

**Hossain v Diaz**

2024 NY Slip Op 33250(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 154458/2022

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

INDEX NO. 154458/2022

ANIS HOSSAIN,

Plaintiff,

MOTION DATE 07/28/2024, 08/25/2024

- v -

MOTION SEQ. NO. 003 004

ISMAEL DIAZ, ARUN BALI

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 73, 74

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 78, 79, 80

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendant Ismael Diaz for summary judgment and dismissal of Plaintiff's Complaint and all cross-claims against him (Motion Sequence #3) and the motion by Plaintiff for summary judgment on the issue of liability against Defendant Arun Bali pursuant to VTL 1129 (a) (Motion Sequence #4) are consolidated for decision and are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a May 20, 2021 multi vehicle accident. There is no dispute concerning the identity of the owners and operators of the three vehicles and the order in which they were traveling as set forth in the police report attached to both motions. The first vehicle was operated by Plaintiff, the second vehicle was owned and operated by Defendant Diaz, and the third vehicle was owned and operated by Defendant Bali.

In support of his motion, Defendant Diaz submits, in pertinent part, the examination before trial testimony of Plaintiff, the examination before trial testimony of Defendant Diaz, and September 15, 2023 and February 16, 2023 Court Orders.

Plaintiff testified that he is a taxi cab driver, at the time of the accident he had one rear passenger in his vehicle sitting behind the driver's seat, driving uptown on Park Avenue, there was a traffic light on Park Avenue and East 35<sup>th</sup> Street, it was red, Plaintiff brought his vehicle to a stop for the red light, it was the first vehicle at the light, his vehicle was stopped for about a minute and a half, when his vehicle was struck in the rear, and as a result his vehicle moved straight a few feet. Plaintiff further testified that he was wearing his seatbelt at the time of the accident.

Defendant Diaz testified that he was working as an Uber driver, he had a passenger, he was driving uptown in the left lane on Park Avenue, there was a red light at the intersection of Park Avenue and East 35<sup>th</sup> Street, he brought his vehicle to a stop behind a yellow taxi, when 30 seconds later, his vehicle was struck in the rear propelling his vehicle forward into the yellow taxi in front of it.

Plaintiff does not oppose Defendant Diaz's motion. As indicated in Plaintiff's own motion for summary judgment (Motion Sequence No. 4), Plaintiff is seeking a judicial determination on the issue of liability against Defendant Bali, not Defendant Diaz. In addition, Plaintiff contends that Plaintiff's motion for summary judgment is essentially seeking the same judicial determination that Defendant Diaz seeks, that Defendant Arun Bali was the sole direct and proximate cause of the subject accident and was negligence per se pursuant to VTL 1129 (a).

In support of Plaintiff's motion for summary judgment, Plaintiff relies, in pertinent part, on Plaintiff's examination before trial testimony, on the testimony of Defendant Diaz, a certified police accident report, and Plaintiff's affirmation.

In his affirmation, Plaintiff affirmed that he was travelling in the left lane on Park Avenue, he saw a red light at the intersection of Park Avenue and East 35<sup>th</sup> Street and began to press his brakes as he approached the intersection, and slowly came to a complete stop. He further affirms that he was stopped for approximately one minute and thirty seconds when he felt one heavy impact to the rear of his vehicle.

Both Plaintiff and Defendant Diaz have demonstrated their prima facie entitlement to judgment as a matter of law. A rear-end collision with a stopped vehicle, or a vehicle slowing

down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident (*Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]; *Beloff v Gerges*, 80 AD3d 460 [1st Dept 2011]). The burden therefore shifts to non-movants to raise a triable issue of fact (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

In opposition to both motions, Defendant Bali submits only an attorney affirmation. Pursuant to the February 16, 2024 and September 15, 2023 Court Orders, Defendant Bali is precluded from both submitting their own affidavit in motion practice and from testifying at trial, absent compelling good cause shown. New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion (*see GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]). Without more, Defendant Bali's opposition fails to provide a non-negligent explanation for the rear end collision and therefore fails to raise an issue of fact sufficient to preclude summary judgment on liability. Pursuant to VTL 1129, a driver must maintain a safe distance between his vehicle and the one in front of him. Any rear-end collision establishes a prima facie case of negligence on the part of the rear-ending driver (*De La Cruz v Ock Wee Leong*, 16 AD3d 199 [1st Dept 2005]). The rearmost driver in a chain-reaction collision bears a presumption of responsibility (*Cabrera v Thomas*, 193 AD3d 406, 407 [1st Dept 2021]). It is undisputed that both Plaintiff's and Defendant Diaz's vehicles were stopped prior to the initial collision. Defendant Bali failed to raise a triable issue of fact to defeat their motions (*Mustafaj v Driscoll*, 5 AD3d 138 [1st Dept 2004]). Accordingly, it is

**ORDERED** that the motion by Defendant Ismael Diaz for summary judgment and dismissal of Plaintiff's Complaint and all cross-claims against him (Motion Sequence #3) is GRANTED; and it is further

**ORDERED** that the complaint is dismissed in its entirety as against Defendant Ismael Diaz and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

**ORDERED** that the action is severed and continued against the remaining Defendants; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for Defendant Ismael Diaz shall serve a copy of this order with Notice of Entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); and it is further

**ORDERED** that the motion by Plaintiff for summary judgment on the issue of liability against Defendant Arun Bali (Motion Sequence #4) is GRANTED; and it is further

**ORDERED** that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

9/12/2024  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE