

Smith v EAN Holdings, LLC.

2018 NY Slip Op 33378(U)

December 3, 2018

Supreme Court, Kings County

Docket Number: 503639/2015

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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 3rd day of December, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
RAYON SMITH,

Plaintiff,

Index No.: 503639/2015

DECISION AND ORDER

- against -

EAN HOLDINGS, LLC., TAMRA DENNIS and
DOUGLAS MCRAE FREDERICK,

Defendants.

Motions Sequence #5, #7

-----X

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

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4,</u>
Opposing Affidavits (Affirmations).....	<u>5, 6, 7, 8,</u>
Reply Affidavits (Affirmations).....	<u>9, 10, 11,</u>

Upon the foregoing papers, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on November 15, 2014. On that day the Plaintiff Rayon Smith (hereinafter the "Plaintiff") was a passenger in a vehicle (the "Dennis vehicle") operated by Defendant Tamara Dennis (hereinafter "Defendant Dennis") and owned by Defendant EAN Holdings, LLC (hereinafter "Defendant EAN") and that collided with a vehicle owned and operated by Defendant Douglas Frederick D. McRae, s/h/a Douglas McRae Frederick (hereinafter "Defendant Mcrae"). The Plaintiff alleges that the collision occurred as the vehicle that he was a passenger in made a left turn at the intersection of Snyder Avenue and

Kings Highway in Brooklyn, New York. Plaintiff has discontinued any claims as against Defendant EAN, as part of a stipulation between the parties dated July 13, 2018.

Defendant McRae, now moves (motion sequence #5) for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint against him. Specifically, Defendant McRae contends that the collision occurred because Defendant Dennis made a reckless left hand turn from Snyder Avenue into oncoming traffic. Both the Plaintiff and Defendant Dennis oppose the motion and argue that it should be denied. The opponents of the motion contend that the motion should be denied given that Defendant McRae conceded in his deposition that he was speeding at the time of the alleged incident and that the incident occurred because Defendant McRae attempted to go around the Dennis vehicle before it turned.

The Plaintiff also moves (motion sequence #7) 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 Plaintiff argues that he bears no liability for the accident since he was an “innocent passenger” in the Dennis vehicle. Both Defendant McRae and Defendant Dennis oppose the motion, to the extent that it seeks to find that either of them are liable, as a matter of law, for the subject accident.

It has long been established that “[s]ummary 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].

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 [2nd 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 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The motion by Defendant McRae is denied. Although the vehicle operated by Defendant Dennis may be found to have been operated in a negligent fashion, which operation was arguably a proximate cause of the accident, there can be more than one proximate cause of an accident. *See Desio v. Cerebral Palsy Transp., Inc.*, 121 A.D.3d 1033 [2nd Dept, 2014]. Defendant McRae acknowledged that he was speeding at the time of the alleged incident. In the instant case there is a triable issue of fact as to Defendant McRae’s comparative fault and whether he could have, with reasonable care, avoided the accident. *See Choi v. Schwabenbauer*, 124 A.D.3d 574 [2nd Dept, 2015]. Accordingly, Defendant McRae’s motion is denied.

As to the Plaintiff’s motion, it is granted solely to the extent that the Plaintiff is found to be a passenger free from liability. “The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers. *Medina v. Rodriguez*, 92 A.D.3d 850, 939 N.Y.S.2d 514 [2nd Dept, 2012]; *see CPLR 3212 [g]*; *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept, 2001]. As a result, the motion is

granted to the extent that the Plaintiff is determined to be free of culpable conduct. His recovery, if any, is subject to a determination of fault in relation to the defendants.

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

The motion (motion sequence #5) by Defendant McRae is denied.

The motion (motion sequence #7) by the Plaintiff is granted to the extent that the Plaintiff is determined to be a passenger free from liability.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

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FILED