

**Celestino v City of New York**

2014 NY Slip Op 30867(U)

March 31, 2014

Sup Ct, New York County

Docket Number: 154244/12

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
HENRY D. CELESTINO,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 154244/12  
Seq. No. 001

CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, SANTIAGO A. PERALTA and  
KENNETH COLEMAN,

Defendants.

-----X  
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-3(Exs. A-B).
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLY AFFIRMATION .....	.....
OTHER...(Memo of Law) .....	.....4.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Henry D. Celestino, a New York City Police Officer, moves, pursuant to CPLR 3212, for an Order granting him partial summary judgment on liability against defendants The City of New York (“the City”), New York City Police Department (“the NYPD”), Santiago A. Peralta and Kenneth Coleman. The motion is unopposed. After a review of the papers presented, all relevant statutes and case law, this Court **grants** the motion as against the City and the NYPD.

**Factual and Procedural Background:**

This case arises from an automobile accident on April 7, 2011 in which plaintiff was injured when the NYPD van he was driving was struck from behind by two other NYPD vans on the Belt Parkway in Brooklyn. The vans which struck his vehicle were owned by the City and operated by defendants Peralta and Coleman. According to plaintiff, he had stopped his vehicle due to traffic conditions when it was struck from behind by the other vans.

Plaintiff now moves for partial summary judgment against the defendants on liability. In support of the motion, plaintiff submits an attorney affirmation, his own affidavit, the summons and verified complaint, the answer served by the City and the NYPD, and a memorandum of law.

**The Plaintiff's Position:**

Plaintiff asserts that he is entitled to summary judgment as to liability pursuant to Vehicle and Traffic Law § 1129(a) since the defendants' vehicles struck his van from behind and defendants have failed to proffer a non-negligent explanation for the occurrence.

**Conclusions of Law:**

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1<sup>st</sup> Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

"It is well settled that when a rear-end collision occurs, 'the driver of the front vehicle is entitled to summary judgment on liability, unless the driver of the following vehicle can provide a

nonnegligent explanation for the collision' (*Santana v Tic - Tak Limo Corp.*, 106 AD3d 572, 573-574 [1<sup>st</sup> Dept 2013])." *Santana v Danco Inc.*, \_\_\_ AD3d \_\_\_, 2014 N.Y. App Div Lexis 1806 (1<sup>st</sup> Dept 2014).

Here, plaintiff met his prima facie burden by submitting an affidavit stating that his van had come to a stop at the time that it was struck in the rear by the vans driven by defendants Peralta and Coleman. *Id.* Since the motion is unopposed, the defendants have failed to raise an issue of fact warranting the denial of the instant application.

This Court notes, however, that plaintiff is granted summary judgment only as against the City and the NYPD. "A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to." *City of Rochester v Chiarella*, 65 NY2d 92, 101 (1985). Here, plaintiff did not annex answers by Peralta or Coleman to its motion. If plaintiff moved against Peralta and Coleman before they answered the complaint, then his motion must be denied since this Court did not have the ability to grant him summary judgment against them. *See Gaskin v Harris*, 98 AD3d 941, 942 (2d Dept 2012). If Peralta and Coleman did answer, then plaintiff's motion must be denied as against them due to his failure to annex those answers to his motion. *See* 3212(b); *Weinstein v Gindi*, 92 AD3d 526, 527 (1<sup>st</sup> Dept 2012). In either event, plaintiff has failed to establish its entitlement to summary judgment against Peralta and Coleman.

In light of the foregoing, plaintiff has established his prima facie entitlement to summary judgment against the City and the NYPD on liability and, by failing to oppose the motion, those defendants have failed to rebut the inference that they were negligent by providing a non-negligent explanation for the collision. *See Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 (1<sup>st</sup> Dept 2012).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Henry D. Celestino is awarded partial summary judgment against defendants The City of New York and the New York City Police Department as to liability, and an assessment of damages is directed; and it is further,

ORDERED that the branch of plaintiff's motion seeking partial summary judgment against defendants Santiago A. Peralta and Kenneth Coleman is denied; and it is further,

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment herein above directed, provided that nothing herein shall authorize the filing of a note of issue prior to the completion of discovery on damages; and it is further,

ORDERED that a copy of this order with notice of entry be served on all parties to this action by plaintiff's attorney within 30 days of the date of this order; and it is further,

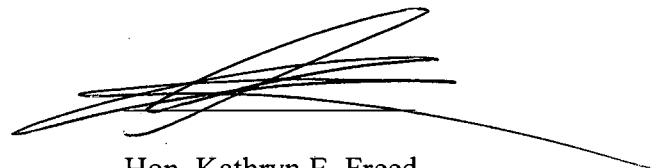
ORDERED that the parties are directed to appear for a settlement conference in this matter on April 29, 2014 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: March 31, 2014

**MAR 31 2014**

ENTER:



Hon. Kathryn E. Freed  
J.S.C.  
**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**