| **Jacobs v Okrent** |
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| 2018 NY Slip Op 30239(U) |
| February 9, 2018 |
| Supreme Court, New York County |
| Docket Number: 154096/16 |
| Judge: Adam Silvera |
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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**
**PRESENT: Hon. Adam Silvera, Justice Part 22**

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**BERNICE JACOBS,**

**Plaintiff,**

**-against-**

**DIANE OKRENT, AARON SHELDON, and MPG EAST 79TH STREET PARKING LLC,**

**Defendants.**

**INDEX NO. 154096/16**

**MOTION SEQ. NO. 001**

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SILVERA, J.:

BACKGROUND

Plaintiff Bernice Jacobs commenced this action to recover damages for personal injuries she allegedly sustained in a motor vehicle accident on February 26, 2016. During the accident, plaintiff alleges that, as she was walking on the sidewalk crossing in front of the opening of a parking garage operated by Defendant Parking Garage, she was struck by a motor vehicle operated by defendant Diane Okrent (hereinafter referred to as "Defendant Driver"), and owned by defendants Diane Okrent and Aaron Shelden (hereinafter referred to as Co-Defendants"). Plaintiff alleges that she sustained serious injuries as a result of the accident due to defendants' negligence in that she suffered from a comminuted fracture of her radius of the left wrist and soft tissue injuries.

Defendant Parking Garage now moves for summary judgment dismissing the complaint against them, and dismissing the cross-claims of Co-Defendants. Plaintiff and Co-Defendants oppose, and Defendant Parking Garage replies.

The standards of summary judgment are well settled. To grant summary judgment, it

must be clear that no material or triable issues of fact are presented. *See Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). "The proponent of a 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". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been shown by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Here, the motion for summary judgment is granted as no triable issues of fact exist. In support, Defendant Parking Garage proffers, *inter alia*, the deposition transcript of plaintiff, Defendant Driver, and of Luis Jorquera, the manager of Defendant Parking Garage on the date of the accident. While it is apparent from the deposition transcripts that there are conflicting accounts on how the accident occurred, it is undisputed that plaintiff was a pedestrian walking on the sidewalk, and crossing in front of the opening of a parking garage operated by Defendant Parking Garage, when she came into contact with a motor vehicle, operated by Defendant Driver, that was proceeding out of the parking garage and across the adjacent sidewalk. It is further undisputed that following the accident, neither plaintiff nor Defendant Driver called the police or an ambulance, and neither notified Defendant Parking Garage of the accident. The Court of Appeals has held, and it is well settled that, the operators of a parking garage owe no duty to individuals to protect them from the acts of third-party drivers operating their motor vehicles within the parking garage. *See Pulka v Edelman et. al.*, 40 NY2d 781, 785 (1976). Thus, the burden shifts to plaintiff and Co-Defendants to raise a genuine triable issue of fact.

Plaintiff proffers her own affidavit, as well as the affirmation of her attorney in

opposition. However, plaintiff's attorney fails to cite any case law in support of his conclusory assertions. Furthermore, plaintiff's own 2-page affidavit mere states that an accident occurred in which she was struck by a motor vehicle operated by Defendant Driver as Defendant Driver proceeding out of a parking garage operated by Defendant Parking Garage, and that plaintiff suffered injuries as a result of the accident. Plaintiff fails to even assert what duty, if any, Defendant Parking Garage owed her, or to even allege that Defendant Parking Garage breached such a duty. Thus, plaintiff has failed to raise a triable issue of fact.

In opposition, Co-Defendants proffer only an attorney's affirmation. It is axiomatic that "a bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1 Dept 1981), aff'd 54 NY2d 715 (1981). Thus, plaintiff's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985).

Even if the Court were to consider Co-Defendant's attorney's speculative affirmation, here, such affirmation argues that an issue of fact exists in that Defendant Parking Garage assumed a duty as they set up mirrors at the opening of the parking garage, and used a buzzer system when a pedestrian or car passed by. Co-Defendants contend that the mirrors and buzzer system were designed to protect the patrons and pedestrians. Thus, according to Co-Defendants' attorney, summary judgment must be denied as issues of fact exist as to whether the mirrors were misaligned or whether the buzzer system was working on the date of the accident. However, contrary to Co-Defendants' attorney's arguments, the Court of Appeals has held that "[t]o hold

that pedestrians are similarly entitled to legal protection from the garage for the conduct of its patrons would be to create an unnecessary extension of a duty beyond the limits required under the law of negligence as we know it. That in this particular case there was evidence that no significant precautionary measures were taken to prevent the negligent conduct of its patrons does not justify the imposition of any duty." *Pulka v Edelman et. al.*, 40 NY2d 781, 785 (1976). Moreover, the Court of Appeals has also held that to apply the principle of assumption of a duty, there must be a showing "not only that defendant…undertook to provide a service and did so negligently, but also that its conduct in undertaking the service somehow placed plaintiff…in a more vulnerable position than he would have been in had…[defendant] never taken any action at all." Here, Co-Defendants have failed to even allege such facts. As no issues of fact exist, and as plaintiff and Co-Defendants have failed to raise any triable issues of fact, Defendant Parking Garage's motion for summary judgment is granted.

Accordingly, it is

ORDERED that defendant MPG East 79th Street Parking LLC's motion for summary judgment dismissing the complaint, and all cross-claims, against it is granted; and it is further

ORDERED that defendant MPG East 79th Street Parking LLC shall serve a copy of this order with notice of entry upon all parties within 45 days of entry.

This constitutes the decision/order of the Court.

**Dated:** 2/9/18

ENTER:

Hon. Adam Silvera, J.S.C.