

Mostafa v Beacon Constr. Mgt., LLC

2024 NY Slip Op 33701(U)

October 18, 2024

Supreme Court, New York County

Docket Number: Index No. 159240/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART **22M**

Justice

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INDEX NO. 159240/2020

ADEL MOSTAFA, SALWA ESKANDAR, ANTHONY
PACELLA,

MOTION DATE 12/26/2023

Plaintiff,

MOTION SEQ. NO. 003

- v -

BEACON CONSTRUCTION MANAGEMENT, LLC, OMAR
SANCHEZ-PEREZ,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 96, 97, 98, 99, 100, 101

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and following oral argument, it is ordered that the motion by Plaintiff Anthony Pacella for summary judgment on liability in his favor and against Defendants Beacon Construction Management, Inc. and Omar Sanchez Perez , or, alternatively, for leave to renew the Court’s prior determination on the motion by Plaintiffs Eskander and Mostafa for summary judgment, the Decision and Order dated April 6, 2023 (entered April 12, 2023) on Motion Sequence #1, and, upon renewal, granting summary judgment on liability in favor of Plaintiff Pacella and against Defendants Beacon and Sanchez Perez is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a June 29, 2020 motor vehicle accident between a vehicle operated by Plaintiff Adel Mostafa, within which Plaintiff Salwa Eskandar was a front seat passenger and Plaintiff Anthony Pacella was a rear seat passenger, and a vehicle owned by Defendant Beacon Construction Management Inc. and operated by Defendant Omar Sanchez-Perez.

Plaintiff Pacella contends that the April 6, 2023 Decision and Order determined that Plaintiff Eskandar and Plaintiff Pacella, as innocent passengers, were not comparatively negligent but did not determine the negligence of either or both drivers of the two vehicles. The Order also

did not strike any of the defendants' affirmative defenses, as same was not requested. Plaintiff Pacella further contends that the instant motion is based upon newly acquired evidence that inculcates only Defendant Perez, operator of the rear vehicle.

Plaintiff Pacella further contends that Defendant Driver Perez appeared for a deposition on October 6, 2023 and that Plaintiff Pacella received the executed transcript on November 30, 2023. As Defendant Perez's examination before trial was not held until after the motion was made and decided, the transcript was not available at the time the original motion was made.

Plaintiff Pacella further contends that Plaintiffs and Defendant Perez agreed that the front bumper of Defendants' vehicle struck the rear bumper of the Plaintiffs' vehicle. Plaintiff contends that there are no issues of fact and seeks a determination that Defendant Perez was solely negligent and that his negligence was the sole proximate cause of this accident, as a matter of law; that the three plaintiffs in this matter were not in any way culpable; and, that Defendant Beacon is vicariously liable for the acts of its employee Perez, who was operating Beacon's vehicle with its express permission, as a matter of law.

In opposition, Defendants contend that Plaintiff Pacella has already been granted summary judgment on the issue of liability. Defendants further contend that renewal is not appropriate here since, as noted above, Plaintiff Pacella has already moved for, and been granted, summary judgment on the issue of liability. The addition of Defendant Perez's deposition testimony does not change the facts that are already known to the Court. Defendants contend that if the court were to consider the subject motion, it ought to be denied because there exist triable issues of fact.

In reply, Plaintiff Pacella contends that summary judgment was granted on the previous motion but highlights that it was only to the extent that the innocent passengers, Plaintiffs Pacella and Eskandar were found to be free of any comparative negligence.

In his examination before trial, Defendant Perez testified that on the day of the accident, he was employed by Beacon Construction, he was driving a van owned by them with the name of the company along the side, another worker was in the passenger seat, they were both wearing their seat belts, Defendant Perez had permission to use the vehicle at the time of the accident, they were stopped at a light, when the light changed, he began to move, but the vehicle in front of his

moved slowly and the front part of his van hit the rear bumper of the vehicle in front of his. Defendant Perez further testified that he was not on his cell phone at the time of the accident. The proponent of a summary judgment motion 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

Summary judgment must be denied if this burden is not met, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The burden of proof shifts to the opposing party once the proponent has made its prima facie showing (*Zuckerman v New York*, 49 NY2d 557 [1980]). The opposing party must show facts sufficient to require a trial of any issue of fact (*id.* at 562).

Successive motions for summary judgment are generally disfavored. They are not prohibited, however, when new evidence is produced that was not available at the time of the prior motion (*Sansol Indus. v 345 E. 56th St. Owners, Inc.*, 276 AD2d 370, 371 [1st Dept 2000]). While deposition testimony that was not elicited until after the original summary judgment motion was decided may constitute new evidence, it is not newly discovered simply because it was not submitted on the prior motion but instead must be used to establish facts that were not available to the movant earlier and which could not have been established through alternative evidentiary means (*Vinar v Litman*, 110 AD3d 867 [2d Dept 2013]).

Here, Plaintiff Pacella's second summary judgment motion is based upon deposition testimony obtained after the first motion was filed. While it is true that the person deposed, Defendant Driver, was known to Plaintiff, the Court accepts that Plaintiff Pacella attempted to depose Defendant Driver earlier but was unable to do so and in opposition to Plaintiffs' first motion for summary judgment, Defendants did not submit an affidavit of Defendant Driver.

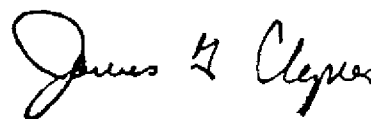
The Court finds that Plaintiff Pacella has met his prima facie burden of establishing entitlement to summary judgment on the issue of liability against Defendants. It is well established that a rear-end collision with a slowing or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle (*see e.g. Kalair v Fajerman*, 202 AD3d 625 [1st Dept 2022]). In opposition, Defendants fail to provide a non-negligent explanation for

the accident (*Ahmad v Behal*, 221 AD3d 558 [1st Dept 2023]). Defendant Driver failed to establish that he maintained a safe following distance (*see* VTL 1129; *Chame v Kronen*, 150 AD3d 622 [1st Dept 2017]). Accordingly, it is

ORDERED that the motion by Plaintiff Anthony Pacella for summary judgment on liability in his favor and against Defendants Beacon Construction Management, Inc. and Omar Sanchez Perez is granted; and it is further

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

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

10/18/2024

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE