

**Steinberg v Excellent Limo Corp.**

2023 NY Slip Op 33261(U)

August 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 532878/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30<sup>th</sup> day of August 2023

HONORABLE FRANCOIS A. RIVERA  
-----X  
ISRAEL STEINBERG,

Plaintiff,

- against -

EXCELLENT LIMO CORP. and "JOHN DOE"  
  
Defendants.  
-----X

**DECISION & ORDER**

Index No.: 532878/2021

Oral Argument: 8/23/2023

Cal. No.: 2, Ms. No.: 2

Recitation in accordance with CPLR § 2219(a) of the papers considered on the notice of motion filed by plaintiff Israel Steinberg (hereinafter Steinberg) on May 25, 2023, under motion sequence two, for an order pursuant to CPLR § 3212 granting summary judgment in his favor on the issue of liability as against the defendant Excellent Limo Corp. (hereinafter Excellent Limo). The motion is opposed by the defendant Excellent Limo.

- Notice of motion, NYSCEF Doc. 21
- Affirmation of Steinberg’s counsel in support, NYSCEF Doc. 22
- Exhibits A to B, NYSCEF Docs. 23-24
- Affidavit of Israel Steinberg, as Exhibit C, NYSCEF Doc. 25
- Affidavit of Joel Steinberg, as Exhibit D, NYSCEF Doc. 26
- Affirmation of defendant’s counsel in opposition, NYSCEF Doc. 30
- Affirmation of Steinberg’s counsel in reply, NYSCEF Doc. 31
- Statement of Material Facts by Steinberg’s counsel, NYSCEF Doc. 34
- Response to Statement of Material Facts by defendant’s counsel, NYSCEF Doc. 36

Oral Argument of the underlying motion was held on August 17, 2023, and attended by Glen P. Ahlers, Esq., of Rimland & Ahlers for the plaintiff and counsel from Baker, McEvoy, Morrissey & Moskovitz for the defendant Excellent Limo Corp. The argument was continued on August 23, 2023, and thereafter deemed submitted for this Court’s decision.

## BACKGROUND

On December 23, 2021, Steinberg commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's Office. On March 1, 2022, Excellent Limo joined issue by filing a Verified Answer. Steinberg's verified complaint and affidavit allege the following salient facts. On September 17, 2019, at around 6:00pm, Steinberg was a passenger in a 2003 Nissan sedan bearing New York State license plate number 609012 on 52<sup>nd</sup> Street, which was stopped and waiting for a red light at its intersection with 18<sup>th</sup> Avenue, Brooklyn, New York. On the same date, place, and time, a vehicle owned by defendant Excellent Limo was operated by an unknown driver.

While the Steinberg vehicle was stopped in traffic and waiting for a red light, it was struck in the rear by the defendant vehicle (hereinafter the subject accident). The subject accident was solely caused by the negligent operation of the defendant's vehicle. The identity of the driver of the defendant vehicle is unknown because the driver left the scene of the accident before police arrived and did not identify himself. The collision caused plaintiff Steinberg to sustain serious physical injuries.

Counsel for plaintiff submitted a Statement of Material Facts in support of the instant motion which states the above facts. Counsel for defendant filed a Response to Statement of Material Facts which admits each item of plaintiff's Statement of Material Facts with immaterial qualifications.

## LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving part to make a prima facie showing that he or she is entitled to summary judgment as

a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by other available proof, such as depositions and written admissions (*Poon v Nisanov*, 162 AD3d 804 [2<sup>nd</sup> Dept 2018], quoting CPLR § 3212 [b]). The moving party's submissions must show that there is no defense to the cause of action or that the cause of action or defense has no merit (*Gobin v Delgado*, 142 AD3d 1134 [2<sup>nd</sup> Dept 2016]).

Steinberg seeks an order pursuant to CPLR § 3212 granting summary judgment in his favor on the issue of liability. Steinberg claims, among other things, that the driver of the defendant vehicle violated Vehicle and Traffic Law § 1129(a) by not keeping the defendant's vehicle at a safe distance and speed while traveling behind the Steinberg vehicle. A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*Modena v. M & S Mech. Services, Inc.*, 181 AD3d 802 [2<sup>nd</sup> Dept 2020], citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]).

In support of the motion, Steinberg submitted his own affidavit, the affidavit of the non-party driver of the plaintiff vehicle, Joel Steinberg, and a certified police report of the subject accident. The affidavits of plaintiff Steinberg and driver Joel Steinberg demonstrated that the front

of the defendant vehicle struck the rear of the Steinberg vehicle while the Steinberg vehicle was stopped and waiting at a red light (*Batashvili v VelizPalacios*, 170 AD3d 791, 792 [2<sup>nd</sup> Dept 2019]; *Lopez v Dobbins*, 164 AD3d 776, 777 [2<sup>nd</sup> Dept 2016]). Additionally, Steinberg offered the police report to admit the statement given at the time and place of the accident. Steinberg also argues that the unknown identity of the defendant vehicle's driver does not undermine the applicability of Vehicle and Traffic Law § 388 which confers liability to the owner of a vehicle for the negligence of a permissive user of the subject vehicle.

The only evidence the defendants submitted was an affirmation of their counsel. The affirmation raised two arguments in opposition to plaintiff's motion. First, the defendant claimed that the motion was premature because the parties had not yet completed discovery. Second, the defendant claimed that the motion should be denied because a jury should be permitted to consider the police report, the defendant's MV-104 report, and to hear the testimony of each witness.

To establish that a summary judgement motion is premature, the nonmoving party must offer an evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the moving party. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion (*Lazarre v Gragston*, 164 AD3d 574, 575 [2<sup>nd</sup> Dept 2018]). Here, the defendants failed to offer such an evidentiary basis that any material facts essential to opposing the motion were exclusively within plaintiff's control.

Though the defendant does not raise this argument, the Court agrees with plaintiff that defendant Excellent Limo is liable for the negligent actions of the unknown permissive user of the defendant's vehicle. In the context of a summary judgment motion such as this, Vehicle and Traffic

Law § 388 creates the presumption that a driver of the defendant's vehicle was a permissive user. In order to rebut this presumption, the opponent of the motion must show substantial evidence sufficient to demonstrate that the vehicle was not operated with the owner's consent (*Fuentes v Virgil*, 119 AD3d 522 [2014]). Here defendant has offered no evidence to rebut this presumption.

Though the defendant does not raise this argument, the Court seeks to address the admissibility of the certified police report attached in support of plaintiff's application. The admission of an adverse party contained in a certified police report is admissible (*Yassin v Blackman*, 188 AD3d 62 [2<sup>nd</sup> Dept 2020]). Here, however, plaintiff was not using the police report to admit any statements made by defendant to the police at the time of the accident. Rather, he was offering the police report to admit the statement the non-party driver Joel Steinberg gave the police at the time. Consequently, the Court finds that the certified police report is inadmissible for the purpose that the plaintiff intended (*Harrinarain v Sisters of St. Joseph*, 173 AD3d 983, 983 [2<sup>nd</sup> Dept 2019]).

While defendant cites to the police report and defendant's MV-104 report, no MV-104 report was attached to defendant's submission for the consideration of this Court. Moreover, the affirmation of defendant's counsel demonstrated no personal knowledge of the subject accident and, therefore, could not and did not provide a nonnegligent explanation for the collision. Consequently, Steinberg has made a prima facie showing of entitlement to summary judgment in his favor on the issue of liability and the defendant has not raised a triable issue of fact.

## CONCLUSION

The motion of plaintiff Israel Steinberg for an order pursuant to CPLR § 3212 granting summary judgment in his favor on the issue of liability as against the defendant Excellent Limo Corp. is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francois A. Rivera*

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J.S.C.

**HON. FRANCOIS A. RIVERA  
J.S.C.**