Tang v Buirkle
2021 NY Slip Op 32772(U)
November 29, 2021
Supreme Court, Kings County
Docket Number: Index No. 525984/2020
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 29th day of November, 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

---X

SHAN TANG,

Plaintiff,

-against-

MICHAEL F BUIRKLE and DANIEL P RASILE,

Defendant.

---X

Index No. 525984/2020

DECISION AND ORDER

Motion Sequence #2

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 21-27,
Opposing Affidavits (Affirmations).. 32, 33,
Reply Affidavits (Affirmations) 34

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

The instant action concerns a claim for personal injuries arising from an alleged motor vehicle collision that occurred on October 9, 2019. At the time of the occurrence, Plaintiff Shan Tang (hereinafter the "Plaintiff"), was operating her vehicle when it was purportedly struck in the rear by a vehicle operated by Defendant Michael F. Buirkle and owned by Defendant Daniel P. Rasile (hereinafter referred to individually or collectively as the "Defendants"). The incident allegedly occurred on the Belt Parkway in Brooklyn, New York.

The Plaintiff moves (motions sequence #2) for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability and proceeding to trial on the issue of damages. The Plaintiff contends that summary judgment should be granted because the Defendants' vehicle was driven in a negligent manner and was the sole proximate cause of the collision. The Defendants oppose the motion, arguing that are issues of fact raised by the Plaintiff's affidavit and that the motion is premature.

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 Defendants' vehicle hit the Plaintiffs' vehicle in the rear. In support of his application, the Plaintiff relies primarily on the affidavit of the Plaintiff and a Police Accident Report. As an initial matter, any statements (admissions) made in the Police Accident Report are not admissible as the report is not certified. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. In her affidavit, the Plaintiff states that "I was traveling west bound in the left lane near Fort Hamilton on Belt Parkway, when a vehicle driven by defendant, Michael F. Buirkle and owned by defendant Daniel P. Rasile, struck my vehicle in the rear." The Plaintiff thereafter states that "[a]t the time of impact I was slowing, it was rainy and the road was wet." (See Plaintiff's Motion, Exhibit "B", Paragraphs 4 and 5). This statement is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against 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." *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007*]; see also Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017].

In opposition to the motion, the Defendant has failed to raise a material issue of fact that would prevent this Court from granting the motion. First, 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]. 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]. Plaintiff requested as relief that summary judgment should be granted and the matter should be set down for an inquest on damages. This request is tantamount to relief seeking dismissal of affirmative defenses in relation to the Plaintiff's comparative negligence, in that the Court could not proceed to trial solely on the issue of damages unless the issue of the Plaintiff's freedom from comparative fault was resolved. Plaintiff's testimony together with the Defendants' silence is sufficient to find that Defendant driver was negligent and the sole proximate cause of the accident. See *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018] and *Poon v. Nisanov*, 162 AD3d 804, 805, 79 N.Y.S.3d 227, 229 [2d Dept 2018]. Accordingly, the Plaintiff's motion for partial summary judgment on the issue of liability is granted and the matter will proceed on the issue of damages.

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

Plaintiff's motion (motion sequence #1 #2) for partial summary judgment on the issue of liability is granted and Defendants' affirmative defenses relating to Plaintiff's comparative fault are dismissed. The matter will proceed on the issue of damages only.

The foregoing constitutes the Decision and Order of the Court.

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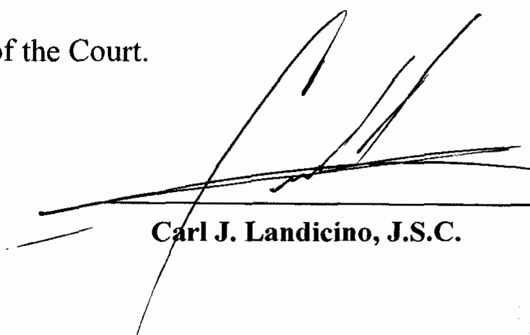

Carl J. Landicino, J.S.C.

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