

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

D33465
N/mv

_____AD3d_____

Argued - November 17, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
PLUMMER E. LOTT
LEONARD B. AUSTIN, JJ.

2010-12148

DECISION & ORDER

Joiliette Davis, plaintiff-respondent, v City of New York,
defendant-respondent, Sun Yun Na, appellant, et al.,
defendants.

(Index No. 32254/08)

Kaplan, Hanson, McCarthy, Adams, Finder & Fishbein, Yonkers, N.Y. (E. Richard Vieira of counsel), for appellant.

Belovin & Franzblau, LLP, Bronx, N.Y. (Mitchell Franzblau and David Karlin of counsel), for plaintiff-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Stephen J. McGrath, Tzipora Teichman, and Victoria Scalzo of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendant Sun Yun Na appeals from an order of the Supreme Court, Kings County (Velasquez, J.), dated November 4, 2010, which denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendant Sun Yun Na for summary judgment dismissing the complaint and all cross claims insofar as asserted against him is granted.

On February 28, 2008, at approximately 1:00 A.M., the plaintiff, Joiliette Davis, was a passenger in a vehicle owned by the defendant Desmond Hunte and operated by the defendant

December 27, 2011

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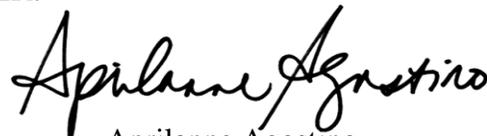
Sydney Suvalin. The Suvalin/Hunte vehicle was struck from the rear by a vehicle owned by the defendant Sun Yun Na (hereinafter the appellant) and operated by Isaac Batista, a nonparty in this action. On February 25, 2008, the appellant had reported his vehicle stolen. The plaintiff commenced this action against, among others, the appellant. The appellant moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against him, and the Supreme Court denied the motion.

The appellant established, prima facie, his entitlement to judgment as a matter of law by presenting evidence that his vehicle had been stolen about three days prior to the subject accident and was being operated without his permission or consent at the time of the accident (*see Devellis v Lucci*, 266 AD2d 180; *Delfino v Ranieri*, 131 Misc 2d 600). In opposition, the respondents failed to raise a triable issue of fact. Even if the appellant violated Vehicle and Traffic Law § 1210(a) on the day of the theft by leaving the key to the vehicle in its ignition, the lapse of three days between the theft of the vehicle and the injury-producing event vitiated any proximate cause between the appellant's purported negligence and the accident as a matter of law (*see Devellis v Lucci*, 266 AD2d 180; *Delfino v Ranieri*, 131 Misc 2d 600; *cf. Johnson v Manhattan & Bronx Surface Transit Operating Auth.*, 71 NY2d 198, 206-207). Contrary to the plaintiff's contention, the motion was not premature, since she failed to demonstrate that further discovery would lead to additional relevant evidence (*see CPLR 3212[f]*; *Abraham Natural Foods Corp. v Mount Vernon Fire Ins. Co.*, 84 AD3d 1281; *Wood v Capital One Fin. Corp.*, 82 AD3d 1214).

Accordingly, the Supreme Court should have granted the appellant's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

DILLON, J.P., ENG, LOTT and AUSTIN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court