| **Amayo v Salinas** |
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| 2016 NY Slip Op 31357(U) |
| June 14, 2016 |
| Supreme Court, Bronx County |
| Docket Number: 301386/13 |
| Judge: Betty Owen Stinson |
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 FILED Jun 17 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ANTONIO AMAYO,

Plaintiff(s),

- against -

LUIS DANIEL SALINAS AND XIAO ZHUANG GE,

Defendant(s).
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**DECISION AND ORDER**

Index No: 301386/13

Stinson, J.

In this action for personal injuries arising from an automobile accident, plaintiff moves seeking an order granting him partial summary judgment on the issue of defendants' liability. Specifically, plaintiff contends that summary judgment is warranted solely because defendants have been precluded from offering any testimony or evidence on the issue of liability at trial. Defendants oppose this motion asserting that their preclusion does not obviate that plaintiff establish *prima facie* entitlement to summary judgment - which they contend he has not done. Moreover, defendants contend that the police report and an eye witness statement raise an issue of fact sufficient to preclude summary judgment.

For the reasons that follow hereinafter, plaintiff's motion is granted.

The complaint alleges the following: On April 27, 2012, on 21st Street and Broaway, Queens, NY, plaintiff was involved in a motor vehicle accident. Specifically, as plaintiff rode his bicycle, he was impacted by a vehicle owned by defendant XIAO ZHUANG GE and operated by defendant LUIS DANIEL SALINAS (Salinas). It is alleged that defendants were negligent in the ownership and operation of their vehicle, said negligence causing the instant accident. As a result of the accident, plaintiff alleges that he sustained injuries.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Plaintiff's motion is granted insofar as he establishes *prima facie* entitlement to summary judgement and because in light of this Court's preclusion orders, defendants' evidence in opposition cannot be considered. Thus, defendants raise no issues of fact warranting denial of the motion. Significantly, plaintiff's evidence in support of this motion - that defendants' vehicle rear-ended him as he rode his bicycle - establishes that defendants were negligent and proximately caused this accident.

In support of this motion, plaintiff submits two prior court orders. The first, dated August 3, 2015, indicates that defendants would be conditionally precluded from offering any testimony or evidence at trial - on the issue of liability - if they failed to produce a witness for a deposition on September 14, 2015. The second, dated January 1, 2016, indicates that because defendants had failed to comply with the first order, they were precluded from

offering any testimony or producing any evidence on the issue of liability at trial.

Plaintiff also submits his deposition transcript, wherein he testified, in pertinent part, as follows. On April 27, 2012, plaintiff, while riding his bicycle, was involved in a motor vehicle accident. Plaintiff was employed as a delivery person for a diner and used a bicycle to make deliveries. On the aforementioned date, plaintiff was headed back to the diner after making a delivery. As he rode his bicycle on 21st Street, a two-lane roadway, with a lane for parking, plaintiff was impacted in the rear by a vehicle. He was then propelled to the ground. At the time of his accident, plaintiff was riding with the flow of traffic on the right side of the roadway.

Based on the foregoing, plaintiff establishes *prima facie* entitlement to summary judgment. Preliminarily, the Court notes that contrary to plaintiff's assertion, it is well settled that the fact that a defendant is precluded from presenting evidence on liability at trial does not automatically entitle a plaintiff to summary judgment (*Northway Eng'g v Felix Indus.*, 77 NY2d 332. 334-335 [1991]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 6 [1st Dept 2011]; *Rosario v Humphreys & Harding*, 301 AD2d 406, 406 [2003] ). Indeed, a preclusion order does not relieve the plaintiff of the burden of proving its case (*Northway* at 337; *Murphy v Herbert*

*Constr., Co.*, 297 AD2d 503, 505 [1st Dept 2002]; *Israel v Drei Corp.*, 5 AD2d 987, 987 [1st Dept 1958]); nor does it preclude proof on affirmative defenses (*Ramos v Shendell Realty Group, Inc.*, 8 AD3d 41, 41 [1st Dept 2004] [affirmative defense of comparative negligence still a viable defense despite the preclusion order]). Accordingly, here, summary judgment is not warranted solely because defendants have been precluded from offering evidence and testimony on liability at trial.

Notwithstanding the foregoing, a review of plaintiff's testimony - appended to plaintiff's motion - establishes *prima facie* entitlement to summary judgment.

In cases alleging negligence as the result of a motor vehicle accident, a plaintiff establishes *prima facie* entitlement to summary judgment by demonstrating that the defendant was negligent and that said negligence was the proximate cause of the accident (*Bodner v Greenwald*, 296 AD2d 564, 564 [2d Dept 2000]; *Maxwell v Land-Saunders*, 233 AD2d 303, 303 [2d Dept 1996]). Moreover, it is well settled that a rear-end collision with a vehicle is prima facie evidence of negligence on the part of the operator of the second, offending, and rear-ending vehicle (*Martinez v Martinez*, 93 AD3d 767, 768 [2d Dept 2012]; *Dattilo v Best Transp. Inc.*, 79 AD3d 432, 433 [1st Dept 2010]; *Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; *Carhuayano v J & R Hacking*, 28 AD3d 413, 414 [2d

Dept 2006]; *Chepel v Meyers*, 306 AD2d 235, 237 [2d Dept 2003]; *Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]; *Power v Hupart*, 260 AD2d 458 [2d Dept 1999]; *Danza v Longieliere*, 256 AD2d 434, 435 [1st Dept 1998]; *Edney v Metropolitan Suburban Bus Authority*, 178 AD2d 398, 399 [2d Dept 1991]). Indeed, [w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (*Martinez* at 768; *Scheker v Brown*, 85 AD3d 1007, 1007 [2d Dept. 2011]). In order to rebut the presumption of negligence, the operator of the rear-ending vehicle is required provide a cognizable non-negligent excuse (*Martinez* at 768; *Dattilo* at 433; *Cabrera* at 553; *Carhuayano* at 414; Johnson at 271; Mitchell at 251). A failure by the operator of the offending vehicle to rebut the finding of negligence with admissible evidence requires judgment in favor of the other vehicle (*Grimes-Carrion v Carroll*, 13 AD3d 125, 126 [1st Dept 2004]; Bendiik v. Dybowski, 227 AD2d 228, 228 [1st Dept 1996]).

With regard to bicycles, Vehicle and Traffic Law § 1231 provides that:

> [e]very person riding a bicycle ... upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a

> vehicle by this title, except as to special regulations in this article and except as to those provisions of this title which by their nature can have no application

Accordingly, the foregoing case law is equally applicable to accidents involving bicycles (*see Gee v Malik*, 116 AD3d 918, 919 [2d Dept 2014] [Court granted defendant's motion for summary judgment when plaintiff a bicyclist rear ended their vehicle and failed to offer a non-negligent explanation for his actions.]; *Martinez* at 768 [2d Dept 2012] [Court denied summary judgment to defendants because although plaintiff bicyclist struck their vehicle in the rear, casting plaintiff in negligence, plaintiff's diverging view of facts created questions of fact, which precluded summary judgment.]).

Here, plaintiff testified that he was struck in the rear by a vehicle as he rode his bicycle. Accordingly, plaintiff establishes that defendants were negligent (*Martinez* at 768; *Dattilo* at 433; *Cabrera* at 553; *Carhuayano* at 414; *Chepel* at 237; *Mitchell* at 251; *Johnson* at 271; *Powerat* 458; *Danza* at 435; *Edney* at 399), and thus, establishes *prima facie* entitlement to summary judgment.

Because defendants have been precluded from offering any testimony or evidence on the issue of liability, the Court cannot consider the evidence submitted in opposition. Thus, because of the foregoing orders, defendants fail to rebut the presumption of

negligence, in that they fail to provide a cognizable non-negligent excuse for impacting plaintiff in the rear (*Martinez* at 768; *Dattilo* at 433; *Cabrera* at 553; *Carhuayano* at 414; Johnson at 271; Mitchell at 251). Accordingly, plaintiff's motion must be granted (*Grimes-Carrion* at 126; Bendiik at 228).

Inasmuch as the preclusion orders do not prohibit defendants from proving their affirmative defenses, at trial defendants are, thus, entitled to prove their affirmative defense of comparative negligence in any way that does not run afoul of this Court's preclusion order (*see Ramos* at 41 ["Although defendants were precluded by a prior order . . . from offering evidence on the issue of liability as a result of their failure to produce a witness for examination before trial, their answer was not stricken and they were not precluded from establishing the affirmative defense of comparative negligence asserted therein. Thus, since the purpose of the preclusion order was to make the demanding party whole . . . by granting plaintiff partial summary judgment on the issue of liability despite alleged factual disputes regarding plaintiff's comparative negligence, which might possibly be established through cross-examination of plaintiff's witnesses, plaintiff was granted more relief than was warranted by defendants' failure to produce a witness for pretrial examination."). It is hereby

**ORDERED** that defendants are liable for plaintiff's accident and that the trial be limited to damages, serious injury and comparative negligence. It is further

**ORDERED** defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : June 14, 2016
Bronx, New York

Betty Owen Stinson, JSC