable issues of fact because the Defendants take no position with respect to the Plaintiff’s request for summary judgment on the issue of liability.

The next issue is whether the Plaintiff should be granted summary judgment dismissing the Defendants' affirmative defense of culpable conduct, "including contributory negligence or assumption of risk." 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]). The Plaintiff meets this burden by averring that his vehicle was stopped when it was rear-ended by the Defendants' vehicle. The affirmative defense of culpable conduct, comparative negligence and/or assumption of risk is thus without merit and dismissed.

Lastly, the Plaintiff seeks an immediate trial on the issue of damages. This application is opposed by the Defendants. The case of *Barr v Raffe*, 96 AD2d 800, 801 [1st Dept 1983], is instructive and controlling:

The fact that the issue of liability had conclusively been determined adversely to defendant and an immediate trial ordered on the issue of damages, should not and does not deprive him of his right to discovery on that issue. Indeed, this Court has said in a situation where it directed summary judgment in favor of a plaintiff on the issue of liability and directed an immediate trial on the issue of damages, that the immediate trial to which plaintiffs are entitled on the issue of damages should be held in abeyance until defendants have had an opportunity to depose plaintiffs and purchasers on that issue.

To paraphrase the apt observation by the *Court in Blasi v. Checker Fuel Oil Corp.*, a defendant already found liable ... should not be driven blindly into a hearing to assess damages without prior opportunity to prepare for it, otherwise a speedy hearing would amount to punishment of a defendant who may be genuinely unaware of the true nature and extent of plaintiff's damages ... It would thus seem that the immediate hearing mandated by the rule should take place after the plaintiff's damages are made known to the defendant through appropriate discovery, procedurally possible by plaintiff's compliance with the readiness rule [internal quotation marks, brackets, parentheses and citations omitted]).

The Plaintiff is thus granted leave to file a note of issue for the purpose of a damages trial after discovery on the issue of damages, including but not limited to, the Plaintiff's deposition and independent medical examination(s), is concluded (*see id.*)

Lastly, the Plaintiff is not relieved of proving at the damages trial that he suffered a serious injury within the meaning of Insurance Law § 5102 [d] (*see Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]).

IV. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted to the extent indicated below; 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, comparative negligence and/or assumption of risk is dismissed; and it is further,

ORDERED, that the Plaintiff is granted leave to file a note of issue for the purpose of a damages trial after discovery on the issue of damages, including but not limited to, the Plaintiff's deposition and independent medical examination(s) is concluded; and it is further,

ORDERED, that the trial of this cause shall be with respect to damages and whether the Plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 [d]; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendants via NYSCEF by October 6, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
August 24, 2023



MOJGAN C. LANCMAN, J.S.C.

