

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27289
C/prt

_____AD3d_____

Submitted - April 1, 2010

HOWARD MILLER, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2008-04653

DECISION & ORDER

Jacqueline Cardone, plaintiff-respondent, v
John Poidamani, defendant-respondent,
Robert Barberesi, et al., appellants.

(Index No. 103938/07)

Lynch Licata Timoshenko & Scotto, LLP, Brooklyn, N.Y. (Victor Timoshenko of counsel), for appellants.

Taub & Marder, New York, N.Y. (Elliot H. Taub of counsel), for plaintiff-respondent.

Leahey & Johnson, P.C., New York, N.Y. (Peter James Johnson, Peter James Johnson, Jr., James P. Tenney, Joanne Filiberti, and Rosa M. Batista of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendants Robert Barberesi and Steven Barberesi appeal from so much of an order of the Supreme Court, Richmond County (Fusco, J.), dated April 28, 2008, as denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is modified, on the facts and in the exercise of discretion, by adding to the first decretal paragraph thereof after the word “denied,” the words “without prejudice to renewal after completion of discovery;” as so modified, the order is affirmed insofar as appealed from, with one bill of costs.

May 11, 2010

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This case arises from a motor vehicle accident involving three vehicles. The plaintiff claims that she was stopped at a traffic light when her vehicle was struck from behind by a vehicle owned by the defendant Robert Barberesi, and driven by the defendant Steven Barberesi, after the latter vehicle was struck from behind by a vehicle owned and driven by the defendant John Poidamani. Prior to depositions, the Barberesis moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The Supreme Court denied the motion, concluding that it was premature. We modify.

We agree with the Supreme Court that it would have been premature to award summary judgment at this stage of the case. Among other things, the plaintiff and Steven Barberesi submitted affidavits containing discrepancies pertaining to the circumstances of the accident, and Poidamani died during the pendency of the action. Furthermore, the plaintiff and Steven Barberesi have yet to be deposed. Accordingly, the motion was properly denied (*see Martinez v Ashley Apts. Co., LLC*, 44 AD3d 830; *Tyme v City of New York*, 22 AD3d 571; *see generally* CPLR 3212[f]). Under the circumstances of this case, we modify the order to provide that the denial of the motion is without prejudice to renewal after completion of discovery.

MILLER, J.P., LEVENTHAL, CHAMBERS and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court