

**Ibemesim v Curtis**

2023 NY Slip Op 33896(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 522549/2022

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 31<sup>st</sup> day of October 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
FRANK IBEMESIM,

Plaintiff,

-against-

DAVID LUMUMBA CURTIS and DAVID ODALAMA,

Defendants.  
-----X

**DECISION & ORDER**

Index No. 522549/2022

Cal No. 25

Oral Argument: 10-26-23

By notice of motion, filed on July 27, 2023, under motion sequence number one, plaintiff Frank Ibemesim sought an order pursuant to CPLR § 3212(b) granting summary judgment in the plaintiff's favor on the issue of as against defendants David Lumumba and David Odalama, and an order pursuant to CPLR § 3211(b) dismissing defendants' affirmative defense alleging contributory negligence. The following document numbers were considered.

- Notice of Motion (NYSCEF Docket No. 19)
- Affirmation in Support (Docket No. 20)
- Plaintiff's Affidavit (Docket No. 21)
- Statement of Material Facts (Docket No. 24)
- Affirmation in Opposition (Docket No. 26)
- Response to Statement of Material Facts (Docket No. 27)
- Affirmation in Reply (Docket No. 29)

After oral argument, the order of the Court is as follows.

**BACKGROUND**

On August 5, 2022, plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk's office. On November 22, 2022, defendants Curtis and Odalama joined issue by filing a verified answer. As relevant here, defendants' first affirmative defense alleges that the plaintiff's comparative negligence contributed to causing the subject accident.

The verified complaint alleges the following salient facts. On July 8, 2021, plaintiff was driving an automobile on Jerome Street at or near its intersection with Linden Boulevard, in the County of Kings, and State of New York. On the same date, time and location, Curtis was operating a 2019 BMW motor vehicle bearing New York State license plate number JJH2475 with the permission of its owner, Odalama. At that time, while plaintiff was stopped for about one minute, defendant Curtis crashed into the rear of plaintiff's vehicle (hereinafter the subject accident). The subject accident was caused by Curtis's negligent operation of his vehicle and caused plaintiff to sustain serious physical injury.

#### LAW AND APPLICATION

A plaintiff moving for summary judgment on the issue of liability in a negligence action must establish, prima facie showing that the defendant breached a duty owed to the plaintiff and the defendant's negligent actions were a proximate cause of the alleged injuries (*Hall v Powell*, 183 AD3d 576 [2nd Dept 2020]). A rear-end collision 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 non-negligent explanation for the collision (*Witonsky v New York City Transit Authority*, 145 AD3d 938 [2nd Dept 2016]; *Hall v Powell*, 183 AD3d 576 [2nd Dept 2020]; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033 [2nd Dept 2018]).

A motion for summary judgment shall be supported by an affidavit, by a copy of the

pleadings and by other available proof, such as, depositions and written admissions (CPLR 3212 (b); *Poon v Nisanov*, 162 AD3d 804 [2nd Dept 2018]; *Marriot v Jackson*, 67 Misc3d 121 l(A) [Kings Supreme Court 2020]).

In support of the motion, the plaintiff submitted the pleadings, an affirmation in support of his counsel, and his own affidavit. The plaintiff's evidentiary submission established the following facts. At the time of the accident, plaintiff was wearing a seat bel while driving his vehicle on Jerome Avenue at or near its intersection with Linden Boulevard, and came to a complete stop on the roadway for approximately one minute. He then felt an impact when he was struck in the rear by the vehicle operated Curtis and owned by Odalama. Plaintiff's affidavit made a *prima facie* showing that at the time of the collision, he was completely stopped for approximately one minute on Jerome Avenue at or near its intersection with Linden Boulevard in the County of Kings, he was struck in the rear by Curtis's vehicle.

Plaintiff's evidentiary submission has established *prima facie* entitlement to judgment in his favor on the issue of liability as against defendants Curtis and Odalama. 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 (Vehicle and Traffic Law § 1129 [a]; *Witonsky*, 145 AD3d 938). Here, defendant Curtis breached that duty owed to the plaintiff. It is well established that summary judgment may be granted only when no triable issue of fact exists. A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Campbell v Mehmood*, 68 Misc3d 1205(A) [Kings Supreme Court 2020]).

Plaintiff's evidentiary submission established, *prima facie*, that he was not at fault in the

happening of the accident. 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, requiring that operator to come forward with evidence of a non-negligent explanation for the collision to rebut the inference of negligence (Vehicle and Traffic Law§ 1129 [a]; *Jimenez v Ramirez*, 171 AD3d 902 [2d Dept 2019]).

The defendants did not submit an affidavit setting forth a non-negligent explanation for the rear end collision with the plaintiff's vehicle. Instead, the defendant's counsel argued that the motion was premature. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]). The mere hope or speculation that evidence to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny a motion for summary judgment (*Paul v Village of Quogue*, 178 AD3d 942, 944 [2d Dept 2019]). *Kagan v Ameriprise Financial Services Inc.* 191 AD3d 654 [2d Dept 2021].

The plaintiff's evidentiary submissions established entitlement to judgment as a matter of law. The defendant's negligent operation of his motor vehicle was the sole proximate cause of the subject accident. Accordingly, the plaintiff is entitled to summary judgment on the issue of liability in his favor.

Regarding the plaintiff's request to strike the affirmative defense of plaintiff's comparative negligence, the affidavit of Ibemesim demonstrated entitlement to the striking of the affirmative defense of culpable conduct. The defendant did not raise triable issue of fact.

## CONCLUSION

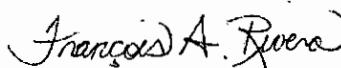
The motion by plaintiff Frank Ibemesim for an order pursuant to CPLR 3212(b) granting

summary judgment in plaintiff's favor on the issue of liability as against the defendants David Lumumba Curtis and David Odalama is granted.

The motion by plaintiff Frank Ibemesim for an order striking the affirmative defense alleging comparative negligence is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.

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