

<b>Antwi v City of New York</b>
2016 NY Slip Op 32333(U)
October 7, 2016
Supreme Court, Bronx County
Docket Number: 25490/14
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
DORIS ANTWI,

Plaintiff(s),

-against-

Index No. 25490/14

**DECISION AND ORDER**

THE CITY OF NEW YORK, NEW YORK  
CITY POLICE DEPARTMENT, P.O. JULIA  
A. GILLEN, MARTINEZ A AND F INC.,  
and BENLOSME DELEON, JR.,  
Defendant(s)

-----X

GONZALEZ, D:

Upon, the motion by Tara M. Bright, Esq., attorney for the City, et al, pursuant to CPLR §3211 dismissing plaintiff's complaint in its entirety as against the City and any and all cross-claims for failure to state a cause of action; and/or pursuant to CPLR §3212 granting summary judgment on behalf of the City dismissing any and all cross-claims and for such other relief as this Court may deem just and proper.

The opposition by Jeff R. Thomas, Esq., attorney for the defendants Martinez A and F Inc., and Benlosme Deleon Jr., and the opposition by Marshall S. Bluth, Esq., attorney for the plaintiff.

**FACTS**

This is an action for personal injuries allegedly sustained by the plaintiff as a result of an automobile accident on April 29, 2014 at the intersection of East 139<sup>th</sup> Street and Willis Avenue,

Bronx, New York. At the time of the occurrence, the plaintiff was a passenger in a vehicle operated by Benslosme DeLeon Jr. that was struck by a police vehicle operated by P.O. Watson.

#### PROCEDURAL HISTORY

The plaintiff served a Notice of Claim on or about May 13, 2014. The plaintiff's 50-H was conducted on September 10, 2014.

This action was commenced by service of a Summons and Complaint on or about November 19, 2014. Issue was joined by service of an Answer on December 11, 2014 as an Amended Answer on February 26, 2015. Co-defendants served an Answer on or about February 12, 2015.

#### DISCUSSION OF LAW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact and the right to judgment as a matter of law. *See, Alvarez v. Prospect Hospital*, 68 N.Y. 2d 320, 508 N.Y.S. 2d 923 (1986). Once the movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *See, Zuckerman v. City of New York*, 49 N.Y. 2d 557, 404 N.E. 2d 718, 427 N.Y.S. 2d 595 (1980). The motion must be decided viewing the facts in the light most favorable to the moving party. *See, Mullin v. 100 Church LLC*, 12 A.D. 3d 263, 784 N.Y.S. 2d 545 (1<sup>st</sup> Dep't 2004). A movant cannot succeed on a summary judgment merely motion by pointing to gaps in the opponent's proof; movant must affirmatively demonstrate the absence of triable issues of fact. *See, e.g. Salgado v. Port Auth. of N.Y. & N.J.*, 105 A.D. 3d 417, 962 N.Y.S. 129 (1<sup>st</sup> Dep't 2013). That there is any factual dispute at all does not necessarily prevent a grant of summary judgment; the factual dispute must relate to the material issue. *See,*

*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 819 N.E. 2d 998, 786 N.Y.S. 2d 382 (2004); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y. 2d 223, 385 N.E. 2d 1068, 413 N.Y.S. 2d 141 (1978). If the opponent of the motion fails to contradict a fact, it is deemed admitted. *See, Tortorello v. Carlin*, 260 A.D. 2d 201, 668 N.Y.S. 2d 64 (1<sup>st</sup> Dep't 1999). The court's role is limited to the identification, not the resolution, of triable issues of material fact. *See, Lindgren v. New York City Hous. Auth.*, 269 A.D. 2d 299, 704 N.Y.S. 2d 30 (1<sup>st</sup> Dep't 2000). Factual issues requiring credibility assessments also preclude summary judgment. *See, Gaspari v. Sadeh*, 61 A.D. 3d 405, 876 N.Y.S. 2d 46 (1<sup>st</sup> Dep't); *Chunn v. New York City Hous. Auth.*, 55 A.D. 3d 437, 866 N.Y.S. 2d 145 (1<sup>st</sup> Dep't 2008).

The movant has failed to sustain its burden in showing there are no triable issues of fact. The movants assert that the defendants were responding to an emergency call when it proceeded into the intersection despite their being a steady red light against them. The movant asserts that it had its flashers and sirens on at the time of the occurrence.

In opposition to the motion, the plaintiff submits the sworn testimony of the co-defendant where he observed the police vehicle at 139<sup>th</sup> Street approaching Willis Avenue. At the time the police vehicle approached the intersection, it did not have its flashers or the sirens activated. Further, the co-defendant had a steady green light as he went through the intersection.

Based on the record before the court, the facts and circumstances surrounding how the accident occurred are disputed. The movant has not sustained its burden in showing to its entitlement to a dismissal of the complaint or its entitlement to summary judgment.

Accordingly, based on the law; a review of the court file; and due deliberation; it is  
hereby

**ORDERED**, the motion is denied in its entirety.

This constitutes the decision and Order of the court.

October 7, 2016  
Bronx, New York

  
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HON. DORIS M. GONZALEZ, AJSC