

Salamone v Simpson
2022 NY Slip Op 33389(U)
September 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 505945/2020
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 27th day of September 2022.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
MICHAEL W. SALAMONE,

Index No.: 505945/2020

Plaintiff,

-against-

DECISION AND ORDER

ADRIAN JULIAN SIMPSON, ATLAS PARTY RENTALS and SGK HOLDING CORP.,

Motion Sequence #2

Defendants.

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

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	41-49,
Opposing Affidavits (Affirmations).....	52-54,
Reply Affidavits (Affirmations)	55 ¹

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

The instant action relates to a claim for personal injuries arising from an alleged motor vehicle collision that occurred on September 20, 2019. Plaintiff Michael W. Salamone (hereinafter the "Plaintiff") alleges that he was injured when the vehicle he was operating was struck in the rear by a vehicle owned by Defendants SGK Holding Corp. and Atlas Party Rentals and operated by Defendant Adrian Julian Simpson (hereinafter referred to individually or collectively as the "Defendants"). The incident allegedly occurred as the Plaintiff was merging onto the Brooklyn-Queens Expressway in Brooklyn, New York.

¹ NYSCEF Docs. 58-61 were filed well after Plaintiff's reply was filed and as such will not be acknowledged for purposes of this motion.

The Plaintiff now moves (motions sequence #2) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and dismissing the Defendants' affirmative defense of comparative negligence. The Plaintiff contends that summary judgment should be granted because the driver of Defendants' vehicle was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that the Plaintiff's vehicle was struck by the Defendants' vehicle in the proximity of the exit ramp at the Brooklyn-Queens Expressway and the Defendants' vehicle failed to maintain a safe distance between the two vehicles and hit Plaintiff's vehicle in the rear. The Plaintiff argues that this constitutes negligence on the part of Defendant driver and is the sole proximate cause of the accident. In support of his application, the Plaintiff relies on his own deposition, the deposition of non-party Moti Perpinal and a certified Police Accident Report.

The Defendants oppose the motion. The Defendants contend that the motion should be denied as it is defective. Specifically, the Defendants contend that the deposition transcripts that the Plaintiff relies on are inadmissible as they are unsigned. The Defendants also argue that the Police Accident Report that the Plaintiff relies on is not admissible given that the police officer was not a witness to the accident. The Defendants also contend that there are issues of fact that should prevent this Court from granting the motion. The Defendants argue that the subject accident occurred when the Plaintiff's vehicle suddenly and unexpectedly cut the Defendants' vehicle off without signaling.

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 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 [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 Plaintiff to establish, *prima facie*, that the Defendant driver was negligent and the sole proximate cause of the accident as a matter of law. In support of his application, the Plaintiff relies primarily on the Plaintiff's deposition, a certified Police Accident Report, and the deposition of non-party witness Moti Perpinal.² In so far as the Police Report is certified, the Defendant driver's admission that he collided with the rear of the Plaintiff's vehicle is admissible. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. The Police Accident Report states "driver 3 [Defendant driver and vehicle] stated on scene that he lost control of the vehicle going around the turn and struck vehicle 1 and 2."

During his deposition, when the Plaintiff was asked whether he had stopped for the stop sign along the entrance ramp to the Brooklyn-Queens Expressway he stated "[y]es."³ When asked if his vehicle came to a complete stop the Plaintiff stated "[y]es." (See Plaintiff's Motion, Exhibit "E", Page 42). The Plaintiff was asked if he then began to move his vehicle and he answered "[y]es." (Page 52). When asked where the Defendants' vehicle was when he first saw it, the Plaintiff stated that "I observed him over my shoulder coming around a turn off of his passenger side wheels. His truck was off of his passenger side wheels." (Page 52). When asked to describe the Defendants' vehicle, the Plaintiff stated that "[i]t was off of its – it wobbled off of its passenger's side tires, then it came down, went off a of its driver's side tires, then began to spin and

² The deposition transcript of non-party Moti Perpinal will not be considered. This is because the transcript is not signed and the Plaintiff has otherwise failed to show that the Plaintiff met his CPLR 3116 (a) obligation; the submission of the unsigned transcript to Perpinal for review and signature that was not responded to (*see* CPLR 3116(a); *Baptiste v. Ditmas Park, LLC*, 171 AD3d 1001, 98 N.Y.S.3d 280 [2d Dept 2020]; *Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 984 N.Y.S.2d 401 [2d Dept 2014]).

³ The Plaintiff's deposition is admissible. Although the transcript was unsigned it was certified and submitted by the Plaintiff as party deponent and deemed adopted as accurate. *See David v. Chong Sun Lee*, 106 A.D.3d 1044, 1045, 967 N.Y.S.2d 80, 82 [2d Dept 2013]; *Rodriguez v. Ryder Truck, Inc.*, 91 AD3d 935, 936, 937 N.Y.S.2d 602, 603 [2d Dept 2012].

turn and approach where I was.” (Page 62). This testimony, taken together is sufficient for the Plaintiff to meet his *prima facie* burden. 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].

The Defendants argue that the Plaintiff suddenly and unexpectedly cut the Defendant driver off without signaling. The Defendants point to the deposition testimony of Defendant Simpson in support of this claim. During his deposition when asked where the vehicle was that he collided with, Defendant Simpson stated “[i]t was in front of me.” When asked how long it was in front of his vehicle before the accident occurred, Defendant Simpson stated “[s]econds.” When asked to specify, he stated “[m]aybe three or so, two or so. Happened very fast.” When asked what caused the collision, Defendant Simpson stated “[t]he white car was trying to beat my car on the highway, trying to get on the highway.” When asked how much time elapsed between when he first saw the Plaintiff’s vehicle attempting to merge onto the highway and the impact between his vehicle and the Plaintiff’s vehicle, Defendant Simpson stated “[s]plit seconds. Very fast.” (See Defendants’ Motion, Defendant Simpson Deposition, Pages 21 through 24). In fact, Plaintiff concedes in Reply at Paragraph 6 that “there is conflicting evidence on the exact space Mr. Salamone had when he merged onto the right lane.” Although the Plaintiff contends that the space was substantial and permitted Defendant Simpson sufficient time to react, Defendant Simpson indicates otherwise. This admittedly conflicting testimony is sufficient to raise an issue of fact. Taken as true, Defendant Simpson’s version of the accident provides a nonnegligent explanation for the collision. “A nonnegligent explanation may include that a vehicle made a sudden lane change in front of a

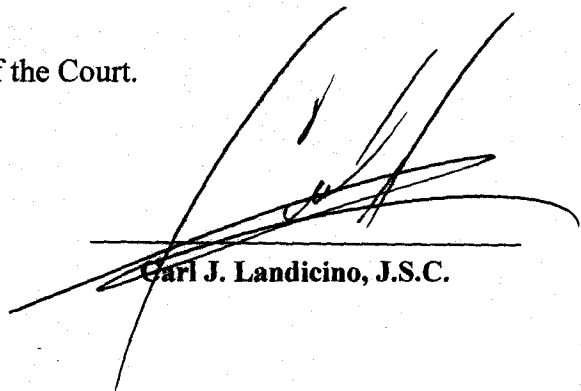
defendant's vehicle, forcing the defendant to stop suddenly." *Flood v. Fillas*, 190 AD3d 828, 136 N.Y.S.3d 767, 768 [2d Dept 2021], quoting *Cruz v. Valentine Packaging Corp.*, 167 AD3d 707, 89 N.Y.S.3d 316 [2d Dept 2018]. Accordingly, the Defendant has raised a material issue of fact and the motion is denied.

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

The Plaintiff's motion (motion sequence #2) for summary judgment on the issue of liability is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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