

**Alston v FedEx**

2021 NY Slip Op 34267(U)

October 22, 2021

Supreme Court, Kings County

Docket Number: Index No. 509856/2020

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 22nd day of October, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----x

WILFRED ALSTON,

Index No.: 509856/2020

*Plaintiff,*

*-against-*

DECISION AND ORDER

FEDEX and CHRISTOPHER BANKS,

Motion Sequence #1

*Defendants.*

-----x

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

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	10-15,
Opposing Affidavits (Affirmations).....	21-26,
Reply Affidavits (Affirmations) .....	27,
Memorandum of Law .....	20,

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

This lawsuit arises out of a motor vehicle accident which allegedly occurred on October 25, 2019. Plaintiff, Wilfred Alston (hereinafter the "Plaintiff") alleges in his Complaint that he suffered personal injuries when the vehicle owned by Defendant FedEx and operated by Defendant Christopher Banks (hereinafter the "Defendant") reversed down a hill and struck Plaintiff's parked vehicle. The collision apparently occurred at the intersection of McDonald Avenue, at or near its intersection with Seelcy Street in Brooklyn, New York.

The Plaintiff now moves (Motion Sequence #1) for an order pursuant to CPLR 3212 granting partial summary judgment as against the Defendants on the issue of liability. The Plaintiff relies on his

affidavit and a certified Police Report to establish that the Plaintiff was not liable for the accident at issue and that the Defendants were negligent and the sole proximate cause of the accident. The Plaintiff also makes an application for an order pursuant to CPLR 3211(b) striking defendants' affirmative defenses of negligence, culpable conduct, comparative negligence, contributory negligence and assumption of risk.

The Defendants oppose the motion and contend that it should be denied as the Plaintiff has not met his *prima facie* burden. The Defendants further argue, in the alternative, that there are questions of fact as to the culpable conduct of the Plaintiff. Specifically, the Defendants contend that the affidavit of the Defendant driver Christopher Banks and the first Police Report (a second was submitted by the Plaintiff) support the position that the Plaintiff was not in his vehicle when the incident occurred. The Defendants also contend that the motion should be denied as premature.

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.” *Kalivas v. Kirchoff*, 14 AD3d 493 [2d 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 [2d 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 [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]; see also *Tsyganush v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]. 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.” *Tsyganush 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 to establish, *prima facie*, that Defendant driver’s actions on the day in question were negligent and the sole proximate cause of the accident. In support of the Plaintiff’s motion, the Plaintiff relies on his own affidavit, and a certified Police Accident Report. In his affidavit, the Plaintiff stated that “[p]rior to the accident, I legally parked my vehicle on McDonald Avenue, Brooklyn, New York.” The Plaintiff thereafter stated that “[p]rior to the accident, Defendants’ Fedex and Christopher Banks, vehicle stopped on McDonald Avenue, Brooklyn, New York, and Defendant, Christopher Banks, exited said vehicle.” The Plaintiff stated that “[s]oon thereafter, Defendants’ vehicle reversed down a hill on McDonald Avenue, Brooklyn, New York and struck my stationary and parked vehicle.” The Plaintiff also stated that “[a]s a result of the accident, my body was violently jolted and thrown inside my vehicle.” (See Plaintiff’s Motion, Exhibit D, Paragraphs 6 through 9). The certified Police Accident Report indicates that “(Driver of Vehicle 1) states he was making package delivery when his truck that was in parked position unattended reversed down the hill hitting pedestrian on the leg and colliding into vehicle 2 that was parked at the location behind vehicle 1.” This statement in the report is admissible because the report is certified, and the statement constitutes an admission. See *Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55

[2d Dept 2020]. This evidence is sufficient to meet the Plaintiff's *prima facie* burden as "[a] plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1033, 83 N.Y.S.3d 74, 75 [2d Dept 2018]. "When a driver fails to secure an unattended vehicle sufficiently to prevent it from starting to move on its own, the driver is negligent." *Franco v. City of New York*, 168 AD3d 543, 544, 90 N.Y.S.3d 523 [1st Dept 2019]. In *Schiffer v. Sunrise Removal*, the Court held that Sunrise, as the owner of the vehicle, and McCallum, as the operator of the vehicle, had a duty to park and secure the unattended truck so that it would "not start up except by the intervention of some external cause not to be anticipated or guarded against." *Schiffer v. Sunrise Removal, Inc.*, 62 AD3d 776, 777, 879 N.Y.S.2d 518 [2d Dept 2009], quoting *Maloney v. Kaplan*, 233 N.Y. 426, 428, 135 N.E. 838, 839 [1922].

In opposition, the Defendants have failed to raise a material issue of fact, that would prevent the Court from granting the Plaintiff partial summary judgment on the issue of liability. As an initial matter "the plaintiff's 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]. What is more, the Defendants have not rebutted the Plaintiff's showing of negligence on the part of the Defendants. The Defendants contend that the Plaintiff's affidavit is insufficient to meet his *prima facie* burden and there are issues of fact regarding whether the Plaintiff was struck while he was inside his vehicle or outside of his vehicle. In his affidavit Defendant Christopher Banks stated that "[a]fter I parked, I observed a male, who I now know to be the Plaintiff in this matter, standing on the sidewalk outside of his truck." He then stated that "the FedEx truck began to roll backward." Defendant Banks also stated that "[t]he FedEx truck came into contact with Plaintiff's vehicle." Aside from acknowledging his

own negligence, Defendant Banks never states where the Plaintiff was located upon impact. It is not even made clear by the Defendant whether this issue is even material to this application. This arguably relates to the issue of damages. The Court has made no determination on the issue of damages.

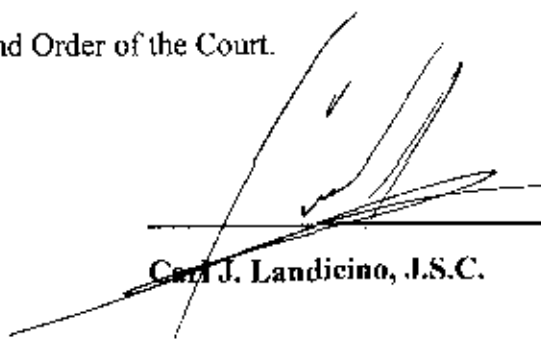
The Court also finds that the Plaintiff's application regarding striking the Defendants' affirmative defenses of negligence, culpable conduct, comparative negligence, contributory negligence and assumption of risk is granted. *See Sapienza v. Harrison*, 191 AD3d 1028, 1029, 142 N.Y.S.3d 584 [2d Dept 2021]. No party with knowledge alleges culpable conduct on the part of the Plaintiff. Plaintiff's motion is granted, and the action shall proceed on the issue of damages. *See Poon v. Nisanov*, 162 AD3d 804, 808, 79 N.Y.S.3d 227, 231 [2d Dept 2018].

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

Plaintiff's motion (motion sequence #1) for partial summary judgment on the issue of liability is granted, and the matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino, J.S.C.

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