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| <b>Moodie v Wilson</b>                                                                                                                                                                                                         |
| 2024 NY Slip Op 35416(U)                                                                                                                                                                                                       |
| May 15, 2024                                                                                                                                                                                                                   |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 703860/2022                                                                                                                                                                                           |
| Judge: Denise N. Johnson                                                                                                                                                                                                       |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENISE N. JOHNSON IAS Part 11  
Justice

-----X  
DELROY G. MOODIE

Plaintiff(s),

- and -

PHILIP A. WILSON

Defendant(s).  
-----X

Index No.:703860/2022

Motion Date: 2/26/24

Motion Cal. No.: 24

Motion Seq. No: 1

The following papers numbered EF 10-26 read on this motion by Defendant in this action for an order, pursuant to CPLR §3212(b), granting summary judgment and dismissing the Complaint.

Papers  
Numbered

Notice of Motion-Affirmation – Statement of Material Facts – Exhibits – Service..... EF 10- 20

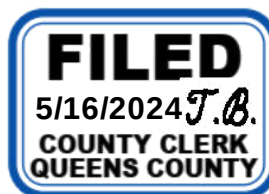
Affirmation in Opposition – Statement of Material Facts – Exhibits – Service..... EF 22-24

Reply Affirmation ..... EF 25

Upon the foregoing papers it is **ORDERED** that as follows:

This is a claim to recover from personal injuries allegedly resulting from a motor vehicle accident on November 14, 2021. Plaintiff alleges that his vehicle that was struck in the rear end by a vehicle operated by Defendant PHILIP A. WILSON. The accident occurred on the Westbound Belt Parkway at or near its intersection with Erskine Street in the County of Kings, City and State of New York. Defendant now moves for an order of summary judgment pursuant to CPLR §3212 dismissing the complaint and any cross claims against him.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine that the proponent of a summary judgment motion has made a *prima facie* showing of



entitlement to judgment as a matter of law. When seeking an Order of Summary Judgment, the proponent must show that they have eliminated all triable issues of fact (see, *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]). They do so by tendering sufficient evidence to eliminate any material issues of fact from the case. (See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4<sup>th</sup> Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

In support of this application the Defendant submits a statement of material facts, the pleadings, the deposition transcript of Plaintiff, the deposition transcript of Defendant, a certified police report and the vehicle title and registration. It is well-established that a rear-end collision is sufficient to create a *prima facie* case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle (see, *Sayyed v Murray*, 109 AD3d 464 [2d Dept 2013]); *Russ v. Investech Secs.*, 6 A.D.3d 602 [2d Dept. 2004]; *Milskiy v. Solanky*, , 8 A.D.3d 353 [2d Dept. 2004]; *Ortega v. City of New York*, 281 A.D.2d 466 [2d Dept. 2001]; *Mendiolaza v. Novinski*, 268 A.D.2d 462 [2d Dept. 2000]; *Leal v. Wolff*, 224 A.D.2d 392 [2d Dept. 1996]. Defendant offers a non-negligent explanation to the collision contends that the accident occurred as a result of mechanical failure of the Plaintiff's vehicle when Plaintiff's axle broke causing Plaintiff to stop abruptly in the left lane of the Belt parkway where both vehicles were travelling. Defendant further argues that the broken axle resulted in oil coming out of the Plaintiff's vehicle which created an oil-slicked roadway. The oily road condition caused Defendant's vehicle and the vehicle between Plaintiff's vehicle and Defendant's vehicle to slide on the road. The sliding of the vehicles created

a cloud of smoke that obscured Plaintiff's vehicle. Defendant further alleges that he applied his brakes immediately upon observing the vehicle in front of him swerving and sliding due to the road condition created by Plaintiff's vehicle but the sliding on the oil slicked road created a cloud of smoke that obscured the Plaintiff's vehicle, and he did not see Plaintiff's vehicle prior to the impact. Defendant articulates that the aforementioned constituted an emergency under the emergency doctrine and warrants summary judgment in his favor. Defendant offers admissible proof of this explanation in the form of the certified police report as well as the deposition testimony from both parties.

Plaintiff in opposition to the motion also offers the deposition transcript of Plaintiff and the deposition transcript of Defendant. Plaintiff does not dispute the facts as alleged by the Defendant nor does Plaintiff offer an alternative circumstance of how the accident that occurred. Instead, Plaintiff argues that summary judgment must be denied because the Defendant bears liability for failure to see that which, through the proper use of senses, should have seen (see *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519 (2006); *Maloney v. Niewender*, 27 AD3d 426 (2006); *Bongiovi v. Hoffman*, 18 AD3d 686 (2005); *Torro v. Schiller*, 8 AD3d 364 (2004); *Russo v. Scibetti*, 298 AD2d 514 (2002); *Breslin v. Rudden*, 291 AD2d 471 (2002); *Agin v. Rehfeldt*, 284 AD2d 352 (2001); *Stiles v. County of Dutchess*, 278 AD2d 304 (2000); *Bolta v. Lohan*, 242 AD2d 356 (1997); *Weigand v. United Traction Co.*, 221 NY 39 (1917). Further, Plaintiff admittedly did not have his hazard lights illuminated at the time of the accident and does not address the road conditions behind him but asserts that the roadway ahead of him was clear and visible.

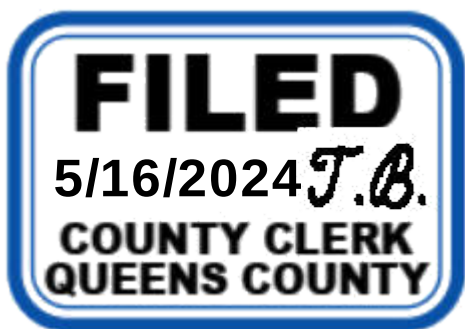
Under the emergency doctrine, "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without

weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (see *Vitale v Levine*, 44 AD3d 935, 936 [2d Dept 2007]; *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, 569 NE2d 432, 567 NYS2d 629 [1991]; see *Caristo v Sanzone*, 96 NY2d 172, 174, 750 NE2d 36, 726 NYS2d 334 [2001]; *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2004]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact (see *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444, 808 NYS2d 120 [2005]), those issues "may in appropriate circumstances be determined as a matter of law" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d at 60; see *Huggins v Figueroa*, 305 AD2d 460, 462, 762 NYS2d 404 [2003]). Therefore, it is,

**ORDERED**, that Defendant PHILIP A. WILSON's motion for an order of summary judgment pursuant to CPLR § 3212 is GRANTED and Plaintiff's complaint is dismissed.

The foregoing shall constitute the decision and order of this court.

Dated: May 15, 2024



*Denise N. Johnson*

**DENISE N. JOHNSON**  
J.S.C.