SHORT FORM ORDER

INDEX # 45622-09
RETURN DATE: **6-14-11**
MOT. SEQ. # **001 & 002**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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KURT ACKLEY,

Plaintiff,

-against-

JUNE B. CERVENY and (AJM AUTOMOTIVE SUPPLY CORP, doing business as TOMAR AUTOMOTIVE),

Defendants.

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CALENDAR DATE: October 19, 2011
MNEMONIC: MG; XMD

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and supporting papers 13-18 ; Answering Affidavits and supporting papers 19-23 ; Replying Affidavits and supporting papers ____; Other ____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, AJM Automotive Supply Corp, d/b/a Tomar Automotive, for summary judgment and dismissal of plaintiff Kurt Ackley's negligence complaint against it, pursuant to CPLR §3212 is granted in its entirety and the plaintiff's action against this defendant is dismissed. The action is severed and continued as against the remaining defendant, June B. Cerveny. The plaintiff's cross-motion for further discovery and an examination before trial of the principal of the moving defendant is denied as moot.

The plaintiff instituted this action for personal injuries allegedly sustained in a motor vehicle accident against the defendants, June B. Cerveny (hereinafter Cerveny) and AJM Automotive Supply Corp, d/b/a Tomar Automotive (hereinafter Tomar) which occurred on October 15, 2009 at approximately 5:20 pm in front of 212 West Main Street, in Patchogue, Suffolk County on Long Island, New York (hereinafter West Main Street). The plaintiff was a pedestrian crossing in the middle of West Main Street when he was struck by the motor vehicle operated by Cerveny which was traveling westbound on West Main Street (also known as Montauk Highway). A number of witnesses gave police statements that the plaintiff was in the middle of the street when struck by the Cerveny vehicle and that the plaintiff darted out even after seeing the Cerveny vehicle. (Cerveny's deposition, p.32). The plaintiff alleges that Tomar had an illegally parked box truck on the street where the accident occurred. The plaintiff sustained injuries to his left arm and left leg. The plaintiff thereafter instituted the present lawsuit.

Tomar now moves for summary judgment and dismissal of the plaintiff's action as against it pursuant to CPLR §3212 claiming that its truck was not illegally parked along West Main Street, that it was never issued a summons by the police who responded to the accident and Tomar's parked truck was not a proximate cause of this accident between the plaintiff and the Cerveny vehicle. The plaintiff opposes the requested relief and argues that the plaintiff has not deposed the owner of Tomar and therefore Tomar's motion should be denied. The plaintiff also submits a cross-motion to compel Tomar to submit to a deposition.

For the following reasons, Tomar's motion pursuant to CPLR §3212 for summary judgment and dismissal of the plaintiff's complaint against it is granted in its entirety and the plaintiff's action as against Tomar is dismissed. The action is severed and continued against Cerveny, the remaining defendant. The plaintiff's motion for further discovery and a deposition of Tomar is denied as moot.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

While summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). Here, in the case at bar, the evidence presented by the witnesses to this accident as well as the deposition testimony of both the plaintiff and Cerveny establish that there are no questions of fact to warrant a denial of summary disposition to Tomar. The plaintiff

admits that he crossed in the middle of the street near where the Tomar truck was parked, rather than at the light and crosswalk because it was inconvenient and too far away. (Plaintiff deposition p. 32). Cerveny has stated that the plaintiff ran in front of her motor vehicle (Cerveny deposition p.20) and she noted that she believed the plaintiff saw her vehicle coming but continued to "trot" into the street in front of her vehicle. (Cerveny deposition p.32).

As to Tomar's actions that day, the plaintiff alleges that Tomar's negligence in parking the truck contributed to the accident. The proponent of a motion 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. If the movant (Tomar) fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form (emphasis added) sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). Tomar has established that its truck was parked in a legal parking spot on the side of the street, that the area where the box truck was parked had identifiable parking spaces and lacked any "no parking" signs, that no summons were issued to its box truck parked in the permitted parking space on the day of the accident, nor was it ever notified by any police department of a violation of law such as to infer a claim of negligence in the happening of this accident. Further, Tomar argues that there is a complete absence of proof that Tomar's box truck was parked illegally at the time of the accident. Tomar also argues that the location of its parked truck was not the proximate cause of the plaintiff's accident.

In opposition to Tomar's motion, the plaintiff engages in speculation and conjecture that a deposition of Tomar's principal may somehow establish that the Tomar box truck may have been illegally parked but the plaintiff fails to identify how Tomar's truck was illegally parked or how it was a proximate cause of this accident. Mere conclusions, expressions of hope or **unsubstantiated** (emphasis added) allegations or assertions are insufficient to defeat a party's request for summary disposition. V. ***Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). In the instant case, the evidence establishes that the plaintiff walked (or jay-walked) out into the middle of the street and into traffic and was struck by the Cerveny motor vehicle which was traveling westbound on West Main Street. The statements by Charles Farrussia and Father John McGarry of St. Francis DeSales Church in Patchogue who witnessed the accident portray a young man who attempted to run across the street between traffic and was struck by the Cerveny motor vehicle which was lawfully proceeding west on the street. Nothing suggests that a box truck parked on the side of the road in a legally designated parking spot was responsible for the happening of this accident. Further, Cerveny testified that the plaintiff "ran directly in the front of my car" (Cerveny deposition p. 21) and that she saw him look at her prior to the accident and see her vehicle but the plaintiff proceeded into the roadway anyway. (Cerveny deposition p.32).

Cerveny in her deposition testified about the plaintiff's actions prior to the accident that:

> "A. He [plaintiff] saw my car was coming, and he was, sort of trotting, and he was going like this (indicating)."
>
> "Q. Can you just describe for the record what you were doing with your hands there?
>
> A. Like crossing his arms.
>
> Q. Was he waving them in front of his body back and forth?
>
> A. Yes, waving them in front of his body." (Cerveny deposition p. 32-33).

The plaintiff during his deposition claims that he stepped off the "sidewalk in front of the U-Haul truck. I stepped a foot out and that's all I remember." (plaintiff depostion p. 20). He further testified that:

> "The hood is over my head, so you can't see anything when you pass by. And the fender , it's like guessing.
>
> I mean, you're taking – that's what I did, I took a chance. But I had to look without getting clipped." (plaintiff deposition p.68).

The testimony showed that the plaintiff didn't want to walk down to where the crosswalk and traffic light controlled traffic and instead chose to "take a chance" and cross in the middle of the street. Tomar's truck was legally parked in a designated parking area and its presence on the street does not provide a basis to impose liability on it for the plaintiff's accident. Tomar having established its entitlement to summary disposition in its favor, it was incumbent on the plaintiff to show by evidentiary facts and not conjecture, surmise or hope that the Tomar vehicle was somehow responsible for the happening of this accident. The plaintiff has failed in that regard and therefore Tomar is entitled to summary judgment and dismissal of the plaintiff's negligence action against it.

Finally, the plaintiff's claim that Tomar's motion for summary judgment is premature because discovery by way of a deposition of Tomar's principal has not been completed is unavailing. A party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts to defeat the motion. ***Lambert v. Bracco***, 18 AD3d 619, 795 NYS2d 662 (2nd Dept. 2005); ***Romeo v. City of New York***, 261 AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). The plaintiff provides no support to infer that a deposition of Tomar's principal would establish a negligence claim against it since the plaintiff had amply opportunity to address the alleged question of illegal parking by inquiry with the county, town or village authorities and failed to do so. Further, the evidence before the Court shows the truck was legally parked in a designated parking area and no summons was issued to Tomar by any authority having jurisdiction on this street. Thus the claim that the truck was illegally parked is without support in the record.

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, Tomar's motion for summary judgment and dismissal of plaintiff's complaint against it pursuant to CPLR §3212 is granted in its entirety and the plaintiff's action as against Tomar is dismissed. The action is severed and continued as against the remaining defendant, June B. Cerveny.

As to the plaintiff's cross-motion for further discovery and a deposition of Tomar, that cross-motion is denied as moot in light of the Court's decision granting Tomar summary judgment. Further, the plaintiff provides absolutely no support to suggest that the testimony of the principal of Tomar would render the facts any different than that which has been provided to the Court by the parties and the witnesses to this accident. The plaintiff's cross-motion is denied.

The foregoing constitutes the decision of the Court.

Dated: May 4, 2012

Peter DeCalon

J.S.C.