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| <b>Green v Aziz</b>  |
| 2022 NY Slip Op 31099(U)   |
| April 1, 2022  |
| Supreme Court, Kings County  |
| Docket Number: Index No. 508958/2017   |
| 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 1st day of April 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
DENISE T. GREEN, COURTNEY JOHNSON,

*Plaintiffs,*

- against -

TARIQ AZIZ, LUX CREDIT CONSULTANTS LLC,

*Defendant.*

-----X

Index No.: 508958/2017

DECISION AND ORDER

Motion Sequence #5, #6

**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..... | 76-84, 85-88, |
| Opposing Affidavits (Affirmations).....                                  | 91-93,        |
| Reply Affidavits (Affirmations).....                                     | 102, 103,     |
| Memorandum of Law.....   | 89,           |

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on June 22, 2016. On that day, Plaintiffs Courtney Johnson (hereinafter "Johnson"), and Denise T. Green (hereinafter "Green") as passengers in a parked vehicle, were involved in a motor vehicle accident with a vehicle owned by Lux Credit Consultants, LLC and operated by Tariq Aziz (hereinafter collectively the "Defendants"). The accident purportedly occurred on Adams Street at or near its intersection with Tillary Street in Brooklyn, New York.<sup>1</sup>

Plaintiff Green now moves (motion sequence #5) for an order pursuant to CPLR 3212 granting her summary judgment on liability against Defendants. Green contends that the Defendants were negligent as

<sup>1</sup> On August 13, 2021, this Court issued a Decision and Order granting the Defendants' motion (motion sequence #2) for summary judgment in relation to Insurance Law 5102 and dismissing the complaint as it relates to Plaintiff Johnson.

a matter of law as the Defendants' vehicle collided with the parked vehicle in which Green was a passenger. Green also states that she had initially been a rear seat passenger in the vehicle and moved to the front seat after the driver exited the vehicle. She stated that she had opened the driver's door slightly ("ajar") prior to the accident, but her actions were not a proximate cause of the collision. Green contends that the Defendants' vehicle collided with her vehicle at the rear driver's side before striking the car door that was slightly opened. Green also indicates that the Defendants have been precluded from offering any testimony in defense of this motion because of having failed to comply with prior orders of this Court. Green also cross-moved (motion sequence #6) for summary judgment, dismissing the Defendants' counterclaim against her, and argues that there is no material issue of fact regarding her liability. Green adopted and incorporated her motion sequence #5 application in support of motion sequence #6..

The Defendants oppose the motions. The Defendants contend that the motion should be denied as there are issues of fact as to whether Plaintiff Green caused the collision by opening her vehicle's door. The Defendants argue that the testimony of Green and Johnson, as well as the Police Accident Report and the MV-104 statement of Defendant Tariq Aziz, support the position that material issues of fact should prevent this Court from granting the Plaintiff's motions.

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 motion sequence #5, the Court finds that sufficient evidence has been presented by the Plaintiffs to establish, *prima facie*, that Defendant Aziz was negligent and a proximate cause of the collision at issue. In support of her motion, Plaintiff Green relies upon her own deposition and the deposition and affidavit of her daughter, former Plaintiff Johnson. During her deposition, when asked how the collision occurred Green states that “I get out, I open the door, the door was already ajar and I open it more and then the car came.” As part of her affidavit Plaintiff Johnson states that “[t]he car that hit us was passing us on the driver's side (left) of our vehicle, but the driver either did not see us or

misjudged the space and hit our driver's side rear quarter panel, doors, front fender and our front bumper cover on the driver's side." (See Plaintiff's Motion, Exhibit 5, Paragraph 4). This indicates that the contact was initiated by the Defendant driver Aziz, the point of impact was well behind the door, and the slight opening of the door was not a proximate cause of the collision.

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 an initial matter, the Plaintiff raises in her reply that any 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 any event, the statements purportedly made therein are not admissions. Moreover, Defendant's unsworn MV-104 accident report is also inadmissible.<sup>2</sup> 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]. Accordingly, the Defendants have failed to provide an affidavit from a person with knowledge of the facts at issue and as a result failed to raise a triable issue of fact. See *Maliakel v. Morio*, 185 AD3d 1018, 1019, 129 N.Y.S.3d 99, 101 [2d Dept 2020]. "An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance." *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456, 826 N.Y.S.2d 152, 153 [2d Dept 2006].

Accordingly, the Court finds that the Plaintiff has provided sufficient evidence in support of her motion sequence #6 for summary judgment on the counterclaim. In opposition, the Defendants have failed to raise an issue of fact and as a result that counterclaim is dismissed. As such, the Court also finds that

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<sup>2</sup> Green, in both her motion and in her Reply Affirmation, states that the Defendant is precluded from offering any affidavit in opposition to the instant motion. "If the party fails to produce the discovery by the specified date, the conditional order becomes absolute." *McIntosh v. New York City P'ship Dev. Fund Co., Inc.*, 165 AD3d 1251, 1252, 87 N.Y.S.3d 637, 639 [2d Dept 2018], quoting *Naiman v. Fair Trade Acquisition Corp.*, 152 AD3d 779, 780, 59 N.Y.S.3d 414, 415 [2d Dept 2017]. The Defendants do not address this in their Affirmation in Opposition.

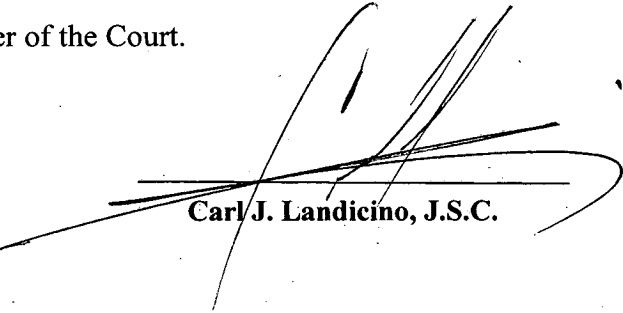
the Defendant's affirmative defense of culpable conduct shall be dismissed. *See Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021]. Although the Plaintiff in motion sequence #5 did not specifically ask that the Defendants' affirmative defenses be dismissed, she did seek summary judgment on liability and comparative negligence, which is tantamount to Green requesting that the affirmative defense of comparative fault be dismissed. In any event, the Court's determination in motion sequence #6 results in a finding that the Defendant driver Aziz was negligent and the sole proximate cause of the accident as a matter of law. *See Moran Enterprises, Inc. v. Hurst*, 96 A.D.3d 914, 947 N.Y.S.2d 538 [2d Dept 2012]; *Wells Fargo Bank, N.A. v. Morales*, 178 A.D.3d 881, 882, 114 N.Y.S.3d 392 [2d Dept 2019]; *see also Poon v. Nisanov*, 162 AD3d 804, 808, 79 N.Y.S.3d 227, 231 [2d Dept 2018]; *see also Diamond v. Comins*, 194 AD3d 784, 785 [2d Dept 2021].

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

Plaintiff Green's motions (motions sequence #5 and #6) for summary judgment on the issue of liability are granted in that the Defendant driver Aziz was negligent and the sole proximate cause of the accident. The Defendants' counterclaim and second affirmative defense of culpable conduct are therefore dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.