

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

MOD

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

GARY ZAHN and JUDITH ZAHN,

Plaintiff(s),

ORIGINAL RETURN DATE: 05/31/11
SUBMISSION DATE: 05/31/11
INDEX No.: 018437/10

-against-

ONLARULE D. MAJOYEOGBE,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Plaintiffs move for an order, pursuant to CPLR 3212, granting summary judgment against defendant on the issue of liability and setting the matter down for an immediate trial on the issue of damages.

“A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Carhuayano v. J & R Hacking*, 28 AD3d 413, 414 [2d Dept. 2006]; *Milsky v. Solansky*, 8 AD3d 353 [2d Dept. 2004]; *Gaeta v. Carter*, 6 AD3d 576 [2d Dept. 2004]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (*see Piltser v. Donna Lee Mgt. Corp.*, 29 AD3d 973 [2d Dept. 2006]; *Dileo v. Greenstein*, 281 AD2d 586 [2d Dept. 2001]; *Leonard v. City of New York*, 273 AD2d 205, 206 [2d Dept. 2000])” (*Kimyagarov v. Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept. 2007]).

Submitted in support of the motion is the affidavit of plaintiff, Gary Zahn, which reveals the following:

The accident at issue was a three-car collision in stopped traffic on I-278, the Verrazano Bridge, which occurred on December 27, 2009. Plaintiffs' vehicle was stopped when defendant's vehicle hit the motor vehicle directly behind plaintiffs' vehicle, causing that middle vehicle to strike the rear of the vehicle owned and operated by plaintiffs. This results in an inference of negligence on the part of defendant, which he has failed to rebut (*Plummer v. Nourddine*, 82 AD3d 1069 [2d Dept. 2011]; *Ballatore v. Hub Truck Rental*, 83 AD3d 978 [2d Dept. 2011]).

While defendant may be entitled to discovery on the issue of plaintiffs' damages, plaintiff is entitled to summary judgment as a matter of law on the issue of liability. Pursuant to CPLR 3212, incomplete discovery does not bar a grant of summary judgment, unless the opposing party can show a reasonable attempt that discovery was made and that triable issues of fact may be uncovered through further discovery (CPLR 3212 (f); *see also, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). The opponent of the motion has personal knowledge of the relevant facts, and the lack of disclosure does not excuse the failure of defendant, a party with personal knowledge, to submit an affidavit in opposition to the motion (*see Rainford v. Han*, 18 AD3d 638 [2d Dept. 2005]; *Niyazov v. Bradford*, 13 AD3d 501, 502 [2d Dept. 2004]).

Defendant's sole submission is the affidavit of his attorney, which speculates on the culpable conduct of plaintiffs. Once a prima facie showing of entitlement to judgment as a matter of law is made by the movant demonstrating the absence of any material issues of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]), the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Id.*).

The affirmation of defendant's attorney, the only paper submitted in opposition to the motion, contains "bald conclusions without any evidentiary facts to substantiate a defense or to refute plaintiff's claims" (*Israelson v. Rubin*, 20 A.D.2d 668 [2d Dept. 1964]). It does not appear that defendant's attorney has any personal knowledge of the facts and bases her affirmation on hearsay; therefore her affirmation has no probative value and should be disregarded (*Niyazov v. Bradford*, 13 AD3d 501 [2d Dept. 2004]; *Barnet v. Horwitz*, 278 App. Div. 700 [2d Dept. 1951]; *Zuckerman*, 49 NY2d at 561). Verified pleadings may be used in lieu of affidavits only when they have been verified by the party, not the attorney. Defendant's failure to provide a bona fide defense to inference of negligence resulting in liability warrants the granting of summary judgment to plaintiff (CPLR 3212; *Israelson v. Rubin*, 20 AD2d 668 [2d Dept. 1964]).

Accordingly that branch of plaintiff's motion seeking summary judgment on the issue of liability is granted.

This matter shall proceed on the issue of damages only.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on July 14, 2011 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: 6-24-11

HON THOMAS P. PHELAN

J.S.C.

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ENTERED
JUN 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE