

**Foy v Mercedes**

2022 NY Slip Op 31851(U)

May 31, 2022

Supreme Court, Kings County

Docket Number: Index No. 528080/2019

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 31<sup>st</sup> day of May, 2022.

P R E S E N T:

HON. CARL J. LANDICINO,  
Justice.

-----X  
MAHOGANY FOY,

*Plaintiff,*

-against-

BRYAN ALEXANDER MERCEDES and JESSICA L. LUGO,

*Defendants.*

-----X  
BRYAN ALEXANDER MERCEDES and JESSICA L. LUGO,

*Third-Party Plaintiffs,*

-against-

KENDALL M. SMITH,

*Third-Party Defendant,*

-----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 .....	15-25,
Opposing Affidavits (Affirmations).....	31-34,
Reply Affidavits (Affirmations).....	37

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, 2017. Third-Party Defendant Kendall M. Smith (hereinafter the “Third-Party Defendant” or “Smith”) alleges that he was operating a vehicle owned by Plaintiff Mahogany Foy (hereinafter the “Plaintiff Foy”), in which Plaintiff Foy was a passenger, when the Plaintiff’s vehicle was struck in the rear by a vehicle owned by Defendant/Third-Party Plaintiff Jessica Lugo and operated by Defendant/Third-Party Plaintiff Alexander B. Mercedes (hereinafter collectively the “Defendants”). The incident allegedly occurred on the southbound FDR Drive in New York, NY.

The Third-Party Defendant now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and dismissing “all other claims.” Third-Party Defendant Smith contends that summary judgment should be granted because the Defendants’ vehicle was negligent and the sole proximate cause of the collision. Specifically, Smith contends that summary judgment should be granted given that there is *prima facie* evidence that Plaintiff’s vehicle was hit in the rear by the Defendants’ vehicle. The Defendants oppose the motion and contend that the Third-Party Defendant’s application for summary judgment should be denied as there is an issue of fact regarding Smith’s comparative negligence. The Defendants contend that Smith made a short stop.

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, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [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, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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, 538 N.Y.S.2d 837 [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 NY3d 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 Smith to establish, *prima facie*, that the Defendants’ vehicle hit the Plaintiff’s vehicle in the rear. In support of his application, the Third-Party Defendant relies upon his Affidavit. In his affidavit, Smith states that “[b]efore the accident, I had been traveling with the

normal flow of traffic in the left lane on the southbound FDR Drive. I had been in this travel lane for at least one minute before the accident occurred, and had remained in this travel lane until the accident occurred. Immediately before the accident, I observed the brake lights from the vehicle traveling in front of me, and as a result, I began to slow my vehicle. While my vehicle was coming to a stop, I felt an impact to the rear of my vehicle.” (See Third-Party Defendant Smith motion, Affidavit of Kendall M. Smith, Page 2). This statement is sufficient for the Third-Party Defendant 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]. Further, “[w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his [or her] vehicle, and to exercise reasonable care to avoid colliding with the other vehicle.” *Gaeta v. Carter*, 6 AD3d 576, 576, 775 N.Y.S.2d 86 [2d Dept 2004]; see Vehicle and Traffic Law § 1129 [a]; *Williams v. Spencer–Hall*, 113 AD.d 759, 759–760, 979 N.Y.S.2d 157 [2d Dept 2014]; *Taing v. Drewery*, 100 AD3d 740, 741, 954 N.Y.S.2d 175 [2d Dept 2012].

In opposition, the Defendants rely primarily on the Police Accident Report. Defendants argue that the motion is premature and that Smith has failed to submit admissible evidence. First, the police report is not certified, as such any otherwise admissible statements are not admissible. See *Yassin v. Blackman*, 188 AD3d 62, 131 N.Y.S.3d 53 [2d Dept 2020]. Second, 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]. Lastly, Smith’s affidavit is admissible despite not including the language “under the penalty of perjury.” The Supreme Court Appellate Division, Second Judicial Department provides an affidavit template on their official website that only states “being duly sworn, depose and say.” The template does not include the language “under the penalty of perjury” as Defendants argue is necessary for the affidavit to be admissible.

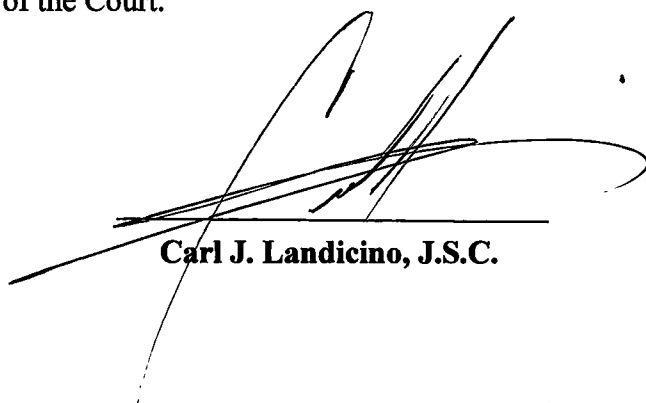
Insofar as the Defendants have not raised an issue of fact as to the Third-Party Defendant’s comparative negligence, the Defendants’/Third-Party Plaintiffs’ action is dismissed.

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

The Third-Party Defendant Smith’s motion (motion sequence #1) for summary judgment on the issue of liability is granted and the Defendants’/Third-Party Plaintiffs’ action is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



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

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