

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
DESTINE LOUNY,

Plaintiff,

-against-

Index No. 534389/2023

**VERIFIED ANSWER  
WITH CROSSCLAIMS**

UMAR MAHWISH, ANGEL DIAZ ORTIZ, and  
WALMART TRANSPORTATION, LLC,

Defendants.  
-----X

The defendant, UMAR MAHWISH, by his attorneys, MORRIS DUFFY ALONSO FALEY & PITCOFF, upon information and belief, answers the plaintiff's Complaint herein as follows:

**THE PARTIES**

1. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: "1," "7," "8," "9," "10," "11," "12," "13," "15," "16," "17," "18," "19," and "20."

2. Admits each and every allegation contained in the paragraphs or subdivisions of the Complaint designated: "2," and "3."

3. Denies each and every allegation contained in the paragraphs or subdivisions of the Complaint designated: "4," "5," and "6," and respectfully refers all questions of law to this honorable court.

4. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: "14," and respectfully refers all questions of law to this honorable court.

**THE ACCIDENT**

5. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: "21," "22," "23," "24," "25," "26," "27," "29," "30," "31," and "32," and respectfully refers all questions of law to this honorable court.

6. Denies each and every allegation contained the paragraphs or subdivisions of the Complaint designated: "28," and respectfully refers all questions of law to this honorable court.

**COUNT ONE: NEGLIGENCE AS TO DEFENDANT UMAR MAHWISH**

7. As to the paragraph of the Complaint designated “33”, answering defendant repeats, reiterates and realleges each and every denial heretofore made with respect to paragraphs “1” through “32” inclusive, with the same force and effect as if fully set forth at length herein.

8. Denies each and every allegation contained the paragraphs or subdivisions of the Complaint designated: “34,” “35,” “36,” “37,” “38,” “39,” “40,” “41,” “42,” “43,” and “44.”

9. Denies each and every allegation contained the paragraphs or subdivisions of the Complaint designated: “45,” “46,” “47,” and “48,” and respectfully refers all questions of law to this honorable court.

**COUNT TWO: NEGLIGENCE AS TO DEFENDANT ANGEL DIAZ ORITZ**

10. As to the paragraph of the Complaint designated “49”, answering defendant repeats, reiterates and realleges each and every denial heretofore made with respect to paragraphs “1” through “48” inclusive, with the same force and effect as if fully set forth at length herein.

11. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: “50,” “51,” “52,” and “53,” and respectfully refers all questions of law to this honorable court.

**COUNT THREE: VICARIOUS LIABILITY AS TO DEFENDANT  
WALMART TRANSPORTATION, LLC**

12. As to the paragraph of the Complaint designated “54”, answering defendant repeats, reiterates and realleges each and every denial heretofore made with respect to paragraphs “1” through “53” inclusive, with the same force and effect as if fully set forth at length herein.

13. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: “55,” “56,” “57,” “58,” “59,” and “60,” and respectfully refers all questions of law to this honorable court.

**COUNT FOUR: NEGLIGENT HIRING, TRAINING, RETENTION  
AND SUPERVISION AS TO DEFENDANT  
WALMART TRANSPORTATION, LLC**

14. As to the paragraph of the Complaint designated “61”, answering defendant repeats, reiterates and realleges each and every denial heretofore made with respect to paragraphs “1” through “60” inclusive, with the same force and effect as if fully set forth at length herein.

15. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the Complaint designated: “62,” “63,” “64,” “65,” “66,” and “67,” and respectfully refers all questions of law to this honorable court.

**DEMAND FOR RELIEF**

16. Denies each and every allegation contained the paragraphs or subdivisions of the Complaint designated: "68," and "69," and respectfully refers all questions of law to this honorable court.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

17. Any damages which may have been sustained by the plaintiff were contributed to in whole or in part by the culpable conduct of the plaintiff, pursuant to Section 14-A, CPLR.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

18. Any damages which may have been sustained by the plaintiff were contributed to in whole or in part by the culpable conduct of third parties not under the control of answering defendant.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

19. Pursuant to CPLR 4545(c), if it be determined or established that plaintiff has received or with reasonable certainty shall receive the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, and that the same shall be replaced or indemnified, in whole or in part from any collateral source such as insurance (except for life insurance), social security (except for those benefits provided under title XVIII of the Social Security Act), workers' compensation or employee benefit programs (except such collateral source entitled by law to liens against any recovery of the plaintiff), then and in that event answering defendants hereby plead in mitigation of damages the assessment of any such cost or expense as a collateral source in reduction of the amount of the award by such replacement or indemnification, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two year period immediately preceding the accrual of this action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits and as otherwise provided in CPLR 4545(c).

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

20. If the plaintiff was not wearing seat belts at the time of the accident, answering defendants plead the failure to wear same, or to wear same properly, in mitigation of damages.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

21. The injuries and damages alleged, all of which are denied by the answering defendants, were caused by the intervening, interceding and superseding acts of third parties not under the control of answering defendants.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

22. The plaintiff's sole and exclusive remedy is confined and limited to the benefits

and provisions of Article 51 of the Insurance Law of the State of New York.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

23. The Court lacks personal jurisdiction over the answering defendants.

**AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE**

24. The Court lacks jurisdiction over the answering defendants due to improper service of process.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

25. The plaintiff failed to mitigate his damages.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

26. That the action against the answering defendant cannot be prosecuted due to the plaintiffs' failure to name and likewise prosecute an indispensable party to this litigation.

**AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE**

27. Answering defendant is entitled to limitation of liability pursuant to Article 16 of the CPLR.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

28. The Complaint fails to state a cause of action upon which relief may be granted.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

29. If the plaintiff sustained damages as alleged, such damages occurred while the plaintiff was engaged in an activity into which he (or she) entered, knowing the hazard, risk and danger of the activity and he (or she) assumed the risks incidental to and attending the activity.

**AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

30. Defendant asserts Section 15-108 of the General Obligations Law and will ask the Court that the defendant be entitled to a set-off for any settlements, releases or discontinuances.

**AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

31. The defendant was not negligent because they were faced with an emergency situation, not of their own making, and acted as a reasonable prudent person would act in the same emergency.

**AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE**

32. Plaintiff was involved in an activity inherently dangerous.

**AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE**

33. The defendants are not liable to the plaintiff as the plaintiff's actions were the sole proximate cause of the alleged occurrence.

**AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE**

34. The plaintiff's sole and exclusive remedy is confined and limited to the benefits and provisions of Article 51 of the Insurance Law of the State of New York.

**AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE**

35. The occurrence alleged herein was an emergency situation and could not have been prevented by the answering defendants herein.

**AS A BASIS FOR AFFIRMATIVE RELIEF AND AS AND FOR A FIRST CROSS-CLAIM AGAINST CO-DEFENDANT(S), ANGEL DIAZ ORTIZ, and WALMART TRANSPORTATION, LLC ANSWERING DEFENDANT(S) ALLEGES:**

36. If plaintiff(s) sustained injuries and damages as alleged in the Complaint through any fault other than the plaintiff(s)' own fault, then such damages were sustained due to the sole fault of the co-defendant(s), and if plaintiff(s) should obtain and/or recover judgment against the answering defendant(s), then the co-defendant(s) shall be liable pursuant to common law for the full indemnification of the answering defendant(s).

In view of the foregoing, the answering defendant(s) is/are entitled to complete common law indemnification for all loss, damage, cost or expense, including, without limitation, judgments, attorneys' fees, court costs and the cost of appellate proceedings from the co-defendants.

**AS A BASIS FOR AFFIRMATIVE RELIEF AND AS AND FOR A SECOND CROSS-CLAIM AGAINST CO-DEFENDANT(S), ANGEL DIAZ ORTIZ, and WALMART TRANSPORTATION, LLC ANSWERING DEFENDANT(S) ALLEGES:**

37. If plaintiff(s) was/were caused to sustain injuries and damages at the time and place set forth in plaintiff(s)' Complaint through any carelessness, recklessness and negligence other

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