At an IAS Term, Part 27 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 25th day of April 2006

HON. ARTHUR M. SCHACK J.S.C.

PRESENT:
HON. ARTHUR M. SCHACK
Justice

CARMINE MAROTTA,
Plaintiff,

- against -

TOYOTA MOTOR CREDIT CORPORATION, KISSLER & COMPANY, INC., and MICHAEL J. GOLDSTEIN,
Defendants.

DECISION & ORDER

Index # 36373/04

The following papers numbered 1 to 3 read on this motion:	Papers Numbered
Notice of Motion - Order to Show Cause Affidavits (Affirmations) Annexed	1
Opposing Affidavit (Affirmations)	2
Reply Affidavit (Affirmations)	3

Plaintiff, in this personal injury auto accident case, moves by motion, pursuant to CLPR Rule 3212, for partial summary judgment on liability upon the grounds that no triable issues of fact exist with respect to defendants' liability. It is undisputed that a two-

vehicle accident took place on February 19, 2004, at about 1:20 P.M., at the intersection of Avenue N and Rockaway Parkway, in the Canarsie section of Brooklyn, New York. Plaintiff, in his verified complaint [exhibit B of motion] and his affidavit in support of the motion, states that he proceeded eastbound on Avenue N into the intersection, at approximately 25 miles per hour, with a steady green light in his favor. He states that defendants' vehicle proceeded southbound on Rockaway Parkway into the intersection, against a steady red light, and struck his vehicle. Plaintiff alleges in his affidavit that:

> [t]he defendant driver, Mr. Goldstein, apologized profusely and admitted he went through the red light. His statement was repeated to the police and is reflected in the police report when the reporting officer indicated in Item # 4 that the apparent cause was the defendant driver's "inattention" and quotes said defendant's admission that he "went through the red light."

This is confirmed by the police accident report [exhibit D of motion]. However, the police accident report is not in admissible form, but the verified complaint and, more important, plaintiff's affidavit in support of the motion are admissible.

Plaintiff's instant motion was filed the same day as his request for judicial intervention (RJI). The motion was made subsequent to joinder of issue, but prior to the scheduling of a preliminary conference to resolve discovery and related issues.

Defense counsel, in his affirmation in opposition, claims that the motion is premature, and that discovery is necessary, pursuant to CPLR Rule 3212 (f), to depose the

parties to determine the facts surrounding the speed of the vehicles, their relevant positions, and whether each driver was keeping a proper lookout. Further, defense counsel states that plaintiff's motion is based upon inadmissible proof, the police accident report. Somehow defendant's counsel not only overlooked plaintiff's admissible affidavit, but failed to present any evidence in admissible form to refute plaintiff's verified complaint and affidavit in support of the motion. For the reasons to follow, CPLR Rule 3212 (f) is inapplicable and plaintiff's motion for summary judgment is timely. Defendants' failure to refute plaintiff with anything in admissible form is fatal to their opposition. This Court must grant plaintiff's motion for partial summary judgment on liability.

Summary Judgment Standard

The proponent of summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See* Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenberg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR Rule 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the nonmoving party. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

Plaintiff's motion for partial summary judgment with its proof in admissible form demonstrates a *prima facie* entitlement to judgment as a matter of law. The Court of Appeals instructed in Andre v Pomeroy, 35 NY2d 361 (1974), at 364, that "when there is no genuine issue to be resolved at trial, the case should be summarily decided . . ." Defense counsel supports his opposition to plaintiff's motion for partial summary judgment upon the grounds that the motion is premature and discovery is needed.

It is clear that the motion is not premature. CPLR Rule 3212 (a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined."

Further, when the party moving for summary judgment has made its showing of entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate the existence of triable issues of fact. *See* Alvarez v Prospect Hospital,

supra; Winegrad v New York University Medical Center, *supra.* It is black letter law that in a CPLR § 3212 motion for summary judgment an affirmation by an attorney who has no personal knowledge of the facts has no evidentiary value. *See* Zuckerman, *supra;* Stahl v Stralberg, 287 AD2d 613 (2d Dept 2001); Deronde Products Inc. v Steve General Contractor Inc., 302 AD2d 989 (4th Dept. 2003). In Indig v Finkelstein, 23 NY2d 728 (1968), the Court clearly instructed, at 729, that the "burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified (citations omitted)." Defense counsel has not submitted any admissible evidence rebutting plaintiff's *prima facie* showing of entitlement to judgment as a matter of law and demonstrating the existence of triable issues of fact.

Defendants' belief that additional discovery might reveal something helpful to the case does not provide a CPLR Rule 3212 (f) basis for denying summary judgment in the instant matter. In Kragel v Animal Hosp. of Rockaways, 5 AD3d 635, 636 (2d Dept 2004), the Court observed that, "it is well settled that the mere hope that further discovery might reveal something helpful to a . . . [party's] case does not provide a basis for postponing a determination of a motion for summary judgment (*see* Petitpain v Curti, 269 AD2d 376)." *See* Morissaint v Raemar Corp., 271 AD2d 586 (2d Dept 2000); Marino v City of New York, 259 AD2d 469 (2d Dept 1999); Cooper v Milton Paper Co., Inc., 258 AD2d 614 (2d Dept 1999); Agoglia v Sterling Foster & Co., Inc., 237 AD2d 549 (2d

Dept 1997); Bryan v City of New York, 206 AD2d 448 (2d Dept 1994); Plotkin v Franklin, 179 AD2d 746 (2d Dept 1992).

CPLR Rule 3212 (f) allows for denial of summary judgment or a continuance for discovery if facts are unavailable to an opposing party. In the facts and circumstance of the instant action defense counsel could easily have secured an affidavit by defendant Goldstein as to his version of the accident. Defendant Goldstein's version of events should be easily available to his counsel. There is no issue present of information exclusive to plaintiff and none has been claimed. Morris v Goldstein, 223 AD2d 582 (2d Dept 1996); Stevens v Hilmy, 185 AD2d 840 (2d Dept 1992).

The Court in Mazzaferro v Barterama Corp., 218 AD2d 643, 644 (2d Dept 1995), held that:

> Pursuant to CPLR 3212 (f), the trial court has discretion to deny a motion for summary judgment, or to order a continuance to permit affidavits to be obtained or disclosure to be had, if "facts essential to justify opposition may exist but cannot then be stated." For the court to delay action on the motion, there must be a likelihood of discovery leading to such evidence (*see,* Frierson v Concourse Plaza Assocs., 189 AD2d 609, 610). The "mere hope" that evidence sufficient to defeat the motion may be uncovered during the discovery

process is not enough . . . Since there was only hope and speculation as to what additional discovery would uncover in the present situation, the court properly granted the motion for summary judgment.

Defendants, by not denying that Mr. Goldstein went through a steady red light and Mr. Goldstein admitting it to plaintiff, now rely upon rank speculation and mere hope that a deposition might bail them out. This is insufficient to interdict partial summary judgment on the issue of liability. Drepaul v Allstate Ins. Co., 299 AD2d 391 (2d Dept 2002); Schneider v Melmarkets, Inc., 289 AD2d 470 (2d Dept 2001); Mazzaferro v Barterama Corp., *supra*.

It is clear that partial summary judgment on liability must be granted to plaintiff.

Conclusion

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgement on the issue of liability, pursuant to CPLR Rule 3212, is granted.

This constitutes the Decision and Order of the Court.

E N T E R

HON. ARTHUR M. SCHACK
J. S. C.

HON. ARTHUR M. SCHACK J.S.C.