

Elnagdy v Tara Mne, Inc

2024 NY Slip Op 34494(U)

December 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 521273/2022

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----x
MOUSTAFA A. ELNAGDY,

Plaintiff,

-against-

TARA MNE, INC, RANKO JOVANOVIC and ANDREJ
SUSKAVCEVIC,

Defendants.
-----x

Mot. Seq. # 1

Index # 521273/2022

DECISION and ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on June 3, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1, 2[Exh. A-C], and 3
Affirmation/Affidavit in Opposition.....	4
Affirmation in Reply.....	5

Plaintiff, Moustafa Elnagdy, moves for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability against the defendants, Tara Mne, Inc, Ranko Jovanovic, and Andrej Suskavcevic, and dismissing all affirmative defenses alleging plaintiffs' culpable conduct, emergency situation, inherently dangerous activity, failure to wear a seatbelt, failure to state a cause of action, lack of jurisdiction, and breach of contract. The defendants oppose plaintiffs' motion on the grounds that plaintiff's affidavit is inadmissible, the motion is premature since discovery has not been completed, and issues of fact exist which preclude summary judgment from being granted.

This action was commenced by the plaintiff who allegedly sustained personal injuries due to a motor vehicle accident which occurred on March 22, 2022, when plaintiff's vehicle was struck in the rear by the defendants' vehicle while traveling on the Brooklyn-Queens expressway in Brooklyn, New York.

After careful review of the moving papers and opposition thereto, the court finds as follows:

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." See, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co., 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

The court agrees with the defendants' argument that the plaintiff's translator's affidavit is not in admissible form. CPLR § 2101(b) provides, inter alia, that an affidavit by a translator shall state his or her qualifications. See, CPLR § 2101(b). Here, the translator's certification that he is employed/retained by LIS Translation Group as an Arabic interpreter and fully fluent in English and Arabic languages is not a sufficient statement of his qualifications. See, Salazar v Kellari Parea, LLC, 189 A.D.3d 1490, 138 N.Y.S.3d 559 (2nd Dept., 2020), where the court held that a translator's affidavit, which accompanied the plaintiff's affidavit, did not comport with the requirements of CPLR 2101 (b) because it did not list the translator's qualifications.

"A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." See, Edgerton v. City of New York, 160 A.D.3d 809, 810, 74 N.Y.S.3d 617 (2nd Dept., 2018).

The court finds that the plaintiff has established his *prima facie* entitlement to judgment as a matter of law on the issue of liability against the defendants. The plaintiff's affidavit and a certified police accident report demonstrated that the plaintiffs' vehicle was at a stop when it was struck in the rear by defendant driver's vehicle. See, Tsyganash v. Auto Mall Fleet Mgt., Inc., 163 A.D.3d 1033, 83 N.Y.S.3d 74 (2nd Dept., 2018); Drakh v. Levin, 123 A.D.3d 1084, 1085, 1 N.Y.S.3d 202 (2nd Dept., 2014); Niyazov v. Bradford, 13 A.D.3d 501, 786 N.Y.S.2d 582 (2nd Dept., 2004).

In opposition, defendants failed to raise a triable issue of fact regarding a non-negligent explanation for the rear-end collision. See, Tsyganash v. Auto Mall Fleet Mgt., Inc., *supra*; Edgerton v. City of New York, *supra*. While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead. See, Arslan v Costello, 164 A.D.3d 1408, 84 N.Y.S.3d 229 (2nd Dept., 2018). Here, defendants have produced no competent evidence that the plaintiff stopped short. Moreover, the defendants' attorney's affirmation which lacks probative value and does not provide

documentary evidence in support of its opposition, fails to raise a material issue of fact and is insufficient to defeat plaintiffs' motion for summary judgment. See, Zuckerman v. City of New York, *supra*; Pryhuber v. Maffucci Storage Corp., 170 A.D.2d 660, 567 N.Y.S.2d 81 (2nd Dept. 1991).

A plaintiff is no longer required to show freedom from comparative fault to establish his or her *prima facie* entitlement to judgment as a matter of law on the issue of a defendant's liability. See, Rodriguez v. City of New York, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018); Merino v. Tessel, 166 A.D.3d 760, 87 N.Y.S.3d 554 (2nd Dept., 2018). 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. See, Toala v. EAN Holdings, LLC., 191 A.D.3d 724, 137 N.Y.S.3d 713 (2nd Dept., 2021); Vehicle and Traffic Law §1129[a]. A defendant's attorney's bare assertions as to a plaintiff's comparative fault, without documentary proof, are insufficient to raise a triable issue of fact as to whether there was a non-negligent explanation of the accident. See, Gutierrez v. Trillium USA LLC., 111 A.D.3d 669, 974 N.Y.S.2d 563 (2nd Dept., 2013).

Due to defendants' failure to provide a non-negligent explanation of the accident, the plaintiff established that the defendant driver was the sole proximate cause of the accident, which warrants dismissal of the defendants' affirmative defenses of culpable conduct (first, second, and eighteenth), emergency situation and inherently dangerous activity (sixteenth, seventeenth, and twenty-first), failure to wear a seatbelt (sixth) and failure to state a cause of action (fifteenth). See, Yawagyentsag v. Safeway Construction Enterprise LLC, 225 A.D.3d 827, 207 N.Y.S.3d 608 (2nd Dept., 2024), where the court held that defendant driver's explanation for striking the plaintiff's vehicle in the rear, to wit, a sudden stop, was insufficient to raise a triable issue of fact as to defendant's negligence or whether the plaintiff's actions contributed to the happening of the accident. In the case at bar, notwithstanding the police report statement, there is no explanation from the defendant driver as to how the accident occurred nor as to how plaintiffs' actions contributed to the accident. Although the issue of comparative fault generally presents a question of fact, that issue should be submitted to a jury "only where there is a triable issue of fact as to whether the frontmost driver also operated his or her vehicle in a negligent manner. See, Clarke v. Phillips, 112 A.D.3d 872, 978 N.Y.S.2d 281 (2nd Dept., 2013), *citing*, Gutierrez v. Trillium USA LLC., 111 A.D.3d 669, 974 N.Y.S.2d 563 (2nd Dept., 2013). The affirmative defenses relating to lack of jurisdiction (ninth, tenth, and eleventh), CPLR Article 16 (fourteenth), and breach of contract (twentieth) are likewise dismissed as they are inapplicable to the matter at hand.

As to the defendants' argument that the plaintiffs' motion for summary judgment is premature due to outstanding discovery, the court finds the argument unavailing. A party who contends that a summary judgment motion is premature is required to 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. See, Singh v Avis Rent a Car Sys., Inc., 119 A.D.3d 768, 989 N.Y.S.2d 302 (2nd Dept., 2014). The mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion. See, Lopez v WS Distrib., Inc., 34 A.D.3d 759, 825 N.Y.S.2d 516 (2nd Dept., 2006). Moreover, the defendant has failed to demonstrate that facts essential to justify opposition to the motion were


exclusively within the knowledge and control of the movant. *See, Pierre v Demoura*, 148 A.D.3d 736, 48 N.Y.S.3d 260 (2nd Dept., 2017).

Based on the foregoing, the court finds that while the plaintiff has established her prima facie entitlement to summary judgment as a matter of law, and the defendants have failed to raised a triable issue of fact, the plaintiff's translator's affidavit is not in admissible form, and therefore, it is hereby

ORDERED that the motion is denied with leave to renew upon submission of the translator's affidavit in compliance with CPLR 2101(b), listing the qualifications of the translator.

This constitutes the decision and order of this court.

Dated: Brooklyn, New York
December 9, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
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