

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

D32334  
Y/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - September 9, 2011

WILLIAM F. MASTRO, J.P.  
RUTH C. BALKIN  
CHERYL E. CHAMBERS  
PLUMMER E. LOTT, JJ.

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2010-08850

DECISION & ORDER

Rachel Campbell, respondent, v Yomton G. Malik,  
defendant, City of New York, et al., appellants,  
et al., defendant.

(Index No. 11061/08)

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Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Scott Shorr of counsel), for appellants.

Segal & Lax, LLP, New York, N.Y. (Patrick Daniel Gatti of counsel), for respondent.

Passarelli & Abiuso, Babylon, N.Y. (Patricia Howlett of counsel), for defendant Yomton G. Malik.

In an action to recover damages for personal injuries, the defendants City of New York and New York City Police Department appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), entered May 13, 2010, as denied, as premature, that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs to the appellants payable by the respondent, and that branch of the motion of the defendants City of New York and New York City Police Department which was for summary judgment dismissing the complaint insofar as asserted against them is granted.

The Supreme Court should have granted that branch of the motion of the defendants City of New York and New York City Police Department (hereinafter together the City defendants)

September 27, 2011

Page 1.

CAMPBELL v MALIK

which was for summary judgment dismissing the complaint insofar as asserted against them. The City defendants established their prima facie entitlement to judgment as a matter of law by showing that the plaintiff applied for and accepted Workers' Compensation benefits for her injuries arising out of the subject accident (*see* Workers' Compensation Law § 11; *Stewart v Glory Bee Realty Mgt. Corp.*, 10 AD3d 648, 650; *DiTommaso v Marino*, 6 AD3d 572; *Torre v Schmucker*, 275 AD2d 365, 366; *Lunsford v Schaffner*, 184 AD2d 625, 626). In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, the motion was not properly denied as premature on the ground that discovery had not yet been completed. The plaintiff failed to demonstrate that further discovery might lead to relevant evidence (*see* CPLR 3212[f]; *Cortes v Whelan*, 83 AD3d 763).

To the extent that the City defendants are raising an issue on appeal regarding that branch of their motion which was to dismiss the action insofar as asserted against the defendant Robert E. Fiore as abandoned pursuant to CPLR 3215(c), that branch of the motion was not addressed by the Supreme Court and, thus, remains pending and undecided (*see* *Joazard v Joazard*, 83 AD3d 664, 665; *Katz v Katz*, 68 AD2d 536, 542-543).

MASTRO, J.P., BALKIN, CHAMBERS and LOTT, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court