

Anderson v Moore

2019 NY Slip Op 33717(U)

November 25, 2019

Supreme Court, Kings County

Docket Number: 517250/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of November, 2019.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

-----X
KADIAN P. ANDERSON,
Plaintiffs,

Index No.: 517250/2017

- against -

DECISION AND ORDER

ARLETTA E. MOORE, MAHMOOD H. HUSSAIN,
JASMINE STUART and WILGHEMS DESIR,
Defendants.

Motion Sequence #3

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	<u>1/2,</u>
Opposing Affidavits (Affirmations).....	<u>3</u>
Reply Affidavits (Affirmations).....	<u>4</u>

After a review of the submitted papers and oral argument the Court determines as follows:
Defendant, Jasmine Stuart (“Defendant Stuart”) moves for summary judgment pursuant to CPLR 3212 and dismissal of the action and all cross-claims against her. Defendant (Arlette E. Moore (“Defendant Moore”) opposes the motion and the remaining Defendants have not submitted any opposition to the motion.

This matter purportedly relates to a four motor vehicle accident, at or near the intersection of Brooklyn and Snyder Avenues, in Brooklyn, New York, on September 17, 2016. Defendant Stuart contends that her vehicle was hit in the rear by a vehicle owned and driven by Defendant Wilghems Desire (“Defendant Desire”), while she was stopped for a red light on Snyder Avenue. Defendant Stuart proffers her affidavit reflecting the above and further states, *inter alia*, that her

vehicle was the first vehicle at the red light, the weather was clear and dry, she was at a complete stop when the collision occurred, she gradually slowed her vehicle while approaching the intersection and that she had no opportunity to prevent the collision. (Defendant Stuart Motion, Exhibit "C").

Defendant Moore argues that the motion is premature as discovery has not taken place. She provides no affidavit or other evidence. Generally, in relation to summary judgment motions, "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2nd Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792-793, 533 N.Y.S.2d 143 [2nd Dept, 1988]. However, this is generally only applicable if further discovery would lead to information not in the possession of the opponent of the motion. See *Cajas-Romero v. Ward*, 106 A.D.3d 850, 852, 965 N.Y.S.2d 559, 561 [2nd Dept, 2013]; *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012]. Defendant Moore has not indicated "that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of ..." another. *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012]. As such, the motion is not premature.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of

fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented to establish, *prima facie*, that Defendant Stuart was not negligent. In support of her application, Defendant Stuart relies upon her own affidavit. Specifically, she contends that she was at a complete stop when the collision occurred, she gradually slowed her vehicle while approaching the intersection and that she had no opportunity to prevent the collision. (Defendant Stuart Motion, Exhibit “C”). “A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Klopin v. Masri*, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept, 2007]; see also *Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017]. Defendant Moore has failed to raise a material issue of fact in opposition. What is more, she presents no affidavit in support of her opposition. Defendant Moore’s contentions, as contained in her counsel’s affirmation, are insufficient to raise an issue of fact that would prevent this Court from granting summary judgment to Defendant Stuart. See *Hakakian v. McCabe*, 38 A.D.3d 493, 494, 833

N.Y.S.2d 106, 107 [2nd Dept, 2007]; *see also Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017]. Accordingly, Defendant Stuart's motion for summary judgment is granted.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant Stuart's Motion (motion sequence #3) is granted. This action and all cross-claims as against Defendant Stuart are dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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