

**Schmahl v Rich**

2022 NY Slip Op 33928(U)

November 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 509361/2019

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 14<sup>th</sup> day of November 2022.

PRESENT:  
HON. CARL J. LANDICINO,  
Justice.

-----X  
DAVID SCHMAHL,

Index No.: 509361/2019

*Plaintiff,*

DECISION AND ORDER

-against-

WILLIAM RICH, U-HAUL INTERNATIONAL, INC.  
and AMAZON.COM SERVICES, INC.

Motion Sequence #4

*Defendants.*

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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 .....	73-86,
Opposing Affidavits (Affirmations).....	89, 91-95,
Reply Affidavits (Affirmations) .....	96-97,
Memorandum of Law .....	90

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 a motor vehicle collision that allegedly occurred on February 5, 2019. Plaintiff David Schmahl (hereinafter the "Plaintiff") alleges that he was injured when the vehicle he was operating was struck by a vehicle operated by Defendant William Rich ("Defendant Rich") and owned by Defendant U-Haul International, Inc. ("U-Haul").<sup>1</sup> Defendant Rich was apparently employed by Defendant Amazon ("Amazon") at the time of the accident. The incident allegedly occurred on Route 110 at or near its intersection with Duryea Road, in Huntington, Suffolk County, New York.

<sup>1</sup> By "Stipulation of Partial Discontinuance" (NYSCEF Doc. #12) Plaintiff discontinued this action against Defendant UHaul International, Inc., without prejudice.

The Plaintiff now moves (motions sequence #4) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and that thereafter the matter should proceed on the issue of damages. The Plaintiff contends that summary judgment should be granted because the Defendant driver was negligent and the sole proximate cause of the collision. Specifically, the Plaintiff contends that summary judgment should be granted as the Plaintiff was proceeding in his lane of travel and the Defendants' vehicle turned into the Plaintiff's lane of travel and struck the Plaintiff's vehicle. In support of his application, the Plaintiff relies on his own affidavit, a certified Police Accident Report, the deposition of Defendant Rich, the deposition of Roger Rico and the deposition of Tina Veilson.

The Defendants Rich and Amazon, (for the purposes of the motion the "Defendants") oppose the motion and contend that there are issues of fact that should prevent this Court from granting the motion.<sup>2</sup> Specifically, the Defendants argue that there is an issue of fact as to the Plaintiff's liability for the subject accident.

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.S2d 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*

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<sup>2</sup> The Defendants contend that the motion should be denied as Plaintiff's attorney affirmation includes legal arguments, contrary to the requirement that legal arguments be confined to memoranda of law as per section 202.8 (c) of the Uniform Civil Rules for the Supreme Court and the County Court. Even assuming that these rules have been violated, the Defendants have not shown any prejudice and the Plaintiff is excused pursuant to CPLR 2001. *See Disarli v. TEFAP NY, LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022]; *see also Mallory v. City of New York*, 22 NY Slip Op 32943(U) [Sup Ct, New York County 2022].

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, 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, 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 the Plaintiff to establish, *prima facie*, that the Defendant driver Rich 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 affidavit and a certified Police Accident

Report. In so far as the Police Report is certified, the Defendant driver's admission that he collided with Plaintiff's vehicle when he made a lane change and did not see Plaintiff's vehicle is admissible. Defendant Rich contests his admission in the Police Accident Report in his deposition stating that he did not tell the police that he failed to see Plaintiff's vehicle when changing lanes but saw a "blur in the mirror." However, this does not constitute a material change of his admission. See *Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. In his affidavit, the Plaintiff states that Defendant came into his lane without warning and he tried to avoid the collision by turning his "steering wheel to the right." (See Plaintiff's Motion, Exhibit "E", Paragraph 5). Moreover, the points of contact reflected in the Police Report show that the front passenger side of Defendant's vehicle collided with the middle of the driver's side of the Plaintiff's vehicle, at the doors.

Plaintiff also relies on the deposition of his non-party passenger, Roger Rico. Mr. Rico stated in his deposition that "[w]e were headed towards the intersection from the right-hand lane. We get approximately 150 to 200 feet, ahead we noticed there was a red light on the left-hand turn lane. We were going to the green light, three lanes. We noticed a white van stopped, and as we get towards the intersection, the white van made a right-hand turn and slammed into us, hit the van." (Roger Rico's Deposition, NYSCEF Document 85, Pages 42-43).

Plaintiff also relies on the deposition of a non-party witness, Tina Veilson. Ms. Veilson stated in her deposition that "I was the first car at the stoplight [on Dureyea]. I don't know the exact make of each car involved. There was one car that was like a contractor's work vehicle that was driving north on 110. Another second car came speeding up behind them and hit them and kind of sent them flying northbound. They went on their side and skidded like on their side down 110." (Tina Veilson's Deposition, NYSEF Document 83, Page 7). When asked to describe the

manner in which the box truck collided with the contractor van, Ms. Veilson stated that “I think it must have just hit it right in the back, at the right angle to just flip the truck.” (Id. Page 10). When asked to confirm that the box truck made a right turn into the contractor van she confirmed “yes. It definitely wasn’t driving straight.” (Id. Page 10).

In opposition to the motion, the Defendants have failed to raise a material issue of fact as to whether Plaintiff was negligent and a proximate cause of the accident. During his deposition, Defendant Rich confirmed that he was traveling “all the way in the left lane” and intended to make a right turn at Duryea Road. (Defendant Rich’s Deposition, NYSCEF Document 86, Page 25). He continued to state that he “was maybe 250 yards before I started to switch” lanes. (Id. Page 27). Defendant Rich stated that once he was 125 yards from the intersection he “[c]hecked my mirrors again, turn off -- my signal light was still on, I never turned it off, because I was trying to go over. So I looked through my mirrors again, and at that point I saw a vehicle coming. It was maybe -- maybe 150 yards from me. I didn’t pick up speed; I just kept going. Next thing I know bang, there is the accident.” (Id. Page 30). Defendant Rich provided no affidavit in opposition that would serve to provide a clearer understanding of his description of how the accident occurred.

During his deposition, Plaintiff stated that “I was cruising in the right lane, the van that hit me was in the first left turning lane and as I approached the light, he cut across all three lanes and hit the side of my van.” (See Defendants’ Affirmation in Opposition, Plaintiff’s Deposition, Exhibit “C”, Page 40). Defendants also argue that the testimony that Plaintiff provided conflicts with Mr. Rico’s testimony as to the exact location and timing of the accident and the speed of the vehicles. However, any discrepancies between the testimony of Defendant Rich and non-party Rico are not material. See *Emery v. New York City Tr. Auth.*, 78 AD3d 416, 914 N.Y.S.2d 1 [1st Dept 2010].

Defendant Rich had a statutory duty to change lanes only when safe to do so. See VTL 1128. Defendant Rich acknowledges that he saw the Plaintiff's vehicle (or something) and proceeded anyway. He does not indicate that the Plaintiff was negligent. Plaintiff states that he tried to take evasive action. The Police Report and the depositions of Rico, the Plaintiff and Veilson support the Plaintiff's position. The Defendant has failed to raise a material issue of fact as to the Plaintiff's liability that would serve the need for a determination of the Plaintiff's liability, if any, at trial.

**Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard, and an operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the traffic laws. However, a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection, and that driver will not be entitled to summary judgment absent a demonstration that the sole proximate cause of the accident was the other driver's violation of Vehicle and Traffic Law § 1141 in turning left directly into the path of his vehicle which was lawfully present in the intersection.**

*Lorentz v. Ruiz*, 129 AD3d 795, 796, 11 N.Y.S.3d 246 [2d Dept 2015] [internal quotations and citations omitted]; see also *Blake v. Francis*, 205 AD3d 671, 165 N.Y.S.3d 754 [2d Dept 2022].

Insofar as the Plaintiff's motion includes the request for a finding that the matter should proceed on this issue of damages, this is tantamount to a request that the Defendant's affirmative defenses be dismissed. See *Poon v. Nisanov*, 162 AD3d 804, 807, 79 N.Y.S.3d 227, 230 [2d Dept 2018]. There were no facts that support the Defendants' affirmative defenses alleging culpable conduct on the part of the Plaintiff based upon the admissible evidence proffered. 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]. No party with knowledge alleges culpable conduct on the part of the Plaintiff. As such, the Plaintiff's motion is granted to the extent that the Defendant driver Rich was negligent and the sole proximate cause of the accident.

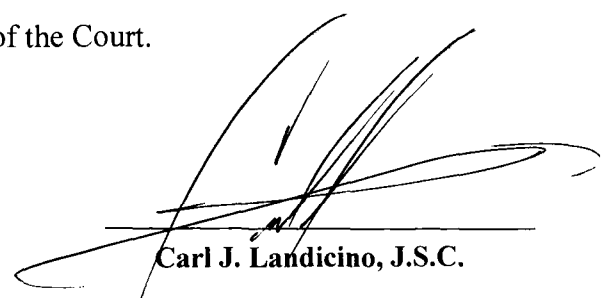
Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #1) for summary judgment on the issue of liability is granted in that the Defendant driver Rich was negligent and the sole proximate cause of the accident and Defendant's 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup> and 18<sup>th</sup> affirmative defenses are dismissed.

The matter shall proceed on the issue of damages only.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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