

Riley v Purcell

2023 NY Slip Op 30860(U)

March 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 524306/2020

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 7th day of March 2023

PRESENT: HON. CARL J. LANDICINO, JSC

-----X
FRANCOIS RILEY,

Index No.: 524306/2020

Plaintiff,

-against-

DECISION AND ORDER

ROMAINE GEORGE PURCELL, STACEY P. WILLIAMS,
and SAMIRBHAI BIPINCHANDRA PATEL,

Motion Sequence #1, #2

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 | 14-18, 21-31, |
| Opposing Affidavits (Affirmations)..... | 19, 33-37, 40-41, |
| Reply Affidavits (Affirmations) | 20, 32, 38, 42-43 |

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 June 29, 2019. Plaintiff, Francois Riley (hereinafter the "Plaintiff") alleges that he was injured while he was a passenger in a vehicle owned and operated by Defendant Romaine George Purcell (hereinafter "Defendant Purcell") when the Purcell vehicle collided with the vehicle owned and operated by Defendant Stacey P. Williams (hereinafter "Defendant Williams"). The Plaintiff alleges in his complaint that Defendant Samirbhai Bipinchandra Patel (hereinafter "Defendant Patel") was also negligent and involved in the collision. The incident allegedly occurred on the Grand Central Parkway in Queens, N.Y.

Defendant Patel now moves (motions sequence #1) for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and any and all cross claims against him. Defendant Patel argues that he did not breach any duty owed to the plaintiff and is not a

proximate cause of the subject accident. Specifically, Defendant Patel argues that his vehicle did not strike the vehicle the Plaintiff was a passenger in, but that his vehicle was struck in the rear by the vehicle operated by Defendant Williams. In support of his application, Defendant Patel relies on his own affidavit and a Police Accident Report. The Plaintiff, Defendant Williams and Defendant Purcell oppose the motion by Defendant Patel as premature. Patel, as a Third Party Defendant in a joined action (Index No. 523564/2020) also moved for summary judgment, dismissing the third party claim against him. It was agreed with the Honorable Karen Rothenberg, the Justice in that action, that the undersigned would decide that application (motion sequence #2) in order to avoid inconsistent determinations. A separate order shall be entered in that case as well.

Defendant Williams also moves (motions sequence #2) for an order, pursuant to CPLR 3212, granting her summary judgment dismissing the complaint and any and all cross claims against her. Defendant Williams argues that she was not a proximate cause of the Plaintiff's injuries and did not operate her vehicle in a negligent manner. Specifically, Defendant Williams contends that her vehicle was struck in the rear by the Purcell vehicle. In support of her application, Defendant Williams relies on her own affidavit and a Police Accident Report. The Plaintiff opposes the motion as premature.

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].

Turning to the merits of the motion by Defendant Patel (motion sequence #1), the Court finds that he has met his *prima facie* burden. In support of his application, Defendant Patel relies on a Police Accident Report and his own affidavit from a joined action involving the same motor vehicle collision wherein Patel is named as a Third Party Defendant and Defendant Williams is a Plaintiff (Index No. 523564/2020). As part of his affidavit, Defendant Patel states that there were three vehicles involved in the collision and contends that “Romaine Purcell [Defendant Purcell] was operating an Acura and Plaintiff Stacey Williams [Defendant Williams in this action] was operating a BMW.” Defendant Patel also states that “[a]t the time of the accident, my vehicle was traveling at approximately 45 miles per hour and was completely within the third lane of travel from the right.” He also states that traffic was light. Defendant Patel states that “[m]y vehicle was suddenly and without warning struck on the rear, driver’s side by the BMW operated by the

plaintiff [Defendant Williams' vehicle]." (See Defendant Patel's Motion, Exhibit "F", Paragraphs 5, 7 and 8). The Police Accident Report states¹ that "V1 [Defendant Purcell's Vehicle] states he was driving straight and was unable to stop in time colliding into V2 [Defendant Williams' Vehicle]." This evidence is sufficient to show that Defendant Patels' vehicle was the lead vehicle in a multiple vehicle collision and was not a proximate cause of the collision at issue. "[A] rear-end collision establishes a prima facie case of negligence on the part of 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." *Niyazov v. Hunter EMS, Inc.*, 154 AD3d 954, 954, 63 N.Y.S.3d 457, 458–59 [2d Dept 2017], quoting *Schecker v. Brown*, 85 AD3d 1007, 925 N.Y.S.2d 528, 529 [2d Dept 2011].

In opposition to the motion, the opponents of the motion fail to raise a material issue of fact that would prevent this Court from granting the motion made by Defendant Patel. As to the position that the motion is premature, it should be noted that the "motion was not premature since these 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]. Although Defendant Williams submits an affidavit, the affidavit does not state that Defendant Patel was a proximate cause of the accident. Plaintiff provides no affidavit in support of his position that the motion is premature. Defendant Purcell does not oppose the motion but does oppose the cross-

¹ The Court notes that, in general, admissions made within uncertified Police Accident Reports are inadmissible hearsay. See *Yassin v. Blackman*, No. 2019-04138, 2020 WL 5648349 [2d Dept 2020]. However, the opponents to the motion have failed to raise any objection to the admissibility of the admissions in the Police Accident Report in their Affirmations in Opposition to the motion. See *Boereau v. Scott*, 140 AD3d 687, 688, 33 N.Y.S.3d 340 [2d Dept 2016]. In fact, Defendant Williams utilizes the same report in her motion papers. Courts have long held that deficiencies that may exist with evidence such as this are waived if not raised in opposition. See *Gilmore v. Mihail*, 174 AD3d 686, 688, 105 N.Y.S.3d 504, 507 [2d Dept 2019]; *Carey v. Five Bros.*, 106 A.D.3d 938, 940, 966 N.Y.S.2d 153 [2d Dept 2013]; *Scudera v. Mahbubur*, 299 AD2d 535, 535, 750 N.Y.S.2d 644, 645 [2d Dept 2002].

motion by Williams. Accordingly, the opponents of the motion have failed to raise an issue of fact. The motion by Defendant Patel is granted, and the complaint and all cross-claims against Patel are dismissed.

Turning to the merits of the motion by Defendant Williams (motion sequence #2), the Court finds that she has met her *prima facie* burden. In support of her application, Defendant Williams relies on a Police Accident Report and her own affidavit. As part of her affidavit she states that at the time of the accident she was “operating a 2018 BMW bearing the NY license plate number GPX6717.” She further states that “[s]uddenly and without warning, while my vehicle was entirely within the left lane, a 2008 Acura struck my vehicle in the rear causing my vehicle to strike the 2015 Toyota.” As stated above, the Police Accident Report states that “V1 [Defendant Purcell’s Vehicle] states he was driving straight and was unable to stop in time colliding into V2 [Defendant Williams’ Vehicle].” This evidence taken together is sufficient to establish Defendant Williams’ *prima facie* burden as it shows that the vehicle that the Plaintiff was a passenger in struck the vehicle driven by Defendant Williams. A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle.” *Nsiah-Ababio v. Hunter*, 78 AD.d 672, 672, 913 N.Y.S.2d 659, 660 [2d Dept 2010].

In opposition to the motion, the Plaintiff again fails to raise a material issue of fact that would prevent this Court from granting the motion made by Defendant Williams. As to the position that the motion is premature, it should be noted that the “motion was not premature since these 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]. The Plaintiff does not submit an affidavit from any person with knowledge to refute the affidavit of

Defendant Williams as to how the collisions occurred. *See Maliakel v. Morio*, 185 AD3d 1018, 1019, 129 N.Y.S.3d 99, 101 [2d Dept 2020]. However, Defendant Purcell does oppose the cross-motion by Defendant Williams. In support thereof, he provides his affidavit. Although Purcell’s opposition is reflected in the NYSCEF system as related to motion sequence #1, a reading of the document (NYSCEF Doc. 33) makes clear that it is in opposition to the cross-motion (motion sequence #2), and the court will treat it accordingly. However, as stated above, the motion is not premature. Purcell does raise a material issue of fact as to Defendant Williams’ culpability. Purcell contends that “[t]he accident occurred after the female driver of the BMW suddenly, unexpectedly, and without warning or signal switched from the middle lane of the three-lane highway into the far left lane right in front of my vehicle.” “My car was approximately one-half car length away from the BMW when Defendant Stacey Williams suddenly and unexpectedly switched lanes in front of me. As a result, I was unable to stop and collided with the BMW.” Purcell’s version of events does not directly contradict his admission in the Police Report that he could not stop in time to avoid his collision with Williams’ car. It is arguably a clarification and only constitutes an issue of credibility. It is clearly not a feigned attempt to avoid the consequences of an earlier statement. As a result, Purcell has raised a triable issue of fact in relation to Defendant Williams’ negligence and her being a proximate cause of the collision with Purcell’s vehicle.

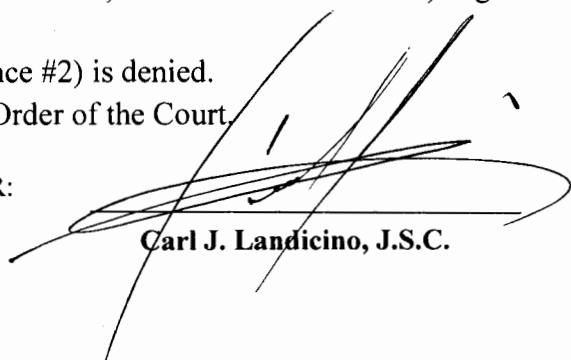
Based on the foregoing, it is hereby **ORDERED** as follows:

Defendant Patel’s motion (motion sequence #1) is granted and the complaint and any cross-claims are dismissed as against Defendant Patel. Accordingly, Third Party Defendant Patel’s motion for Summary Judgment (motion sequence #2, Index No. 523564/2020) is granted in accordance herewith.

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Defendant Williams’ motion (motion sequence #2) is denied.
 The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.