

Torregrosa v Massery
2019 NY Slip Op 34898(U)
August 20, 2019
Supreme Court, Kings County
Docket Number: Index No. 513045/2017
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 20th day of August, 2019.

P R E S E N T: HON. CARL J. LANDICINO,
-----X

ANA M. TORREGROSA,
Plaintiff,

Index No.:513045/2017

DECISION AND ORDER

- against -

Motions Sequence #1

RALPH ALBERT MASSERY and MORRIS MASSERY,
Defendants.

-----X
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, _____

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KINGS COUNTY CLERK
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Upon submission and review of the foregoing papers, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on January 23, 2017. Plaintiff Ana M. Torregrosa (hereinafter “the Plaintiff”) alleges in her Complaint that on that date she suffered personal injuries after the vehicle she was operating collided with a vehicle owned by Defendant Morris Massery (“Defendant Morris”) and operated by Defendant Ralph Albert Massery (“Defendant Ralph” or “Defendant Driver”) (collectively “Defendants”). The Plaintiff further alleges in her Verified Bill of Particulars that the motor vehicle collision occurred near Avenue S and East 8th Street in Brooklyn, New York. The Plaintiff provides an Affidavit dated October 17, 2018 (See Plaintiff’s Motion, Exhibit “B”) and states that at the time of the accident she was traveling westbound on Avenue U through the intersection of Avenue S and East 8th Street, when the Defendant Vehicle made a left turn and struck her vehicle on the left front bumper of her vehicle¹.

¹Although other information and representations discuss the accident as occurring on Ave S at the intersection of East 8th Street, Plaintiff’s affidavit references Avenue U as well. There is

The Plaintiff moves (motion sequence #1) for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability. Specifically, the Plaintiff argues that summary judgment should be granted given that she made a *prima facie* showing that she had a steady green light for approximately one block prior to reaching the intersection, which remained green. Plaintiff contends that the Defendant Driver, turned left in front of her and failed to yield the right of way in violation of VTL §1141. The Defendants oppose the motion and contend that the Plaintiff's application for summary judgment should be denied as there is an issue of fact regarding the negligence of the Plaintiff.

“Summary 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 [2nd 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 [2nd 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 [2nd Dept, 1989]. 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

no explanation for this inconsistency.

166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the instant motion, the Court finds that insufficient evidence has been presented to establish, *prima facie*, that the Defendants breached a duty to stop or yield the right of way to the Plaintiff. See *Jaber v. Todd*, 171 A.D.3d 896, 98 N.Y.S.3d 134 [2nd Dept, 2019], *Matias v. Bello*, 165 A.D.3d 642, 84 N.Y.S.3d 551 [2nd Dept, 2018], *Hurst v Belomme*, 142 A.D.3d 642, 36 N.Y.S.3d 735 [2nd Dept, 2016], *Katanov v. County of Nassau*, 91 A.D.3d 723, 936 N.Y.S.2d 285 [2nd Dept, 2012] and *NYS Dominguez v. CCM Computers, Inc.*, 74 A.D.3d 728, 729, 902 N.Y.S.2d 163, 164 [2nd Dept, 2010].

In support of her application, the Plaintiff relies on the Affidavit of the Plaintiff and a Police Accident Report. The Police Accident Report attached to the Plaintiff's motion is admittedly inadmissible, given that the Police Officer did not witness the alleged incident and the report is not certified. See *Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]. The Affidavit of the Plaintiff is insufficient for the Plaintiff to establish a *prima facie* showing. "A plaintiff moving for summary judgment on a cause of action asserted in a complaint generally has the burden of establishing, *prima facie*, 'all of the essential elements of the cause of action.'" *Poon v. Nisanov*, 162 A.D.3d 804, 806, 79 N.Y.S.3d 227, 229–30 [2nd Dept, 2008], quoting *Nunez v. Chase Manhattan Bank*, 155 A.D.3d 641, 643, 63 N.Y.S.3d 481, 484 [2nd Dept, 2017]. Plaintiff is unclear as to what occurred. In short, there was no clear evidence presented by the Plaintiff in her moving papers that the Defendant was negligent and a proximate cause of the alleged accident². See *Howell v. RS Cab Corp.*, 63 A.D.3d 1002, 884 N.Y.S.2d 426 (2d Dept. 2009), *Martinez v. Mizhuiri Transp., Inc.*, 69 A.D.3d 684, 891 N.Y.S.2d 652 (2d Dept. 2010).

As a result, the Plaintiff failed to meet her *prima facie* burden. Accordingly, we need not address the sufficiency of the Defendant's opposition papers. See *Schacker v. Cty. of Orange*, 33

²The Court notes that the Plaintiff did not provide either her or Defendant Driver's deposition transcript. The Defendants did provide deposition testimony.

A.D.3d 903, 904, 822 N.Y.S.2d 777, 778 [2nd Dept, 2006]. Even assuming that Plaintiff had made that *prima facie* showing, the Defendant raises a material issue of fact in relation to Plaintiff being the sole proximate cause of the accident. Plaintiff stated, during her deposition, that she saw the Defendant's vehicle prior to entering the intersection and that she did witness the left turn signal blinking on Defendant's vehicle. (Defendants' Exhibit "C", excerpts of Plaintiff's deposition testimony) It is true that "[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 [2nd Dept, 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]. However, the deposition transcripts of the Plaintiff indicate that Plaintiff was aware of and saw the Defendants' vehicle entering the intersection before she did. Based upon this testimony there is an issue of fact as to whether the Plaintiff proceeded with reasonable care. As such, a jury could determine that the Plaintiff was the sole proximate cause of the accident.

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

Plaintiff's Motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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