SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

----------X

ANDREW ROBB,

Plaintiff,

- v -

KNIGHTS COLLISION & AUTO CARE CENTER INC, KNIGHTS COLLISION EXPERTS, INC, KNIGHTS COLLISION REPAIR, INC., ROBLES TOWING, INC.,

Defendant.

INDEX NO. 154878/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISMISS/SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted in part**.

Plaintiff Andrew Robb claims that he was injured on August 29, 2013, when the motorcycle he was driving skidded on a slippery substance on the FDR Drive in Manhattan. He claims that the substance was negligently left on the road by defendants Knights Collision & Auto Care Center Inc. ("KCAC"), Knights Collision Experts, Inc. ("KCE"), Knights Collision Repair, Inc. ("KCR"), and Robles Towing, Inc. ("Robles"), which towed a vehicle from the accident site shortly before his accident. Defendants move, pursuant to CPLR 3215 (c), to dismiss the claims against Robles. They also move, pursuant to CPLR 3212, for summary judgment dismissing the claims against KCAC, KCE, and KCR. Plaintiff and nonparty the City of New York ("the City") oppose the motion only as against KCE. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **granted in part**.

Defendants have established that, although Robles was served with process via the Secretary of State on June 22, 2016, plaintiff never pursued a default against him within one year of his default. Thus, the claims against Robles are dismissed pursuant to CPLR 3215 (c).

In addition, defendants have demonstrated, through the affidavit of Robert Karadzas, General Manager of KCAC, KCE, and KCR, that KCAC and KCR were never involved in towing activities. Thus, KCAC and KCR established their prima facie entitlement to summary judgment dismissing the claims against those entities, and plaintiff does not oppose the dismissal of the claims against them.

Although Karadzas further states that the towing contract between KCE and The City of New York "does not in any way require [KCE] to perform any 'clean up' duties, or to perform any 'wash down' activities on any roadways," the permit granted to KCE by the City required, inter alia, that it comply with Vehicle and Traffic Law section 1219(c), which states that "[a]ny person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle." This, in and of itself, creates an issue of fact regarding whether KCE had a duty to clean any dangerous substance on the roadway from which it towed a vehicle. Thus, KCE is not entitled to summary judgment dismissing the complaint.

Additionally, plaintiff correctly asserts that where, as here, a motion for summary judgment is clearly premature as having been filed prior to a preliminary conference, and no discovery has been conducted, such application must be denied pursuant to CPLR 3212(f). *See Gao v City of New York*, 29 AD3d 449, 449 (1st Dept 2006); *Bradley v Ibex Construction. LLC*, 22 AD3d 380, 380-381 (1st Dept 2005); *see also McGlynn v. Palace Co.*, 262 AD2d 116, 117 (1st Dept 1999) (motion for summary judgment denied when made one month after preliminary conference order

and before any discovery was conducted). Since no preliminary conference has been held and no discovery has been conducted in this matter, KCE's motion for summary judgment is clearly premature. KCE's motion for summary judgment is thus denied with leave to renew after the completion of discovery. *Gao*, 29 AD3d, at 449 *Bradley*, 22 AD3d, at 380 *McGlynn*, 262 AD2d, at 117.

KCE's motion for summary judgment was filed on September 25, 2017, after the captioned action was consolidated with another action, styled *Andrew Robb v The City of New York, Hertz Corporation, Martin E. Connor, Brendon Grant, Aron Prero, Dustin Schrader and Alexander DeGeorge*, New York County Index Number 154579/14 ("the City action"), by order of this Court (Tisch, J.) dated April 25, 2017. In that order, Justice Tisch directed the parties to submit to him an order of consolidation. Although the City served the April 25, 2017 order with notice of entry on May 3, 2017, it was not served on counsel for KCE. The proposed order of consolidation thereafter submitted to Justice Tisch was not signed until November 13, 2017 and was not entered until December 15, 2017. On December 19, 2017, plaintiff's attorney served the said order with notice of entry on counsel in the captioned action and the City action, including the attorney for KCE. The motion papers do not reflect that counsel for KCE had notice of the consolidation before December 19, 2017.[1]

[1] Despite the order consolidating the captioned action and the City action, it does not appear that the consolidation has been effectuated. Therefore, counsel for the City, the party which moved for the consolidation, should take the proper steps to ensure that the actions are consolidated in the City Part under Index Number 154579/14. The City's attorney should serve a copy of the order of Justice Tisch dated November 13, 2017 and entered December 15, 2017, with notice of entry, on the County Clerk (Room 141B), by filing with NYSCEF a completed "Notice to the County Clerk" (NYSCEF Form EF-22, available on the NYSCEF site). The City's attorney should also serve a copy of the said order with notice of entry on the General Clerk's Office (Room 119) pursuant to e-filing protocol at genclerk-ords-non mot@nycourts.gov.

In opposing the instant motion, plaintiff's counsel relies on the deposition of plaintiff and Police Officer Rosa, both of whom testified in the City action. KCE's attorney argues that this testimony is improperly submitted in opposition to its motion since the transcripts were appended to plaintiff's supplemental affirmation in opposition. However, as plaintiff's counsel asserts, since KCE moved for summary judgment before any discovery was conducted, he was left with little choice but to oppose KCE's motion with whatever evidence he could obtain, including this deposition testimony. The plaintiff's deposition testimony reflects, inter alia, that the area smelled like an accident scene, that his bike skidded, and that his clothes were wet after the accident.[2] Officer Rosa, who responded to the first accident, said that the roadway was wet and that KCE would routinely clean the area after an accident. Thus, this testimony raises additional issues regarding the scope of KCE's duties and the condition of the accident site.

In accordance with the foregoing, it thereby:

ORDERED that the branch of the motion seeking dismissal of plaintiff's claims against Robles Towing, Inc. pursuant to CPLR 3215 (c) is granted; and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3212, for summary judgment seeking dismissal of plaintiff's claims against defendants Knights Collision & Auto Care Center Inc. and Knights Collision Repair, Inc. is granted; and it is further

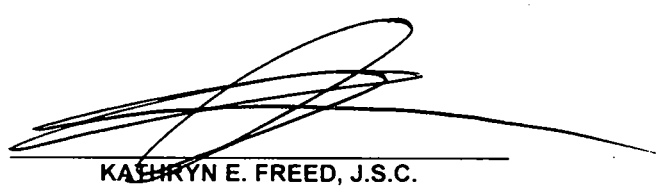
[2] In the City case, the City moved for a protective order seeking to prevent discovery relating to plaintiff's theory that the alleged accident was caused by a slippery substance. In support of the motion, the City relied on plaintiff's deposition testimony that he did not observe a slippery substance on the ground before or after his accident, but that he claimed there were wet stains on his clothes after the occurrence. This Court (Chan, J.) denied the City's motion, reasoning that plaintiff should not be deprived of discovery on an issue in controversy simply because the City denies plaintiff's theory of negligence. Similarly, plaintiff should not be deprived of discovery from KCE simply because it denies responsibility for cleaning the accident site and because there was no testimony by plaintiff that he saw something on the road.

ORDERED that the branch of the motion, pursuant to CPLR 3212, for summary judgment seeking dismissal of plaintiff's claims against defendant Knights Collision Experts, Inc. is denied with leave to renew after the completion of discovery; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order, with notice of entry, on the parties in the matter of *Andrew Robb v The City of New York, Hertz Corporation, Martin E. Connor, Brendon Grant, Aron Prero, Dustin Schrader and Alexander DeGeorge*, New York County Index Number 154579/14, within 20 days after this order is uploaded to NYSCEF; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.



1/24/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE