

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - March 5, 2026

LARA J. GENOVESI, J.P.
BARRY E. WARHIT
DONNA-MARIE E. GOLIA
PHILLIP HOM, JJ.

2025-00674

DECISION & ORDER

Maycol Segura, appellant, v Loren Smith, et al., respondents,
et al., defendant.

(Index No. 523728/23)

The Law Offices of Omrani & Taub, P.C., New York, NY (James L. Forde of counsel), for appellant.

Callahan & Fusco, LLC, New York, NY (Christopher S. Del Bove of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Steven Z. Mostofsky, J.), dated November 21, 2024. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment dismissing the affirmative defenses of the defendants Loren Smith, Hems Delivery, Inc., and Fedex Ground Package System, Inc., alleging comparative negligence, failure to wear a seatbelt, and assumption of risk.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying those branches of the plaintiff's motion which were for summary judgment dismissing the affirmative defenses of the defendants Loren Smith, Hems Delivery, Inc., and Fedex Ground Package System, Inc., alleging assumption of risk and failure to wear a seatbelt and substituting therefor a provision granting those branches of the plaintiff's motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff commenced this action to recover damages for personal injuries that he alleged he sustained when the vehicle he was operating was struck in the rear by a vehicle owned by, among others, the defendants Hems Delivery, Inc., and Fedex Ground Package System, Inc., and

operated by the defendant Loren Smith (hereinafter collectively the defendants). The defendants interposed separate answers, asserting affirmative defenses alleging, inter alia, comparative negligence, failure to wear a seatbelt, and assumption of risk. The plaintiff subsequently moved for summary judgment on the issue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence, failure to wear a seatbelt, and assumption of risk. In an order dated November 21, 2024, the Supreme Court granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability but denied those branches of the motion which were for summary judgment dismissing the defendants' affirmative defenses alleging comparative negligence, failure to wear a seatbelt, and assumption of risk. The plaintiff appeals.

"There can be more than one proximate cause of an accident, and the issue of comparative negligence is generally a question for the jury to decide" (*Castillo v Unique Roofing of N.Y., Inc.*, 218 AD3d 432, 433 [citation omitted]). However, "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" (*Karim v Proline Rental, LLC*, 222 AD3d 851, 852; *see Fischetti v Simonovsky*, 227 AD3d 670, 671).

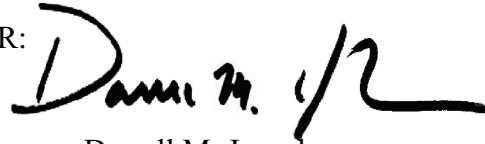
Here, the plaintiff failed to establish, prima facie, that he was not comparatively at fault in causing the accident. In support of his motion, the plaintiff submitted his affidavit wherein he averred that his vehicle had been stopped at a red traffic light for at least 20 seconds when it was struck in the rear by the defendants' vehicle. However, the plaintiff also submitted a certified copy of a police accident report wherein the defendant driver stated that the plaintiff's vehicle came to a sudden stop even though the traffic light was green, which failed to eliminate all triable issues of fact as to whether the plaintiff was comparatively at fault in causing the accident (*see Martinez v Colonna*, 232 AD3d 876, 878; *Martin v Copado-Esquivel*, 226 AD3d 668, 670). Although the police report contained inadmissible, self-serving statements of the defendant driver, the plaintiff waived any objection to the admissibility of the report by submitting it in support of his motion (*see Kang Min Lee v Ke Ping Huang*, 223 AD3d 790, 791; *Grant v Carrasco*, 165 AD3d 631, 632). Under the circumstances, the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment dismissing the defendants' affirmative defenses alleging comparative negligence regardless of the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

However, the Supreme Court should have granted those branches of the plaintiff's motion which were for summary judgment dismissing the affirmative defenses alleging failure to wear a seatbelt and assumption of risk. The plaintiff established his prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defenses alleging failure to wear a seatbelt through his affidavit wherein he stated that he was wearing a seat belt at the time of the accident (*see Johnson v Cain*, 244 AD3d 972, 973; *Maurice v Donovan*, 235 AD3d 633, 635). In addition, the plaintiff established his prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defenses alleging assumption of risk, as this doctrine does not apply to this case (*see Custodi v Town of Amherst*, 20 NY3d 83, 88-90; *Kelley v Verizon Servs. Corp.*, 241 AD3d 1309, 1310). In opposition to the plaintiff's prima facie showing, the defendants failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

GENOVESI, J.P., WARHIT, GOLIA and HOM, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a long horizontal flourish.

Darrell M. Joseph
Clerk of the Court