McCrackin v Ford
2017 NY Slip Op 31101(U)
May 16, 2017
Supreme Court, Kings County
Docket Number: 508324/2016
Judge: Carl J. Landicino
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FILED: KINGS COUNTY CLERK 05/18/2017 04:09 PM
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NYSCEF DOC. NO. 23
RECEIVED NYSCEF: 05/18/2017

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 16th day of May, 2017.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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K.P., a minor, by his Mother and Natural Guardian, KISHA MCCRACKIN, and KISHA MCCRACKIN, individually,
Plaintiffs,

- against -

DOROTHY ANN FORD and ALLEN C. SIMON,
Defendants.

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Index No.:508324/2016

DECISION AND ORDER

Motion Sequence #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..	1/2
Opposing Affidavits (Affirmations)..	3,
Reply Affidavits (Affirmations)..	4

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident which occurred on January 15, 2016. On that day, the Plaintiffs K.P., a minor, by his Mother and Natural Guardian, Kisham McCrackin, and Kisha McCrackin individually (hereinafter "the Plaintiffs") allege in their complaint that they suffered personal injuries after the vehicle they were passengers in (owned and operated by non-party Steve O. Omozusi) was engaged in a collision with a vehicle owned by Defendant Dorothy Ann Ford (hereinafter "Defendant Ford") and operated by Defendant Allen C. Simon (hereinafter the "Defendant Simon"). Specifically, the Plaintiffs allege that the vehicle they were passengers in was stopped for several moments at the intersection of Belmont Avenue and Shepard Avenue, when it was struck in the rear by the vehicle owned by Defendant Ford and operated by Defendant Simon.

The Plaintiffs now move for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability, and proceeding to trial on the issue of damages. The Plaintiffs argue that the Defendants are solely liable for the incident since the Defendants' vehicle allegedly struck their vehicle (as passengers) in the rear while it was stopped. Specifically, the Plaintiffs argue that the Defendant driver violated the Vehicle and Traffic Law (hereinafter "VTL) §1129 in as much as Defendant Simon failed to maintain a safe distance from the vehicle in which the Plaintiffs were passengers. In opposition, the Defendants argue that the motion should be denied based upon the affidavit of Defendant Simon who alleges that the collision was caused because the car in which the Plaintiffs were passengers stopped suddenly.

"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 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

In general, "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law." *Colpan v. Allied Cent. Ambulette, Inc.*, 97 A.D.3d 776, 777, 949 N.Y.S.2d 124, 125 [2nd Dept. 2012]. However, "a plaintiff moving for summary judgment has the ultimate burden of establishing his or her freedom from comparative negligence as a matter of law." *Frey v. Richmond Hill Lumber & Supply*, 132 A.D.3d 803, 804, 18 N.Y.S.3d 407, 408 [2nd Dept, 2015].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendants were the sole proximate cause of the accident. In support of the Plaintiff's motion, the Plaintiffs rely on a Police Accident Report, and an affidavit from Plaintiff Kisha McCrackin. Although the Police Accident Report is not admissible and is considered a hearsay statement,[1] the Court finds that the affidavit of Plaintiff Kisha McCrackin, in which she states that the vehicle she was a passenger in was stopped at an intersection before being hit in the rear, is sufficient for the Plaintiffs to meet their *prima facie* burden. "When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle." *Taing v. Drewery*, 100 A.D.3d 740, 741, 954 N.Y.S.2d 175, 177 [2nd Dept, 2012].

In opposition, insufficient proof in admissible form has been submitted to establish a material issue of fact that prevents this Court from granting summary judgment. In opposition to the motion, the Defendants rely on the affidavit of Defendant Alan Simon. In that affidavit, Defendant Simon states that the vehicle in which the Plaintiffs were passengers stopped suddenly and he did not have sufficient time to respond or to avoid that vehicle. However, even accepting Defendant Simon's version as true, the Defendant states that his vehicle was approaching a stop sign at the time of the alleged incident. As such Defendant Simon should have expected the Plaintiffs' vehicle to come to a stop. "While a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, 'vehicle 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'" *Tumminello v. City of N.Y.*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739 [2nd Dept, 2017], quoting *Bros. v. Bartling*, 130 A.D.3d 554, 556, 13 N.Y.S.3d 202 [2nd Dept, 2015]. Accordingly, the Plaintiffs' motion is granted.

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[1] The statements contained therein are not attributed to anyone.

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

The motion for summary judgment by the Plaintiff is granted in that the issue of liability is determined and the parties shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

Date: May 16, 2017

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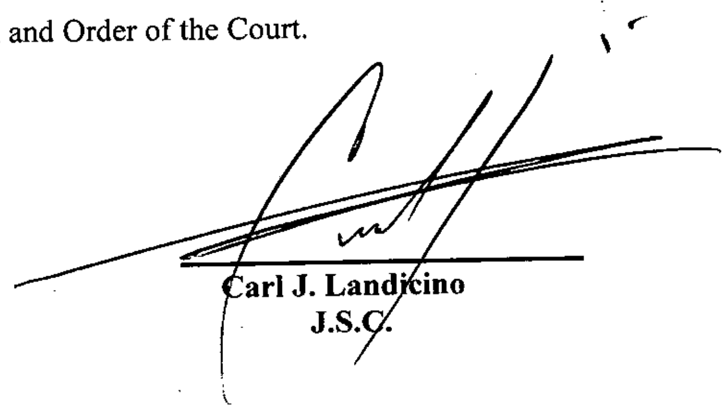

Carl J. Landicino
J.S.C.