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| <b>Osei v Sanchez-Duran</b>  |
| 2021 NY Slip Op 30596(U)   |
| January 14, 2021   |
| Supreme Court, Queens County   |
| Docket Number: 705438/2016   |
| Judge: Cheree A. Buggs   |
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**FILED**

**1/15/2021**

**9:19 AM**

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

**COUNTY CLERK  
QUEENS COUNTY**

-----X  
KOFI OSEI,

Index No.:705438/2016

Plaintiff,

Motion  
Date: January 13, 2021

-against-

Motion Cal. No. 22

Motion Sequence No. 2

JUAN C SANCHEZ-DURAN, MODERN  
STONework INC., RAMON ANGEL  
GONZALEZ AND TRI STAR PLUMBING  
AND HEATING INC.,

Defendants.  
-----X

The following efile papers numbered EF 33-49 fully submitted and considered on this motion by plaintiff KOFI OSEI (hereinafter referred to as "Plaintiff") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 granting partial summary judgment against the defendants JUAN C. SANCHEZ- DURAN (individually referred to as "Juan"), MODERN STONework INC. (individually referred to as "Modern"), RAMON ANGEL GONZALEZ (individually referred to as "Ramon") and TRI STAR PLUMBING AND HEATING INC. (individually referred to as "Tri-Star") (collectively referred to as "Defendants") on the issue of liability, dismissing affirmative defenses and for such other and further relief as this Court deems just and proper.

|   | <u>Papers<br/>Numbered</u> |
|---|----------------------------|
| Notice of Motion-Affidavits-Exhibits..... | EF 33-37                   |
| Opposition-Exhibits.....                  | EF 38-45                   |
| Opposition.....                           | EF 46                      |
| Stipulation Adjournment of Motion.....    | EF 47                      |
| Reply.....                                | EF 48                      |
| Reply.....                                | EF 49                      |

Plaintiff contends that he was traveling east on the Verrazano-Narrows Bridge and came to a complete stop due to traffic ahead of him. Plaintiff contends that whilst he was stopped the vehicle owned by Tri Star and operated by Juan hit him in the rear. Plaintiff contends that he sustained serious injuries.

### Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

"A rear-end collision is sufficient to create a *prima facie* case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle". (*Rimona Levine et al. v. Clyde Taylor et al.*, 268 A.D.2d 566 [2<sup>nd</sup> Dept 2000]).

Plaintiff contends he was stopped due to traffic "for close to 60 seconds" when the vehicle operated by Juan and owned by Tri Star struck him in the rear.

Plaintiff presented transcripts from Juan/Tri Star and Ramon/ Modern which illustrate that this was a multi-car accident and Plaintiff was stopped prior to being struck in the rear.

Plaintiff has established *prima facie* entitlement to judgment as a matter of law. The burden now shifts to the opposing parties to raise a triable issue of fact.

Abbas

ZAHEER ABBAS (hereinafter referred to as "Abbas") operated the vehicle that was ahead of the Plaintiff. Abbas testified that he was stopped for approximately 30 to 40 seconds. Abbas testified he did not see Plaintiff's car prior to the impact between the two. That he did not see any other vehicle involved in the accident prior to the accident.

Juan

Juan operated the vehicle directly behind Plaintiff. Juan testified that he felt two impacts in total, the first impact was to his rear and the second in front when he came into contact with Plaintiff. According to Juan:

Q: At the time of that first impact, were you pressing on the brake?

A: Yes.

Q: Were you slowing down?

A: I was slowing down.

Q: For what reason were you slowing down?

A: The vehicle in front of me also came to a complete stop or near a complete stop.

(Page 26-27 lines 20-25 and 2-3)

Q: The vehicle in front, you said came to almost a complete stop. Was that before the first impact?

A: Yes.

(Page 31 lines 8-11)

Q: You said other than looking straight ahead approximately four seconds prior to feeling the impact to your rear, did you see if the taillights of the car ahead of you were on, were off, something else?

A: They were on.

Q: Approximately how long before impacting the rear of the vehicle ahead of you did you observe those taillights?

A: A couple of seconds, three or four seconds maybe.

(Page 43 lines 14-24)

Ramon

Ramon operated the vehicle that traveled directly behind Juan. Ramon testified that Juan was stopped prior to the impact between their two cars because the Juan vehicle struck Plaintiff's vehicle. Ramon further testified the following regarding Plaintiff:

Q: Was the van stopped when the black car hit it?

A: Yes

(Page 29 lines 5-7)

Q: When did you apply your brakes for the first time before the accident?

A: When I heard the noise of the car that hit in front.

Q: Was that the noise of the sedan hitting the van?

A: I think.

Q: So you saw the sedan hit the rear of the van; is that correct?

A: Yes.

(Page 49-50 lines 25 and 2-10)

Q: Did you hear any noises of any collisions before you saw the sedan hit the rear of the van?

THE INTERPRETER: Could you read that back, please?

(Whereupon, the record was read back by the reporter.)

A: No

(Page 50 lines 11-13)

In *Bournazos v. Malfitano* (275 A.D.2d 437 [2d Dept 2000]), the first car came to a full stop due to a malfunction (*id*). The second and third cars disputed what occurred next. The third car asserted the second car came into contact with the first before it came into contact with the second (*id*). The second car asserted that it was stopped before the third car came into contact with it, which subsequently caused its collision with the first car. The third car failed to dispute that the second car was stopped before it came into contact with the second car. The court held that the second car established their entitlement to summary judgment (*id* at 438). The court reasoned the evidence was undisputed that the second car was stopped before it was struck in the rear (*id*). Therefore, it was the third car's burden to rebut the inference of its own negligence created by the rear-end collision, or to demonstrate that negligence on the part of the second car contributed to the collision between the two (*id*). The court held, whether or not the second vehicle struck the first vehicle before the collision between the second and third car was irrelevant in determining the third car's liability (*id*).

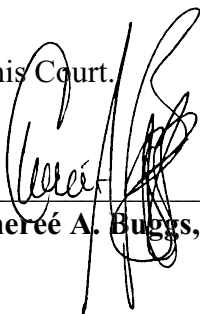
Here, neither Juan nor Ramon submitted evidence to dispute Plaintiff's claim that he was stopped prior to impact. Instead, both parties attempt to raise issues of fact surrounding whether it was Juan who hit Plaintiff first or if Ramon's impact to Juan's rear caused Juan to impact Plaintiff. However, the facts as disputed need not be resolved for this Court to grant Plaintiff's motion for partial summary judgment as against Juan and Ramon. Therefore, it is

**ORDERED**, that the branch of Plaintiff's motion seeking partial summary judgment on the issue of liability as against Defendants is granted; and it is further,

**ORDERED**, that the branch of Plaintiff's motion seeking dismissal of Defendants' affirmative defenses is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: January 14, 2021

  
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Hon. Chereé A. Buggs, JSC

**FILED**

**1/15/2021  
9:19 AM**