

<b>Mcdonald v Moss</b>
2017 NY Slip Op 33353(U)
September 29, 2017
Supreme Court, Dutchess County
Docket Number: Index No. 50743/2016
Judge: James D. Pagonis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
RENEE MCDONALD,

Plaintiff,

-against-

AMANDA H. MOSS and JAMES B. MOSS,

Defendants.

-----X

DECISION AND ORDER

Index No. 50743/2016

HON. JAMES D. PAGONES, A.J.S.C.

Plaintiff moves for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability. Defendants cross-move for an order, pursuant to CPLR 3126, striking the plaintiff's complaint.

The following papers were read:	
Notice of Motion-Affidavit-Exhibits A-D	1-6
Memorandum in Support	7
Notice of Cross-Motion-Affirmation-Exhibits A-F	8-15
Affirmation	16
Supporting Papers	17
Affirmation in Reply	18

By way of background, this is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident which occurred on May 30, 2013. The rear-end collision took place on Noxon Road and the intersection of Robinson Lane in the Town of Lagrange, New York.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (see *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponents of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v. City of New York.*, 49 NY2d 557 [1980]).

In support of her motion, plaintiff offers her own affidavit. Plaintiff states that while she was at a complete stop at a red traffic light at the intersection of Noxon Road and Robinson Lane, another vehicle driven by defendant Amanda Moss, and registered and owned by defendant James Moss, rear-ended her vehicle. The law is clear that 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 non-negligent explanation for the collision (see *Arias v. Rosario*, 52 AD3d 551 [2<sup>nd</sup> Dept 2008]). Here, the plaintiff's affidavit establishes, *prima facie*, that

defendant Amanda Moss was solely responsible for the happening of the accident (see *Cruz v. Lise*, 123 AD3d 514 [1<sup>st</sup> Dept 2014]; *Hakakian v. McCabe*, 38 AD3d 493 [2<sup>nd</sup> Dept 2007]). The Court would note that it did not consider the MV-104A, Police Accident Report, as it is uncertified and therefore inadmissable (see *Nationwide Gen. Ins. Co. v. Bates*, 130 AD3d 795 [2<sup>nd</sup> Dept 2015]). Nor did the Court consider the unsigned deposition transcript of Amanda Moss submitted in support of the plaintiff's motion, as plaintiff failed to establish compliance with CPLR 3116(a).

Since plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]), defendants must show that genuine triable issues of material fact exist in order to defeat plaintiff's motion (*id.*).

In opposition and in support of their cross-motion, defendants fail to come forward with any evidence to rebut the inference that defendant Amanda Moss was negligent. The affirmation of counsel, who has no personal knowledge of the facts, is insufficient, as a matter of law, to defeat summary judgment (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *9394 LLC v. Farris*, 10 AD3d 708 [2<sup>nd</sup> Dept 2004] *leave to appeal denied by* 4 NY3d 705). Accordingly, defendants have failed to raise an issue of fact as to the movant's negligence (see *Nozine v. Anurag*, 38 AD3d 631 [2<sup>nd</sup> Dept 2007]; *Niyazov v. Bradford*, 13

AD3d 501 [2<sup>nd</sup> Dept 2004]).

The Court must now address the defendants' cross-motion which seeks to strike plaintiff's complaint based upon her alleged failure to disclose information with respect to a prior lawsuit for personal injury. It is well settled that an action should be resolved on the merits wherever possible, and the harsh remedy of the striking of a pleading should not be employed without a showing of a deliberate or willful refusal to disclose (see *Cruzatti v. St. Mary's Hosp.*, 193 AD2d 579 [2<sup>nd</sup> Dept 1993]). Here, the defendants make no such showing. However, the Court recognizes that defendants' counsel has demanded and is entitled to information concerning the plaintiff's October 14, 2010 accident. Plaintiff is directed to provide, within thirty (30) days from the date of this decision and order, the non-privileged portion of the plaintiff's attorney's file relating to the October 2010 accident; including the deposition transcripts, medical records and a copy of the release.

Based upon the foregoing, plaintiff's motion for summary judgment is granted in its entirety. This action shall proceed to trial solely on the issue of damages. Defendants' cross-motion is granted to the extent delineated above. The parties are directed to appear for a Preliminary Conference on October 23, 2017 at 9:30 a.m. Adjournments are only granted with leave

of the Court.

The foregoing constitutes the decision and order of this Court. This decision and order has been filed electronically.

Dated: September 29, 2017  
Poughkeepsie, New York

ENTER

  
\_\_\_\_\_  
HON. JAMES D. PAGONES, A.J.S.C.

TO: MICHAEL A. FAKHOURY, ESQ.  
Attorney for Plaintiff  
725 Route 9  
Fishkill, New York 12524  
[Fakhourylaw@yahoo.com](mailto:Fakhourylaw@yahoo.com)

WILLIAM S. BADURA, ESQ.  
KORNFELD, REW, NEWMAN & SIMEONE, ESQS.  
Attorneys for Defendants  
46 Washington venue  
Suffern, New York 10901  
[wsb@krne.com](mailto:wsb@krne.com)

092817 decision&order