

**Shendi v Awuah**

2021 NY Slip Op 33951(U)

December 13, 2021

Supreme Court, Queens County

Docket Number: Index No. 707093/18

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

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HATEM SHENDI,

Index No. 707093/18

Plaintiff,

Motion

Date: July 12, 2021

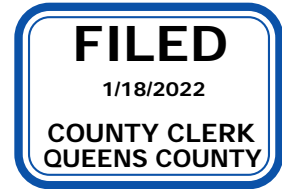
-against-

M# 3

GABRIEL AWUAH, ET AL.,

Defendants.

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The following papers numbered EF 39-56 read on this motion by defendant Carlos Detres (Detres) pursuant to CPLR 3211(a) (5) to dismiss the complaint and all cross claims based on the doctrines of res judicata and collateral estoppel; and cross motion by plaintiff Hatem Shendi (Shendi) for summary judgment on the issue of liability.

Papers  
Numbered

- Notice of Motion - Affidavits - Exhibits..... EF 39-48
- Notice of Cross Motion - Affidavits - Exhibits.. EF 49-54
- Answering Affidavits - Exhibits..... EF 55-56

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

It is alleged that Shendi, a passenger in a vehicle operated by defendant Gabriel Awuah (Awuah) and registered to defendant Witolo Progorzycz (Progorszcz), sustained injuries when this vehicle was involved in an accident with a vehicle operated and owned by defendant Detres.

A companion action arising out of the same motor vehicle accident was commenced in Supreme Court, New York County, entitled *Tarek Makshat, et al. v Carlos Detres, et al.*, Index No. 159578/2017 (Action No. 1). Detras, a defendant in Action No. 1, moved for summary judgment on the issue of liability. After oral argument, the court granted his motion as co-defendants Progorszcz and Awuah had not set forth a non-negligent explanation. The claims of plaintiffs' Makshat and Osman in

Action No. 1 against Detres and the cross claims by Progorszcz and Awuah were also dismissed in the order dated February 27, 2019.

In prior proceedings in this matter (Action No. 2), this court vacated Detres' default by order dated March 30, 2021 and granted him leave to interpose an answer within 30 days after service of a copy of that order. Shortly after filing and serving an answer including the affirmative defense of res judicata, Detres made the instant motion. Movant requested relief under CPLR 3211(a)(5). However, issue was joined upon service of the answer, therefore, Detres' motion will be deemed a request for summary judgment on the issues of res judicata and collateral estoppel.

In support of Detres' current motion, he includes a copy of the order issued in Action No. 1, a police accident report certified as a true and complete copy of a record on file in the New York State Department of Motor Vehicles, pleadings in this matter, an answer verified by counsel as well as other affirmations by counsel.

The doctrine of res judicata will bar the re-litigation of the same cause of action between parties which has already resulted in a valid final judgment. (See *Simmons v Trans Express*, 37 NY3d 107 [2021]; *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978].) Collateral estoppel relates to issue preclusion and can be invoked when an identical issue has been decided in a prior proceeding and the party to be precluded had a fair opportunity to fully litigate that issue in the prior proceeding. (See *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [2003].) A determination of whether a party has had a full and opportunity to litigate in the prior proceeding requires a practical inquiry. (See *Gilberg v Barbieri*, 53 NY2d 285, 292 [1981].)

In the instant matter, Shendi was not a named party or participant in Action No. 1. Clearly, plaintiff herein did not have a full and fair opportunity to litigate the issue of defendants' negligence. (See *Buechel v Bain*, 97 NY2d 295, 303-304 [2001]; *Augustine v Sugrue*, 8 AD3d 517 [2nd Dept 2004].) Moreover, as a nonparty, plaintiff was not aggrieved by the prior order and did not have an opportunity to appeal the determination. (*Id.*; see *Davidov v Searles*, 84 AD3d 859 [2nd Dept 2011].) As a result, the negligence of the defendants with respect to Shendi was not resolved in Action No. 1. Moreover, as Detres has not provided the pleadings and motion papers in Action

No. 1, no determination can be made as to the request for dismissal of the cross claims of Awuah and Progorzcz on the basis of res judicata in this matter.

This court will next address plaintiff Shendi's cross motion for summary judgment on the issue of liability. In support of this relief, plaintiff essentially relies on the affidavit of Detres filed in Action No. 1 and a "certified" police accident report. Detres describes the accident in his affidavit indicating that it was rear ended by defendant Awuah. The police accident report sets forth the following statements recorded by the police officer, who was not a witness to the accident. "Driver one [Detres] states he was rear ended while stopping short. Driver two [Awuah] states same statement as driver one."

Even if the accident report is in compliance with certification requirements under CPLR 4518(a) (see *Yassin v Blackman*, 188 AD3d 62, 65-67 [2nd Dept 2020]), Awuah's ambiguous statement is inadequate to constitute an admission of wrongdoing. (See generally, *Taylor v New York City Tr. Auth.*, 130 AD3d 712 [2015]; *Sanchez v Steenson*, 101 AD3d 982, 983 [2012].) In addition, the only affidavit submitted by plaintiff in the e-filed system (Doc. No. 16) fails to provide sufficient evidentiary facts regarding the manner in which the subject accident occurred. Shendi's mere reference to the facts set forth in the complaint filed in this action is unavailing as it was verified by counsel. (CPLR 3020.) Shendi has, therefore, not tendered sufficient admissible evidence to demonstrate entitlement to judgment as a matter of law. (See *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980].) In light of the foregoing, the motion must be denied even though plaintiff is apparently an innocent passenger. (See *Wise v Boyd Bros. Transp.*, 194 AD3d 1096 [2nd Dept 2021].) Under these circumstances, the court need not address the sufficiency of the opposition papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].)

Accordingly, the motion by Detres for summary judgment and the cross motion by the plaintiff for summary judgment on the issue of liability are denied.

The parties are directed to expeditiously proceed with disclosure.

Dated: December 13, 2021

  
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CARMEN R. VELASQUEZ, J.S.C.