

<b>Rivera v Almontaser</b>
2019 NY Slip Op 34871(U)
October 18, 2019
Supreme Court, Kings County
Docket Number: Index No. 519476/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18<sup>th</sup> day of October, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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MARIA E. RIVERA,

*Plaintiff,*

Index No.: 519476/2018

- against -

DECISION AND ORDER

NASSER ALMONTASER, the person intended as the driver and NASSER ALMONTASER, the person intended as the owner of the vehicle,

*Defendants.*

Motions Sequence #2

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**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3, _____
Reply Affidavits (Affirmations).....	4, _____

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on July 21, 2018. Plaintiff, Maria Rivera (hereinafter “the Plaintiff”) alleges in her Complaint that on that date she suffered personal injuries after she was struck, by a motor vehicle, while a pedestrian crossing Smith Street at its intersection with Douglass Street, County of Kings, State of New York. The Plaintiff alleges that she was struck by a vehicle owned by Defendant Nasser Almontaser (“Defendant Owner”) and operated by his grandson Defendant Nasser Almontaser (“Defendant Driver”) (collectively hereinafter “the Defendants”).

The Plaintiff now cross-moves<sup>1</sup> (motion sequence #2) for an order pursuant to CPLR 3212, granting partial summary judgment on the issue of liability. The Plaintiff argues that the Defendants are liable for the accident since the Plaintiff was walking in the crosswalk of the intersection when Defendant Driver allegedly made a right turn and struck the Plaintiff. The Plaintiff argues that the Defendants have violated Vehicle and Traffic Law §§1146, 1151 and 1163, since the vehicle allegedly struck the Plaintiff while she was a pedestrian with the right of way. The Plaintiff also alleges that the Defendants were in violation of VTL 501(2)(vi), since the operator of the vehicle was not of legal age to drive. The Defendants oppose the motion. The Defendants argue that the motion should be denied as there are triable issues of fact regarding whether the Plaintiff was paying proper attention when she crossed the intersection at issue.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2<sup>nd</sup> Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2<sup>nd</sup> Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> Dept, 1989].

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<sup>1</sup> The Defendants’ motion (motion sequence #1) was withdrawn on March 7, 2019.

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2<sup>nd</sup> Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994]. What is more, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 A.D.3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2<sup>nd</sup> Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendants’ actions on the day in question were a proximate cause of the accident, as a matter of law. In general, “[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law.” *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124, 125 [2<sup>nd</sup> Dept. 2012]. Vehicle and Traffic Law §1146(a) provides that “[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.” In support of the Plaintiff’s motion, the Plaintiff relies on her own affidavit, a video of the accident, still images of the scene and accident and the Police Accident Report. The Plaintiff contends that she looked both ways, entered the cross walk and continued to look for oncoming vehicles as she proceeded and that Defendant Driver failed to yield the right of way.

Even assuming, *arguendo*, that the Police Accident Report attached to the Plaintiffs’ motion is not admissible, given that the Police Officer did not witness the alleged incident (*see Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2<sup>nd</sup> Dept, 2014]), the affidavit of the

Plaintiff is supported by the video and images of the scene, and is thereby sufficient for the Plaintiff to establish a *prima facie* showing.

The Police Report only indicates that there was a vehicle that collided with a pedestrian. No statements are reflected therein. *See Martinez v. Allen*, 163 A.D.3d 951, 82 N.Y.S.3d 130 [2<sup>nd</sup> Dept, 2018].

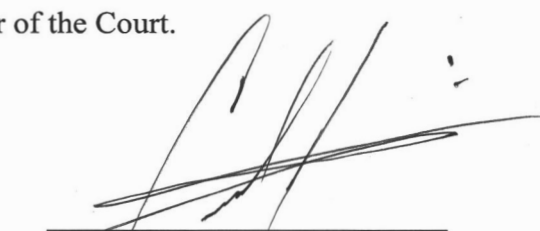
As indicated, the Plaintiff has established Defendants' negligence and her entitlement to partial summary judgment on the issue of liability. In opposition to the motion, the Defendants have failed to raise a material issue of fact. The Defendant Driver does not challenge the veracity of the video. In fact, Defendant Driver makes no mention of the video. Further, Defendant Driver's recollection of the events is belied by the images and video provided by the Plaintiff. As such Defendant Driver was the sole proximate cause of the accident. *See Moreira v. Travel & Transp., Inc.*, 106 A.D. 3d 965, 966 N.Y.S. 2d 150 [2<sup>nd</sup> Dept, 2013].

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion (motion seq. #2) for summary judgment on the issue of liability is granted. The matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
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Carl J. Landicino  
J.S.C.

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KINGS COUNTY CLERK  
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