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 23rd day of January, 2019.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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EVELYN CARRILLO,

Plaintiff,

Index No.: 522133/2016

- against -

DERRICK LIMBACKER, NEW YORK CITY TRANSIT AUTHORITY, MAJOR LEASING, LLC, NABI NABIEV, and XPRESS TRANSPORT & MULTI SERVICES, INC.,

Defendants.

DECISION AND ORDER

Motion Sequence #6

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NEW YORK CITY TRANSIT AUTHORITY,

Third Party Plaintiff,

-against-

XPRESS TRANSPORT & MULTI SERVICES, INC., and NABI NABIEV,

Third Party Defendants.

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

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

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The Plaintiff, Evelyn Carrillo (hereinafter "the Plaintiff") alleges in her complaint that she was injured while a passenger in a vehicle involved in a motor vehicle collision on November 16, 2015. The vehicle that Plaintiff was a passenger in was operated by Defendant Nabi Nabieve and owned by Defendant Major Leasing, LLC. (hereinafter "Major Leasing Defendants"). The Major Leasing Defendants' vehicle was allegedly involved in a collision with a vehicle owned and operated by Defendant Derrick Limbacker (hereinafter "Defendant Limbacker"). The Complaint further alleges that Defendant New York Transit Authority (hereinafter "Defendant NYCTA") "supervised, directed, and controlled" the access-a-ride transportation services provided by the Major Leasing Defendants.

Defendant New York City Transit (hereinafter "Defendant NYCTA") now moves (motion sequence #6) for, *inter alia*, an order pursuant to CPLR 3211(a)(7) and CPLR 3212 to dismiss the action on the grounds that the pleading fails to properly state a cause of action, or alternatively to award the NYCTA summary judgment. Defendant NYCTA contends that it does not own, operate, control or mantain any of the vehicles involved in the alleged incident. Defendant Limbacker and the Major Leasing Defendants oppose the motion and contend that the NYCTA motion should be denied as premature.

CPLR 3211(a)(7)

Defendant NYCTA's motion made pursuant to CPLR 3211(a)(7) is denied. In order to prevail on a motion to dismiss pursuant to CPLR §3211(a)(7), "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2nd Dept]; *see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino,* 21 A.D.2d 60, 64–65, 248 N.Y.S. 2d 121. Moreover, a Court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" *Nonnon v. City of New York,* 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511. In the instant matter, Defendant NYCTA has not sufficiently shown that the Plaintiff's complaint fails to state a cause of action as against Defendant NYCTA and as a result this aspect of the motion is denied.

CPLR 3212

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 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.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 [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].

Motions for summary judgement have been denied as premature when a party opposing summary judgment is entitled to further discovery and "when it appears that facts supporting the position of the opposing party exist but cannot be stated." *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 81 [2nd Dept, 2010]; *see Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.,* 59 A.D.3d 578, 872 N.Y.S.2d 724 [2nd Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens,* 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd Dept, 2006]. Moreover, "'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].

Both the Defendant Limbacker and the Major Leasing Defendants have raised matters which justify the continuation of discovery, and have accordingly provided sufficient reason why a motion for summary judgment should be denied at this time. Also, examinations before trial of the Defendant NYCTA should be conducted. Under these circumstances the material relied upon by the NYCTA cannot serve to establish a dispositive result. Accordingly, the motion for summary judgment is denied as premature.

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

Defendant NYCTA motion (motion sequence #6) is denied

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
FILED
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