

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

D36063
G/kmb

_____AD3d_____

Argued - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2011-04665

DECISION & ORDER

Peter Pipelias, appellant, v City of New York,
et al., respondents.

(Index No. 24470/05)

Sacco & Fillas, LLP, Whitestone, N.Y. (Lamont K. Rodgers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers, Margaret S. King, and Alan G. Krams of counsel), for respondent City of New York.

Fabiani Cohen & Hall, LLP, New York, N.Y. (Michele V. Ficarra and Kevin B. Pollack of counsel), for respondent P&T Contracting Corp.

Robert P. Tusa (Shapiro, Beilly & Aronowitz, LLP, New York, N.Y. [Roy J. Karlin], of counsel), for respondents Sharon E. Pollard and James J. Pollard.

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Hart, J.), entered March 7, 2011, which, upon the denial of the plaintiff's motion pursuant to CPLR 3126 to strike the answer of the defendant P&T Contracting Corp., the granting of the defendants' separate motions, in effect, pursuant to CPLR 4401 for judgment as a matter of law, and an order of the same court entered January 30, 2009, which, upon reargument, adhered to the original determinations denying the plaintiff's motion pursuant to CPLR 3126 to strike the answer of the defendant P&T Contracting Corp. and granting the defendants' separate motions, in effect, pursuant to CPLR 4401 for judgment as a matter of law, is in favor of the defendants and against the plaintiff dismissing the complaint.

ORDERED that the judgment is reversed, on the law, with one bill of costs payable

October 3, 2012

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by the defendants appearing separately and filing separate briefs, the defendants' separate motions, in effect, pursuant to CPLR 4401 for judgment as a matter of law are denied, the order entered January 30, 2009, is vacated, the complaint is reinstated, and the matter is remitted to the Supreme Court, Queens County, for a new trial before a different Justice.

The Supreme Court erred in granting the defendants' separate motions, in effect, pursuant to CPLR 4401 for judgment as a matter of law, and in dismissing the complaint before the plaintiff presented his case (*see* CPLR 4401). “A motion for judgment as a matter of law is to be made at the close of an opposing party’s case or at any time on the basis of admissions (*see* CPLR 4401), and the granting of such a motion prior to the close of the opposing party’s case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable” (*Kamanou v Bert*, 94 AD3d 704, 704, quoting *Burbige v Siben & Ferber*, 89 AD3d 661, 662). Here, the court should have afforded the plaintiff the opportunity to present evidence to the jury before granting the defendants' separate motions for judgment as a matter of law. Therefore, we reverse the judgment, deny the motions, vacate the order entered January 30, 2009, made upon reargument, reinstate the complaint, and remit the mater to the Supreme Court for a new trial, to be conducted before a different Justice.

The Supreme Court, however, did not improvidently exercise its discretion in denying the plaintiff’s motion pursuant to CPLR 3126 to strike the answer of the defendant P&T Contracting Corp. (*see* CPLR 3126[3]; *Masik v Lutheran Med. Ctr.*, 92 AD3d 732; *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 924).

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court