

**King v Shitesl**

2021 NY Slip Op 34259(U)

November 29, 2021

Supreme Court, Kings County

Docket Number: Index No. 516892/2019

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 29<sup>th</sup> day of November 2021.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
TOMIKA D. KING,

*Plaintiff.*

- against -

ARI SHITESL, JACKELINE SANTIAGO  
and HERBERT GAMBLE,

*Defendants.*

-----X

Index No.: 516892/2019

DECISION AND ORDER

Motion Sequence #1

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 .....	20-28,
Opposing Affidavits (Affirmations).....	31-33, 36-38,
Reply Affidavits (Affirmations) .....	34, 41

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

This action concerns a motor vehicle accident that purportedly occurred on September 21, 2018. The Plaintiff Tomika D. King (hereinafter "the Plaintiff") claims that on that day she suffered personal injuries when her vehicle was involved in a collision with a vehicle owned and operated by Defendant, Ari Shitesl (hereinafter "Defendant Shitesl"), a vehicle owned and operated by Defendant Jackeline Santiago (hereinafter "Defendant Santiago"), and a vehicle owned and operated by Defendant Herbert Gamble (hereinafter "Defendant Gamble"). The

collision allegedly occurred on the Palisades Interstate Parkway North in the town of Stony Point, in the State of New York.

Defendant Shitesl now moves (motion sequence #1), for an order pursuant to CPLR 3212, granting him summary judgment and dismissing the summons and complaint and any and all cross-claims against him. Defendant Shitesl contends that his vehicle was the lead vehicle. Defendant Shitesl contends that he was first struck by the vehicle operated by Plaintiff who was caused to strike Defendant Shitesl's vehicle after Plaintiff's vehicle was rear ended by Defendant Santiago's vehicle.

Defendant Santiago opposes the motion and argues that it should be denied. Defendant Santiago contends that the motion should be denied as Defendant Shitesl relies on deposition transcripts that were inadmissible because they were not signed. Defendant Santiago also contends that Defendant Shitesl cannot rely on the Police Accident Report that he proffered as it is not certified and that the statements therein are therefore inadmissible. Furthermore, Defendant Santiago argues that the motion should be denied as there are material issues of fact as to whether Defendant Shitesl was negligent and a proximate cause of this multi-vehicle chain collision.

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.*

*Cr.*, 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 A.D.3d 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 motion by Defendant Shitesl (motion sequence #1), the Court finds that Defendant Shitesl has failed to meet his *prima facie* burden. In support of his motion, Defendant Shitesl relies on his own deposition, the deposition of the Plaintiff, the deposition of Defendant Santiago, the deposition of Defendant Gamble and a Police Accident Report. As an initial matter, the depositions of the Plaintiff, Defendant Santiago and Defendant Gamble are

inadmissible given that Defendant Shitesl “failed to show that the unsigned deposition transcripts of various witnesses [he] submitted in support of [his] [motion] had previously been forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a).” *Pina v. Flik Int’l Corp.*, 25 AD3d 772, 773, 808 N.Y.S.2d 752, 753 [2d Dept 2006]; see also *Franzese v. Tanger Factory Outlet Centers, Inc.*, 88 AD3d 763, 763, 930 N.Y.S.2d 900 [2d Dept 2011]. What is more the statements, constituting purported admissions of the parties, contained in the Police Accident Report are not admissible since the report is not certified. See *Yassin v. Blackman*, 188 AD3d 62, 66, 131 N.Y.S.3d 53, 56 [2d Dept 2020]. However, the deposition of Defendant Shitesl is admissible since, although it is unsigned, it is certified. “The unsigned but certified deposition of the defendant was admissible under CPLR 3116(a), since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent.” *David v. Chong Sun Lee*, 106 AD3d 1044, 1045, 967 N.Y.S.2d 80, 82 [2d Dept 2013].

Although his deposition is admissible, the Court finds that the information provided in the deposition is unclear and at times seemingly confused. Defendant Shitesl’s testimony during his deposition is insufficient for Defendant Shitesl to meet his *prima facie* burden to establish that he was free from liability in that he was not negligent and not a proximate cause of this multi-vehicle chain collision.

Defendant Shitesl apparently fails to have a clear recollection of how the initial collision took place.

**Question** That is my question to you. Did you actually see the vehicle that supposedly cut in front of the vehicle in the left lane or did you get that information from somewhere else?

**Answer** I just saw him flying by my left side. I didn’t see him before. I just saw him passing by my left side very fast.

**Question** What did you see that vehicle actually do when you first saw it and then when it progressed, what did it do?

**Answer** It do nothing. It just pass by and then I look in the mirror and I saw the vehicle spinning, the vehicle behind.

**Question** Could you tell if the vehicle behind the vehicle you saw spinning struck that vehicle before the spinning vehicle hit you?

**Answer** No. I don't know.

(See Defendant Shitesl's Motion, Exhibit D, Pages 8-10)

Defendant Shitesl also appears unclear about the initial impact to his vehicle.

**Question** And at some point after that vehicle is spinning you feel an impact, correct?

**Answer** Yes. I saw it happening in my mirror.

**Question** You saw that vehicle strike your vehicle, the spinning vehicle?

**Answer** I saw the vehicle spinning. That vehicle hit that vehicle. That vehicle was hit. If it hit the vehicle, the spinning vehicle before or after, I don't know.

When asked where his vehicle was impacted, Defendant Shitesl's answer is unclear.

**Question** What part of your vehicle was hit, the back, the side?

**Answer** The back. Yeah. The back driver side.

**Question** So it was not the bumper, it was the side what they kind of call the quarter panel over the wheel or something else?

**Answer** The whole back was messed up. I don't know exactly it's the middle, the center. It was more to the driver side because it was hit. The whole thing. The back, the whole back to the driver side.

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When asked how quickly the event took place, Defendant Shitesl acknowledged that it happened very quickly.

**Question** When that other vehicle impacted with yours, had you slowed down or were you going about the same speed?

**Answer** There was no time to slow down. It took seconds.

**Question** Did you ever honk your horn before the incident happened?

**Answer** If I honk my horn?

**Question** Yeah. Did you honk your horn before the incident?

**Answer** No.

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Defendant Shitesl also seemed unable to confirm the number of impacts to his vehicle.

**Question** Now, before you observed that vehicle in the back spinning did you hear a sound of an impact?

**Answer** No.

**Question** Now, before you observed the vehicle in the back spinning did you hear a honking horn or screeching tires?

**Answer** I don't recall. I don't remember.

**Question** How many impacts did you feel to your vehicle?

**Answer** If I remember, one, but maybe there was -- I remember one. I don't know. You know, I don't know. I wasn't counting impacts. I just know I got hit.

**Question** How many impacts did you hear?

**Answer** I don't recall. I don't remember. One for sure but I don't know.

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This testimony is insufficient for Defendant Shitesl to meet his *prima facie* burden regarding whether he was free from comparative fault. His testimony does not sufficiently describe how the collision occurred. The Court is unable to make a finding based upon the admissible evidence Defendant Shitesl has provided.

Since Defendant Shitesl failed to meet his *prima facie* burden, the court does not need to consider the sufficiency of the Plaintiff's opposition papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 A.D.3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

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

Defendant Shitesl's motion for summary judgment (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
 Carl J. Landicino, J.S.C.