

Morgan v Anderson
2022 NY Slip Op 33930(U)
November 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 512942/2021
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 14th day of November, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
DAVE MORGAN,

Index No.: 512942/2021

Plaintiff,

-against-

DECISION AND ORDER

AUDLEY BRADLEY ANDERSON, F&M
TRANSPORTATION LLC and METAL PARTNERS
REBAR, LLC

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 13-24,
- Opposing Affidavits (Affirmations)..... 30-33,
- Reply Affidavits (Affirmations) 34-36

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 August 3, 2020. At the time of the occurrence, Plaintiff was allegedly operating a parked vehicle when his vehicle was allegedly struck by a vehicle owned by Defendant F&M Transportation LLC (“Defendant F&M”) and operated by Defendant Audley Bradley Anderson (“Defendant Anderson”). As part of his complaint, the Plaintiff alleges that at the time of the collision Defendant Anderson was employed by Defendant Metal Partners Rebar,

LLC. The accident purportedly occurred on Atlantic Avenue at or near its intersection with Court Street, in Brooklyn, New York.

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability as against the Defendants. The Plaintiff also makes an application for dismissal of the Defendants' first, second, fifth and twelfth affirmative defenses. The Plaintiff contends that summary judgment should be granted because at the time of the accident the Plaintiff's vehicle was stopped, with the ignition off, and the Defendants' vehicle struck the Plaintiff's vehicle. In support of his motion, the Plaintiff relies primarily on his affidavit and a certified police accident report.

The Defendants oppose the motion. Specifically, the Defendants contend that the Plaintiff's motion should be denied as it is premature and there is a genuine issue of material fact regarding liability for the accident. The Defendants contend that the motion is premature as discovery has not been completed. The Defendants also argue that the Defendants' vehicle remained in its lane of travel when Plaintiff's vehicle crossed into Defendants' lane of travel, as Defendants' vehicle was passing Plaintiff's vehicle, and the two vehicles collided. Defendants argue that Defendant driver's version of what occurred creates an issue of fact as to Plaintiff's liability. As such, Defendants contend that the Court should deny Plaintiff's motion.

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*

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].

In support of his application, the Plaintiff relies on his affidavit and a certified police accident report. As an initial matter, the police accident report, while certified, does not contain any admissible statements. The statement by Defendant Anderson that “he proceeded to drive westbound on Atlantic towards the green light when he heard a loud noise coming from the

passenger side of the vehicle and he stopped” does not constitute an 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 “I was driving straight on Atlantic Avenue when I began to approach a designated parking lane near the corner of Court Street. The parking lane is separated from the roadway by a solid white line. I then pulled my car into the parking lane and brought it to a complete stop.” (See Plaintiff’s Motion, Plaintiff’s Affidavit, Paragraph 7). Plaintiff further states that “[w]hen I was fully within the parking lane, I then stopped my car and turned the engine off. My car was stopped 2-3 inches from the curb adjacent to the parking lane. No part of my car was in the moving lane of travel on Atlantic Avenue. At the time that the impact occurred, my car was parked and at a complete stop for approximately five (5) minutes when my car was suddenly struck on the drivers side by a tractor trailer.” (Id. Paragraphs 8-9).

Defendant Anderson’s affidavit serves to wholly contradict Plaintiff’s version of how the accident occurred. In his affidavit, Defendant Anderson states that “I was operating a 2018 Freightliner tractor trailer on Atlantic Avenue in Brooklyn, New York.” (See Defendants’ opposition, Affidavit, Paragraph 4). He further states that “[a]s I was approaching the traffic light on Atlantic Avenue at its intersection with Court Street, I was slowing down to come to [*sic*] stop. I was fully within my lane of travel, facing westbound. From the time I got onto Atlantic Avenue, my truck was always fully within its lane of travel. As I was coming to a stop at the light, I heard a loud noise coming from the front right side of my truck. My steering wheel then pulled sharply to the right and I stopped my vehicle. When I exited the truck, my vehicle was still fully within its lane of travel, to the left of the white line separating the lane I was in from the parking lane. There was a car, which apparently struck the truck. The front driver’s side of the car was angled into my

truck and was partially across the line. I did not cause this accident as my truck never crossed the white line.” (Id. Paragraph 7-10).

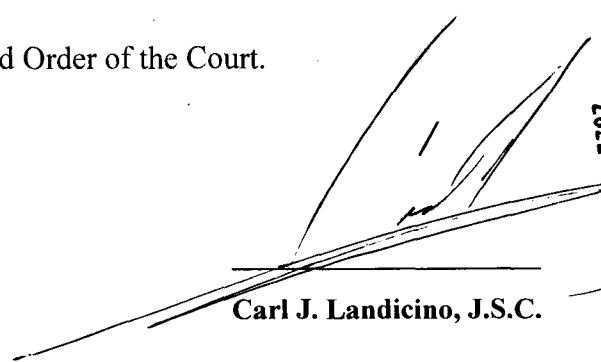
The Court finds that there are contradictory statements of how the collision occurred. Defendant Anderson’s version of the accident, taken as true, establishes that he is free from comparative fault. The Plaintiff has failed to meet his burden that the Defendant driver was negligent and a proximate cause of the collision at issue. A review of this evidence in a light most favorable to the nonmoving party shows that “the plaintiff failed to eliminate triable issues of fact as to whether the defendant was negligent and, if so, whether any such negligence caused or contributed to the accident.” *Flores v. Rubenstein*, 175 AD3d 1490, 1491, 109 N.Y.S.3d 390, 392 [2d Dept 2019]. Accordingly, the Plaintiff’s motion is denied.

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

The Plaintiff’s motion as against the Defendants (motion sequence #1) 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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