Hossain v Dyl
2023 NY Slip Op 31658(U)
May 9, 2023
Supreme Court, Kings County
Docket Number: Index No. 525895/2021
Judge: Carl J. Landicino
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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 9th day of May, 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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BELAYET HOSSAIN,

Plaintiff,

-against-

LUKASZ DYL,

Defendant.

---X

Index No.: 525895/2021

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 (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	15-19,
Opposing Affidavits (Affirmations)........	34,
Reply Affidavits (Affirmations)	35

After a review of the papers and oral argument, the Court finds as follows:

The instant action concerns a claim for personal injuries allegedly arising from a motor vehicle collision that occurred on May 13, 2019. The Plaintiff, Belayet Hossain (hereinafter the "Plaintiff") alleges that he was injured when his vehicle was struck in the rear by a vehicle owned and operated by Defendant Lukasz Dyl (hereinafter the "Defendant"). The incident allegedly occurred on the Gowanus Ramp towards the Exit to 38th Steet of I-278 Brooklyn/Queens Expressway.

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability and dismissing the Defendant's affirmative defenses of comparative fault. The Plaintiff contends that summary judgment should be granted because the Defendant's vehicle was negligent and the sole proximate cause of the

collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that Plaintiff's vehicle was hit in the rear by the Defendant's vehicle. In support of their application, the Plaintiff relies on his own affidavit and a Police Accident Report. The Defendant opposes the motion and contends that Plaintiff's application for summary judgment should be denied as the motion is premature insofar as discovery has not been completed.

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, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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, 538 N.Y.S.2d 837 [2d 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 AD3d 518, 520, 824

N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiff to establish, *prima facie*, that the Defendant's vehicle hit the Plaintiff's vehicle in the rear. In support of Plaintiff's application, the Plaintiff relies on his affidavit, and a Police Accident Report. As an initial matter, the certified police accident report is admissible and the statement by Defendant driver, that "TPO Driver of V1 [Defendant] states he was travelling E/B in the left lane when V2 suddenly braked, causing him to rear end V2 [Plaintiff]", is admissible. The statement constitutes an admission. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. In his affidavit, the Plaintiff states that "[a]t the time I was driving a 2016 Toyota Taxi, bearing the New York license plate number T732090C." The Plaintiff states that "[a]t around 5:45PM, I traveled eastbound on I278 Gowanus Ramp, Exit to 38th Street. While slowing for traffic, I was hit from in the rear by another vehicle." Regarding the application of his brakes, the Plaintiff states that "[w]hen slowing down for traffic, I applied my brakes gradually and did not abruptly stop or slam on my brakes." These statements are sufficient for the Plaintiffs to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d

Dept 2007]. Further, "[w]hen 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." *Gaeta v. Carter,* 6 AD3d 576, 576, 775 N.Y.S.2d 86 [2d Dept. 2004]; *see* Vehicle and Traffic Law § 1129 [a]; *Williams v. Spencer–Hall,* 113 AD3d 759, 759-760, 979 N.Y.S.2d 157 [2d Dept 2014]; *Taing v. Drewery,* 100 AD3d 740, 741, 954 N.Y.S.2d 175 [2d Dept 2012].

In opposition, the Defendant relies on his attorney's affirmation. First, it should be noted that the "motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Cajas-Romero v. Ward*, 106 AD3d 850, 852, 965 N.Y.S.2d 559, 562, 2013 N.Y. Slip Op. 03446 [2d Dept 2013], quoting *Lopez v. WS Distrib., Inc.,* 34 A.D.3d 759, 760, 825 N.Y.S.2d 516. What is more, the Defendant does not submit an affidavit from a person with knowledge of the facts. The conclusory allegation of a sudden stop in the police report, even assuming its admissibility in that it is an exculpatory statement, without more, is insufficient. *See Hakakian v. McCabe*, 38 AD3d 493, 494, 833 N.Y.S.2d 106, 107 [2d Dept 2007]; *David v. New York City Bd. Of Educ.*, 19 AD3d 639, 797 N.Y.S.2d 294 (Mem) [2d Dept 2005]. ""[A] conclusory assertion by the operator of [a] 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 A.D.3d at 670–671, 974 N.Y.S.2d 563; *see Le Grand v. Silberstein,* 123 A.D.3d at 773, 999 N.Y.S.2d 96)." *Brothers v. Bartling*, 130 AD3d 554, 556, 13 N.Y.S.3d 202, 203-204, 2015 N.Y. Slip Op. 05630 [2d Dept 2015].

Insofar as the Defendant has not raised an issue of fact as to Plaintiff's comparative negligence and the Plaintiff has moved for the dismissal of Defendant's affirmative defense in relation to culpable conduct, the Defendant's affirmative defenses of culpable conduct on the part of the Plaintiff are dismissed. *See Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021]; *see also Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018]. "[E]ven though a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence." *Marangoudakis v. Suniar*, 208 AD3d 1233, 1235, 175 N.Y.S.3d 263, 265 [2d Dept 2022].

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

The Plaintiffs' motion (motion sequence #1) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and the proximate cause of the accident, and the Defendant's 6th, 10th and 11th affirmative defenses are dismissed. The matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.