

Campbell v Mehmood
2020 NY Slip Op 32430(U)
July 21, 2020
Supreme Court, Kings County
Docket Number: 503052/2020
Judge: Francois A. Rivera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July, 2020

HONORABLE FRANCOIS A. RIVERA
-----X
KATSIARYNA CAMPBELL,

Plaintiff,

DECISION & ORDER
Index No. 503052/2020

- against -

ASIF MEHMOOD and ABID MAHMOOD,

Defendants.

-----X
Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of plaintiff Katsiaryna Campbell, filed on May 20, 2020, under motion sequence one, for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability and setting the matter down for a trial on damages only. The motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Exhibit A-C

BACKGROUND

On February 6, 2020, the plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office (hereinafter KCCO). On May 11, 2020, defendants Abid Mahmood and

Asif Mehmood joined issue by electronically filing their joint verified answer with the KCCO.

The verified complaint alleges, among other things, the following salient facts. On February 16, 2019, Asif Mehmood (hereinafter Mehmood) was driving a 2008 Dodge Sedan bearing license plate number EKK1037 (hereinafter the subject vehicle) with the permission of its owner, Abid Mahmood, at or near the intersection of Queens Boulevard and Grand Avenue in Queens County, New York. At the same date and time, the plaintiff was crossing Queens Boulevard at or near its intersection with Grand Avenue in Queens County, New York. The subject vehicle came into contact with the plaintiff (hereinafter the subject accident) causing her to sustain serious physical injury. The collision was allegedly caused by Mehmood's negligent operation of the subject vehicle.

LAW AND APPLICATION

There is no opposition to the instant motion. However, a summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion, i.e. defaulted (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 278 n [1st Dept 2006] citing *Vermont Teddy Bear Co., v 1-800 Beargram Co.*, 373 F3d 241 [2nd Cir 2004] ["the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the ... court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law"]; see *Cugini v System Lumber Co., Inc.*, 111 AD2d 114 [1st

Dept 1985]).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

A plaintiff may establish prima facie entitlement to judgment as a matter of law by submitting evidence establishing that he or she was crossing the street with the traffic light in his or her favor, when the defendant driver failed to yield the right-of-way

striking the plaintiff (*Twarog v Ortiz-Deviteri*, 137 AD3d 777 [2nd Dept 2016], citing 34 RCNY 4-03 [a] [1] [i]; *Zhu v Natale*, 131 AD3d 607, 608 [2nd Dept 2015]).

The plaintiff contends that this is exactly what happened here. The documents plaintiff submitted in support of the motion, however, did not establish these facts. Plaintiff's submitted the summons and verified complaint, an affirmation of plaintiff's counsel and a certified police report. CPLR 105 (u) provides that a verified pleading may be utilized as an affidavit whenever the latter is required. Here, the complaint was verified by plaintiff's counsel pursuant to CPLR 3020 (d) and, as such, cannot be used as an affidavit of the plaintiff pursuant to CPLR 105 [u] (*see King v King*, 99 AD3d 672 [2nd Dept 2012]). The affirmation of plaintiff's counsel does not claim or demonstrate personal knowledge of the facts regarding the subject accident, and, therefore, has no probative value (*Thompson v Pizzaro*, 155 AD3d 423 [1st Dept 2017]).

Plaintiff claims that a statement attributable to Mehmood contained in the annexed certified police report is probative as an admission of an adverse party. While the statements of an adverse party contained in a police report may be admissible as an admission against that party, it is not sufficient to carry the plaintiff's prima facie burden (*Brown v URS Midwest, Inc.*, 132 AD3d 936, 937 [2nd Dept 2015]). In the absence of an affidavit by the plaintiff or a witness setting forth the facts and circumstances of the subject accident, a plaintiff cannot establish that the adverse party was negligent, and that the negligence proximately caused the collision. The police report, at best, only provides a piece of the proof but it is not sufficient standing alone to carry the plaintiff's burden.

The motion must be supported by sworn testimony of any individual with personal knowledge of the circumstances of the subject accident. There was no such evidence here. Accordingly, the motion must be denied regardless of the sufficiency, or lack thereof, of opposing papers (*Cugini*, 111 AD2d 114).

CONCLUSION

The motion by Katsiaryna Campbell for an order granting summary judgment in her favor on the issue of liability is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francis A. Rivera

J.S.C.

KINGS COUNTY CLERK
FILED
2020 JUL 24 PM 12:47