

**Reid v Esmail**

2021 NY Slip Op 34269(U)

December 20, 2021

Supreme Court, Kings County

Docket Number: Index No. 516424/2020

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 20th day of December, 2021.

PRESENT:  
HON. CARL J. LANDICINO,  
Justice.

-----X  
TYRA REID and JASON SHEPPARD,

Index No.: 516424/2020

*Plaintiff,*

-against-

DECISION AND ORDER

FOUAD ESMAIL and UBER TECHNOLOGIES, INC.

Motions 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 ..... 12-17,

Opposing Affidavits (Affirmations)..... 23-25, 29-38, 40, 41, 42,

Reply Affidavits (Affirmations) ..... 43

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 a motor vehicle collision that allegedly occurred on July 15, 2019. At the time of the occurrence, Plaintiff Jason Sheppard was operating a vehicle in which Plaintiff Tyra Reid was a passenger (hereinafter referred to collectively as the "Plaintiffs"), when that vehicle was allegedly struck in the rear by a vehicle owned and operated by Defendant Fouad Esmail (hereinafter referred to as "Defendant Esmail"). As part of their complaint, the Plaintiffs' allege that at the time of the collision Defendant Esmail was employed by Defendant Uber Technologies, Inc. (hereinafter "Defendant Uber"). The

accident purportedly occurred on Eastern Parkway at or near its intersection with Utica Avenue, in Brooklyn, New York.

The Plaintiffs now move (motions sequence #1) for an order pursuant to CPLR 3212 granting them summary judgment on the issue of liability as against both Defendant Esmail and Defendant Uber. The Plaintiffs also make an application to dismiss the Defendants' affirmative defenses raised relating to the issue of liability and direct that discovery and the trial proceed on the issue of damages only. The Plaintiffs contend that summary judgment should be granted because at the time of the accident the Plaintiffs' vehicle was stopped at a traffic signal and the Defendant Esmail's vehicle struck Plaintiffs' vehicle in the rear. In support of their motion, the Plaintiffs rely on a Police Accident Report and affidavits from each of the Plaintiffs.

Both Defendant Esmail and Defendant Uber oppose the motion. Specifically, Defendant Esmail contends that the Plaintiffs' motion should be denied as it is premature and that there is a genuine issue of material fact regarding the accident. Defendant Esmail contends that the motion is premature as discovery has not been completed and also that there was no collision between the two vehicles and this should at least create an issue of fact that leads the Court to deny the Plaintiffs' motion. Defendant Uber contends that the Plaintiffs' motion should be denied as the Plaintiffs have failed to show that Defendant Uber owned or operated the vehicle at issue and argue that Defendant Esmail was an independent contractor at the relevant time. As a result Defendant Uber argues that it is not liable for the Plaintiffs' alleged injuries.

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 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 instant motion, the Court finds that sufficient evidence has been presented by the Plaintiffs to establish, *prima facie*, that Defendant Esmail's vehicle hit the Plaintiffs' vehicle in the rear. In support of their application, the Plaintiffs rely primarily on a Police Accident Report and the Plaintiffs' affidavits. The Police Accident Report is not certified. *See Yassin v. Blackman*, 188 AD3d 62, 66, 131 N.Y.S.3d 53, 56 [2d Dept 2020]. Even assuming the lack of admissibility of the admissions or other information in the police report, the Plaintiffs' affidavits are sufficient. In her affidavit, Plaintiff Reid states that "[a]t the time of the accident, Jason Sheppard was the driver of a motor vehicle owned by BMW of Manhattan known as a 2019 BMW SUV, on eastbound Eastern Parkway at the aforementioned intersection, and I was a passenger in his vehicle." Plaintiff Reid thereafter stated that "[a]t that time and place, Jason Sheppard's vehicle was stopped at a traffic light when a 2013 Toyota SUV with New York State license plate number T729618C owned and driven by FOUAD ESMAIL struck the rear of the motor vehicle in which I was a passenger." (See Plaintiff's Motion, Exhibit B, Paragraph 3). The affidavit of Plaintiff Sheppard states similarly that "[a]t the time of the accident, I was the driver of a motor vehicle owned by BMW of Manhattan, known as a 2019 BMW SUV, on eastbound Eastern Parkway at the aforementioned intersection, and Tyra Reid was a passenger in my vehicle." Plaintiff Sheppard also states that "[a]t that time and place, my vehicle was stopped at a traffic light when a 2013 Toyota SUV with New York State license plate number T729618C owned and driven by FOUAD ESMAIL struck my vehicle in the rear I was involved in a motor vehicle accident which occurred on July 15, 2019, at approximately 2:00 p.m." (See Plaintiff's Motion, Exhibit C, Paragraph 3). This evidence taken together is sufficient for the Plaintiffs 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 VTL 1129(a).

In opposition to the motion, Defendant Esmail has failed to raise a material issue of fact that would prevent this Court from granting the Plaintiffs’ 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, Defendant Esmail’s unsworn MV-104 accident report is inadmissible. Plaintiff in reply raises the fact that the statement is not an affidavit in that it is not sworn. See *Allstate Ins. Co. v. Ramlall*, 132 AD3d 617, 618, 17 N.Y.S.3d 308, 309 [2d Dept 2015]; *Bates v. Yasin*, 13 AD3d 474, 788 N.Y.S.2d 397, 398 [2d Dept 2004]. Additionally, Defendant Esmail fails to raise an objection to the lack of certification of the Police Report. As such, any objections to the admissibility of the report are waived. See *Gilmore v. Mihail*, 174 A.D.3d 686, 688, 105 N.Y.S.3d 504, 507 [2d Dept 2019]; *Carey v. Five Bros.*, 106 A.D.3d 938, 940, 966 N.Y.S.2d 153 [2d Dept 2013]; *Scudera v. Mahbubur*, 299 A.D.2d 535, 535, 750 N.Y.S.2d 644, 645 [2d Dept 2002]. The Police Report states in pertinent part that “[a]t TPO driver of V1 states while stopped in traffic, V2 struck his vehicle from the rear. Driver of V2 states the same.” Moreover, even if the Court were to accept the statements in the MV-104, they do not reference the Police Report and do not dispute the statements made therein. As such they would be treated as feigned testimony in order to avoid the motion being granted. See *Abramov v. Miral Corp.*, 24 AD3d 397, 398, 805 N.Y.S.2d 119, 120 [2d Dept 2005]; see also *Rosenblatt v. Venizelos*, 49 AD3d 519, 520, 853 N.Y.S.2d 578 [2d Dept 2008]. Further, Defendant Esmail’s supplemental papers in

opposition were not filed with Court approval and the Plaintiff objects to same. The Court will not consider them. However, even assuming their propriety the supplemental papers do not serve to raise an issue of fact. Defendant Esmail does not address the Police Report and does not state that there was no contact of the vehicles. Defendant Esmail only states that he heard no noise or bump and observed no damage. As such, the Defendant Esmail did not raise an issue of fact that would prevent this Court from granting Plaintiff's Summary Judgment motion on the issue of liability and dismissing the Defendants' affirmative defense of culpable conduct on the part of the Plaintiffs. *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].

Turning to the merits of the Plaintiffs' motion as it relates to Defendant Uber, the Court finds that the Plaintiffs have failed to meet their *prima facie* burden as it relates to Defendant Uber. The Plaintiffs' contend that Defendant Uber employed Defendant Esmail and that at the time of the collision, Defendant Esmail was acting within the scope of his employment with Defendant Uber. However, while the Plaintiffs' affidavits in support of their motion refer to Defendant Esmail as the owner and operator of the subject vehicle at issue, there is no evidence regarding Defendant Esmail's relationship to Defendant Uber in order to support this conclusion. Since the Plaintiffs failed to meet their *prima facie* burden, we need not consider the sufficiency of Defendant Uber'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]. The Court notes that Plaintiffs concede this result in reply. Counsel states "[w]ith respect to the Defendant Uber it is unclear under the law how Defendant Uber will be treated." "It is Plaintiffs' intention to prove that the Defendant's business relationship/employment constitutes a

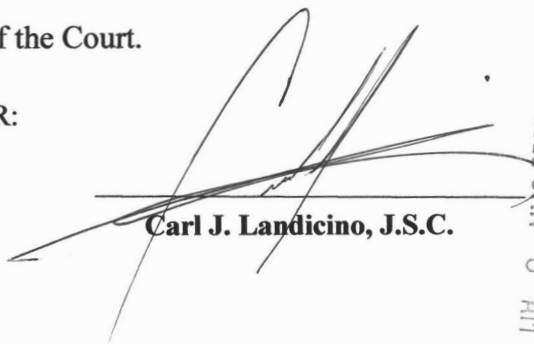
viable cause of action.” Finally, Plaintiffs ask that discovery continue “as to the liability of Defendant Uber...”

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

The Plaintiffs’ motion as against Defendant Esmail (motion sequence #1) for summary judgment on the issue of liability is granted. Defendant Esmail was negligent and the sole proximate cause of the accident and Defendant Esmail’s affirmative defenses relating to Plaintiffs’ culpable conduct are dismissed. The Plaintiffs’ summary judgment motion as against Defendant Uber is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino, J.S.C.**

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KINGS COUNTY CLERK  
FILED