

Elebute v Northwell Health, Inc.
2018 NY Slip Op 32956(U)
November 14, 2018
Supreme Court, Kings County
Docket Number: 520675/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
OGUNWALE ELEBUTE,
Plaintiffs,

Index No.: 520675/2017

DECISION AND ORDER.

- against -

NORTHWELL HEALTH, INC., NORTSHORE
UNIVERSITY HOSPITAL and JOHNNY RAY
MARQUEZ,
Defendants.

Motions Sequence #1

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2.
Opposing Affidavits (Affirmations).....	3.
Reply Affidavits (Affirmations).....	4

After a review of the papers and after oral argument the Court determines as follows:

This action concerns a motor vehicle accident that occurred on March 29, 2017. On that day, the Plaintiff Ogunwale Elebute (hereinafter the "Plaintiff") was involved in a motor vehicle collision with a vehicle owned by Defendant Northshore University Hospital (hereinafter "Defendant Northshore") and operated by Defendant Johnny Ray Marquez (hereinafter "Defendant Marquez"). The Plaintiff alleges that the vehicle owned by Defendant Northshore ran into and struck the Plaintiff's vehicle while the vehicles were traveling on the Brooklyn Queens Expressway at or near its intersection with Degraw Street in Brooklyn, New York.

Plaintiff now moves for summary judgment (motion sequence #1) on the issue of liability. Plaintiff contends that he was slowing down in his lane when he was struck by the Defendant's vehicle and that his conduct did not contribute to or cause the accident. In opposition, the Defendant contends that the instant motion is premature as discovery has not been completed and that the motion should otherwise be denied given that the Plaintiff has failed to meet his *prima facie* burden.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In general, motions for summary judgment have been denied as premature “where facts essential to justify opposition to a motion for summary judgment are exclusively within the

knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.” *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2nd Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792-793, 533 N.Y.S.2d 143 [2nd Dept, 1988]. However, affidavits submitted in support of summary judgment may be sufficient to establish a movant’s *prima facie* burden and prematurity is only applicable if it would lead to information not in the possession of the opponent of the motion. See *Cajas-Romero v. Ward*, 106 A.D.3d 850, 852, 965 N.Y.S.2d 559, 561 [2nd Dept, 2013]; *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012].

Turning to the merits of the motion (motion sequence #1) by the Plaintiff the Court finds that the movant has provided sufficient evidence to meet his *prima facie* burden. The Court finds that the affidavits presented in support of the motion is sufficient to establish the movant’s *prima facie* burden and that the Defendants have “failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the defendant.” *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012].

What is more, “[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Klopchin v. Masri*, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept, 2007]. Even assuming, *arguendo*, that the Police Accident Report attached to the Plaintiffs’ motion is not admissible, given that the Police Officer did not witness the alleged incident (see *Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]), the affidavit of the Plaintiff and non-party

Jenavieve Hatch are sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 A.D.3d 951, 82 N.Y.S.3d 130 [2nd Dept, 2018].

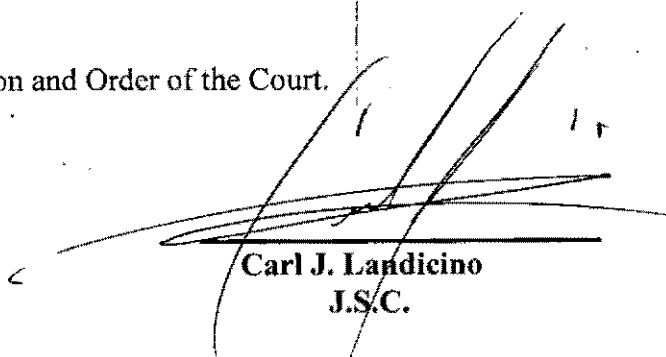
In opposition to the motions, the Defendants have failed to raise a material issue of fact that would prevent this Court from granting the motion. The Defendants point to the Plaintiff's affidavit and the affidavit of non-party Jenavieve Hatch and argue that they are insufficient to support the Plaintiff's *prima facie* showing. This Court disagrees given that each affidavit explains that the Plaintiff's vehicle was struck in the rear as it stopped. What is more, the Defendants present no affidavit in support of their position. This, without more, is insufficient to raise an issue of fact that would prevent this Court from granting summary judgment. *See Hakakian v. McCabe*, 38 A.D.3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept, 2007].

Based upon the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion for summary judgment and the dismissal of the Defendants' 1st, 3rd, 4th, 5th, 6th, and 9th affirmative defenses (motion sequence #1) is granted. The matter shall proceed to a trial on damages only.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

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