

Lattimore v Montgomery
2025 NY Slip Op 35407(U)
January 3, 2025
Supreme Court, Westchester County
Docket Number: Index No. 66047/2020
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
TINA LATTIMORE and KEVIN MARTIN,

Plaintiffs,

-against-

JAMES MONTGOMERY"JOHN DOE" INTENDING DRIVER
OF THE JAMES MONTGOMERY VEHICLE, AND
VELMA E. WALKER,

Defendants.

-----X
WOOD, J.

**DECISION & ORDER
Index No. 66047/2020
Sequence No. 5**

In this action to recover damages for personal injuries plaintiffs allegedly sustained in a motor vehicle accident, New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 81-100 were read in connection with the motion by pro-se plaintiff Kevin Martin ("plaintiff"), for summary judgment pursuant to CPLR 3212. According to plaintiff, on June 11, 2019, plaintiff along with his co-plaintiff wife Tina Lattimore were passengers inside the vehicle owned by defendant James Montgomery, with Bobby Jones as the driver. At or around Tarrytown Road at the intersection of Aqueduct Road in the Town of Greenburgh, defendants' vehicle rear-ended a vehicle owned and operated by Velma E. Walker¹, while Walker was allegedly stopped at a red light. The driver of Montgomery vehicle left the scene of the accident before the police arrived.

A proponent of a summary judgment motion 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” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1986]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (*Yelder v Walters*, 64 AD3d 762, 767 [2d Dept 2009]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (*Ortega v City of New York*, 721 NYS2d 790 [2d Dept 2000]). “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” (*Guralenko v New York City Transit Auth.*, 220 A.D.3d 847, 848 [2d Dept 2023]). “A rear-end collision with a stopped or stopping vehicle 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 nonnegligent explanation for the collision” (*Fernandez v Babylon Mun. Solid Waste*, 117 AD3d 678 [2d Dept 2014]).

The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision, because the operator of that car has a duty to avoid stopping suddenly without properly

signaling to avoid a collision “when there is opportunity to give such signal” (Vehicle and Traffic Law §1163; *see id.*; *Colonna v Suarez*, 278 AD2d 355 [2d Dept 2000]). “A conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation” (*Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 670 [2d Dept 2013]). But “stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*Gutierrez v Trillium USA, LLC*, 111 AD3d at 671). However, the frontmost driver also has the duty to avoid stopping suddenly or slowing down without signaling to avoid a collision (*Martinez v Allen*, 163 AD3d 951, 952 [2d Dept 2018]).

To make a prima facie showing, the motion must be supported “by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions” (CPLR 3212[b]). In support of plaintiff’s motion an uncertified copy of a police accident report is offered. While said report is signed at the bottom by the reporting police officer, absent is a certification as a business record, and an affidavit or other sworn evidence from a person with personal knowledge demonstrating the police report’s authenticity or accuracy. A properly certified police accident report is admissible where “the report is made based upon the officer’s personal observations and while carrying out police duties” (*Yassin v Blackman*, 188 AD3d 62, 65 [2d Dept 2020]). Therefore, the court cannot consider the report. Also, plaintiff’s affidavit is unclear if plaintiff personally witnessed the accident and what were the specific events leading up to the accident, as plaintiff merely refers to the uncertified police accident report. As defendant’s counsel points out: plaintiff cites to VTL 1111(d), stating that Jones “ran a red light”, which specifically contradicts the assertion that Walker was stopped at a red light and that

Jones rear-ended Walker's allegedly stopped vehicle. For these reasons, plaintiff fails to establish, prima facie, that defendants were at fault for or contributed to the happening of the accident (*Delgado v. Lachman*, 219 AD3d 580, 581 [2d Dept 2023]). The Second Department has found that "if the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, ... summary judgment on the issue of liability must be denied (id. at 580). Accordingly, that branch of the plaintiff's motion which was for summary judgment on the issue of liability against defendants, is denied regardless of the sufficiency of the opposition papers (id. at 581).

Further, to the extent that plaintiff alleges that he sustained a serious injury as defined in the Insurance Law, plaintiff fails to establish prima facie that he is entitled to summary judgment on the issue of threshold pursuant to Insurance Law §5102(d). A plaintiff moving for summary judgment on the issue of serious injury must establish, prima facie, that he or she sustained a serious injury within the meaning of Insurance Law § 5102(d) and "that the [serious] injury was causally related to the accident" (*Degachi v Faridi*, 215 AD3d 733, 733–34, [2d Dept 2023]). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury." Pursuant to Insurance Law §5102(d), serious injury means:

"a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days

during the one hundred eighty days immediately following the occurrence of the injury or impairment”.

Here, plaintiff attaches two unsworn MRI reports in support of his allegation that he has met the serious injury threshold. The question of whether the alleged injuries plaintiff allegedly suffered (including to his right knee and left shoulder) were causally related to the subject accident cannot be resolved on this record as a matter of law (id. at 733). Since plaintiff fails to satisfy his prima facie burden, this branch of plaintiff's motion is also denied without regard to the sufficiency of defendant's opposition papers (id. at 734).

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. Therefore, as stated herein, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that within twenty days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order with notice of entry upon all parties, and file proof of service on NYSCEF within five days of service; and it is further

ORDERED, that the matter is hereby referred to the Central Pre-Trial Alternative Dispute Resolution Part for a settlement conference. The Part Clerk shall notify the parties of the date, time, and method of the settlement conference. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
January 3, 2025



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF