

**Cruz v Collado**

2018 NY Slip Op 32957(U)

November 15, 2018

Supreme Court, Kings County

Docket Number: 521895/2017

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 15<sup>th</sup> day of November, 2018.

PRESENT:  
HON. CARL J. LANDICINO,

Justice.

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SAMANTHA CRUZ,

*Plaintiff,*

Index No.: 521895/2017

DECISION AND ORDER

- against -

REBECCA COLLADO, CESAR COLLADO, WALTER ANDUJAR, JAZMIN ANDUJAR, JOSE BERROTERAN,

Motions Sequence #1, #2

*Defendants.*

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**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.....	<u>1/2, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>5, 6, 7, 8</u>
Reply Affidavits (Affirmations).....	<u>9, 10, 11</u>

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 December 1, 2014. The Plaintiff Samantha Cruz (hereinafter the "Plaintiff") alleges in her Complaint that on that date she suffered personal injuries after she was struck while a pedestrian crossing the intersection of Harrison Avenue and Walton Street in the County of Kings, State of New York.

Defendants Jazmin J. Andujar and Walter Andujar (hereinafter the "Andujar Defendants") move (motion sequence #1) for an order pursuant to CPLR §3212, granting summary judgment to the Andujar Defendants and dismissing the summons and complaint and

any and all cross-claims against them. The Andujar Defendants contend that the record establishes that no liability for the accident exists as against the Andujar Defendants. Specifically, the Andujar Defendants contend that it was not their vehicle that struck the Plaintiff. The Andujar Defendants allege that Defendant Jose G. Berroteran (hereinafter "Defendant Berroteran") is liable for the alleged incident. Defendants Rebecca Collado and Cesar Collado (hereinafter "the Collado Defendants") also move (motion sequence #2) for an order pursuant to CPLR §3212, granting summary judgment to the Collado Defendants and dismissing the summons and complaint and any and all cross-claims against them. The Collado Defendants also point to the vehicle operated by Defendant Berroteran as the sole proximate cause of any of the Plaintiff's alleged injuries.

Both the Plaintiff and Defendant Berroteran oppose the motions and argue that they should be denied. First, both the Plaintiff and Defendant Berroteran contend that the motions should be denied as premature given that there is discovery outstanding. The Affirmation in Opposition by Defendant Berroteran also contends that the affidavit of Defendant Walter Andjuar raises an issue of fact as to whether Defendant Berroteran was the sole proximate cause of the alleged incident.

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 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2004], citing *Alvarez v.*

*Prospect Hospital*, 68 N.Y.2d320, 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].

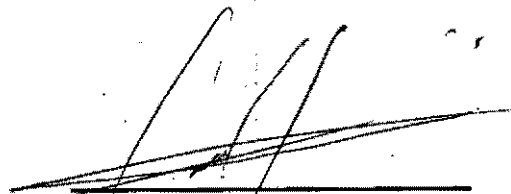
Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792–793, 533 N.Y.S.2d 143 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2013]; *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2<sup>nd</sup> Dept, 2012].

The opposition by Berroteran is unavailing and self serving. In any event there is no basis for a prematurity finding based on Berroteran's opposition. Defendant Berroteran was in a position to observe the incident and is not lacking knowledge of facts necessary to defeat the motion. However, the Plaintiff has raised matters which justify the continuation of discovery, and has accordingly provided sufficient reason why a motion for summary judgment should be denied at this time in order to afford her a reasonable opportunity to address such dispositive motions. The alleged incident was a three vehicle collision involving a pedestrian on the sidewalk. Examinations before trial should be conducted. *See Shenkerman v. Goycoechea*, 34 Misc. 3d 496, 502, 933 N.Y.S.2d 839, 843 [Sup. Ct. Kings Cty, 2011]; *see* CPLR 3212(f). Accordingly, both motions (motion sequence #1, #2) for summary judgment are denied as premature, without prejudice to renew when discovery is complete.

This constitutes the Decision and Order of the Court.

ENTER:

  
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 Carl J. Landicino  
 J.S.C.

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