

Mickens v Cheema
2021 NY Slip Op 32728(U)
December 7, 2021
Supreme Court, Kings County
Docket Number: 515156/2019
Judge: Carl J. Landicino
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.

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 7th day of December, 2021.

0

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
KASON MICKENS,

Index No. 515156/2019

Plaintiff,

-against-

DECISION AND ORDER

MOHAMMAD A. CHEEMA, IFTIKHAR AHMED,
MARIE E. RICHE, and Y&M TRANSIT CORP,

Motion Sequence #1

Defendants.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	16-24,
Opposing Affidavits (Affirmations).....	29,
Reply Affidavits (Affirmations)	30

KINGS COUNTY CLERK
FILED
2021 DEC 16 AM 9:22

After a review of the papers and oral argument, the Court finds as follows:

The instant action is a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on April 17, 2018. The Plaintiff, Kason Mickens (hereinafter the “Plaintiff”), alleges that he was a passenger in a vehicle operated by Defendant Mohammad A. Cheema and owned by Iftikhar Ahmed (hereinafter the “Cheema Defendants”) when that vehicle was in a collision with a bus operated by Defendant Marie E. Richie and owned by Defendant Y&M Transit Corp. (hereinafter the “Bus Defendants”). The collision allegedly occurred at the intersection of Hegeman Avenue and Wyona Street in Brooklyn, New York.

The Plaintiff now moves (motions sequence #3) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability, striking Defendants' affirmative defenses alleging culpable conduct, and proceeding to trial on the issue of damages. The Plaintiff contends that summary judgment should be granted because the Plaintiff is an innocent passenger. Specifically, the Plaintiff contends that he was a passenger in the Cheema Defendants' vehicle and did nothing to interfere with the operation of either vehicle. The Plaintiff further contends that while the Cheema Defendants' vehicle briefly stopped at the intersection at issue, the Cheema Defendants' vehicle entered the intersection when it was unsafe to do so. What is more, the Plaintiff also contends that the Bus Defendants were also a proximate cause of the collision as the bus was travelling at a high rate of speed at the time of the accident.

The Cheema Defendants oppose the motion, arguing that the motion is premature. The Cheema Defendants contend that none of the parties have been deposed and that depositions are necessary to determine how the collision occurred. Additionally, the Cheema Defendants contend that a material issue of fact has been raised and the motion must be denied. The Bus Defendants do not oppose the motion.

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 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med.*

Ctr., 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[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 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d 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 by the Plaintiff to establish, *prima facie*, that the Plaintiff was a non-negligent party free from comparative fault, an innocent passenger. In support of his application, the Plaintiff relies primarily on the Plaintiff's written statement, a Police Report and a video of the collision. The Police Accident Report attached to the Plaintiffs' motion is not admissible, as it is not certified,

and any statements/admissions therein are therefore inadmissible. See *Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. The Cheema Defendants raise this deficiency, and although the Bus Defendants are silent on the issue, the report does not contain an admission or other admissible material fact. However, the written statement of the Plaintiff is sufficient for the Plaintiff to establish a *prima facie* showing.¹ See *Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018].

In his statement, the Plaintiff states that “I was sitting in rear passenger seat of the 2009 Ford at the time of the accident.” He further states that “I did not do anything to affect the operation of either vehicle at the time of the accident.” The Plaintiff also states that “[t]he 2009 Ford did stop briefly but entered the intersection when it was unsafe to do so and caused and contributed to the accident.” Finally, the Plaintiff states that “[t]he 2013 Thomas school bus was traveling at a very high rate of speed at the time of the accident and also caused and contributed to the accident.” (See Plaintiff’s motion, Exhibit “E”). This testimony, together with the video, serves to make a *prima facie* showing that Defendant Cheema was negligent and a proximate cause of the accident. Defendant Cheema had an obligation to proceed only when it was safe to do so. Although he stopped, he failed to yield and proceed when it was unsafe to do so. See VTL 1146. However, the video does not, as a matter of law, support the Plaintiff’s otherwise speculative and conclusory statements as to his contention that the bus was speeding. See *Youthkins v. Cascio*, 298 A.D.2d 386, 387, 751 N.Y.S.2d 216, 217 [2d Dept 2002], *aff’d*, 99 N.Y.2d 638, 790 N.E.2d 264 [2003]. The Plaintiff has failed to make a *prima facie* showing as to fault on the part of the bus driver.

¹ Although the Plaintiff’s purported affidavit does not indicate that it was sworn, the Defendants did not raise this issue in their Affirmation in Opposition. As a result, that objection has been waived. See *Lefkowitz v. Kelly*, 170 AD3d 1148, 1150, 96 N.Y.S.3d 642, 645 [2d Dept 2019].

“The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers.” *Romain v. City of New York*, 177 AD3d 590, 591, 112 N.Y.S.3d 162, 164 [2d Dept 2019]. None of the Defendants has raised an issue regarding Plaintiff’s freedom from comparative negligence.

In opposition to the motion, the Defendants have failed to raise a material issue of fact that would prevent this Court from granting the Plaintiff’s motion. As stated above, the Bus Defendants do not oppose the motion. As to the opposition of the Cheema Defendants, it should be noted that the “motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. Defendant driver Cheema, who was driving the vehicle that Plaintiff was in, is silent on the issue. Moreover, “[i]n opposition, the defendant, who did not submit his own affidavit or an affidavit from a person with personal knowledge of the facts, failed to raise a triable issue of fact.” *Maliakel v. Morio*, 185 AD3d 1018, 1019, 129 N.Y.S.3d 99, 101 [2d Dept 2020]. Accordingly, the Plaintiff’s motion is granted, to the extent that Plaintiff is found to be an innocent passenger free from liability, Defendant Cheema was negligent and a proximate cause of the accident and the comparative negligence of the Defendant Bus driver, Richie, if any, has not been determined.

The Court also finds that the Plaintiff’s application regarding striking the Bus Defendants’ and the Cheema Defendants’ affirmative defenses of culpable conduct on the part of the Plaintiff should also be granted. There were no facts that support the Defendants’ affirmative defenses alleging culpable conduct on the part of the Plaintiff based upon the admissible evidence proffered.

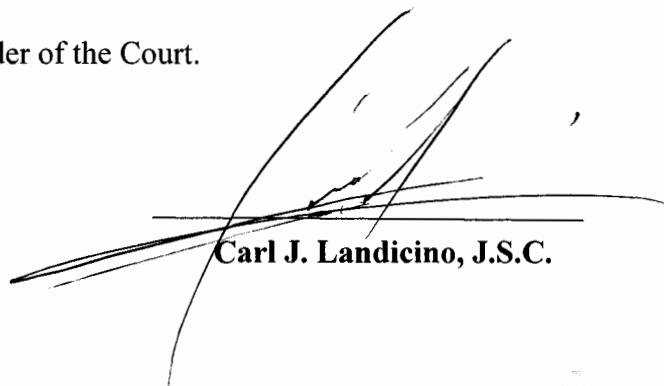
See Sapienza v. Harrison, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021]. No party with knowledge alleges culpable conduct on the part of the Plaintiff.

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

The Plaintiff's Summary Judgment motion (motion sequence #1) is granted to the extent that the Plaintiff is determined to be an innocent passenger free from liability and the Defendants' affirmative defenses of culpable conduct on the part of the Plaintiff are dismissed. Defendant Cheema was negligent and a proximate cause of the accident, and the issue of comparative negligence on the part of the Defendant bus driver, Richie, if any, has not been determined.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2021 DEC 16 AM 9:29