

<b>Winston v Jae Taek Shim</b>
2019 NY Slip Op 30704(U)
March 11, 2019
Supreme Court, Kings County
Docket Number: 505698/2018
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 11<sup>h</sup> day of March, 2019.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
DOROTHY WINSTON,  
Plaintiff,

Index No.: 505698/2018

- against -

DECISION AND ORDER

JAE TAEK SHIM, RAW EQUIPMENT BUILDING MATERIALS, RICHARD D. GONZALEZ, LIMO SEVEN TRANSPORTATION, INC., and ABDURASUL MAKGMUDOV,  
Defendants.

Motion Sequence #1&2

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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, 5/6</u>
Opposing Affidavits (Affirmations).....	<u>3, 7, 8,</u>
Reply Affidavits (Affirmations).....	<u>9,</u>

After a review of the submitted papers and oral argument the Court finds as follows:

Defendants, Raw Equipment Material Corp. i/s/h/a Raw Equipment Building Materials (“Defendant REMC”) and Richard D. Gonzalez (“Defendant Gonzalez”) (collectively the “Raw Defendants”) move (motion sequence #1) for summary judgment against Plaintiff, Dorothy Winston (the “Plaintiff”) seeking dismissal of the complaint and any and all cross-claims as against them. The Raw Defendants contend that this matter concerns “a three car, rear end collision that occurred on October 7, 2017.” Apparently, on the day of the accident, Defendant Gonzalez was the operator of a vehicle owned by Defendant REMC. The Raw Defendants allege that they were the lead car of the three cars and were hit in the rear by a vehicle owned by Co-Defendant Limo Seven Transportation, Inc. (“Defendant LST”) and operated by Co-Defendant Abdurasul Makgmudov (“Defendant Makgmudov”) (collectively, the “Limo Defendants”). The Plaintiff was allegedly a passenger in the Limo Defendants’ vehicle at the time of the accident.

The Raw Defendants contend that in so far as they were hit in the rear, as represented by the affidavits of Defendant Gonzalez and Adriana Gonzalez<sup>1</sup> (Raw Defendants' Motion, Exhibits E and F) there is a presumption that the rear vehicle(s) are responsible for the collision and that the front vehicle is free from liability. Accordingly, the Raw Defendants contend that the case as against them should be dismissed and that all cross-claims should similarly be dismissed.

Co-Defendant Jae Taek Shim ("Defendant Shim") who was owner/operator of the vehicle behind the Limo Defendants' vehicle, asserts "Partial Opposition" to the motion and states that although he does not oppose the dismissal of the complaint as against the Raw Defendants' he opposes dismissal of his cross-claim against the Raw Defendants for contribution, apportionment and/or common law indemnity. Defendant Shim contends that the Raw Defendants motion is premature, the Raw Defendants have failed to make a *prima facie* showing and "there are issues of fact requiring discovery and depositions."

The Plaintiff cross-moves (motion sequence #2) for summary judgment pursuant to CPLR 3212, on the issue of liability. The Plaintiff contends that she was a passenger in the Limo Defendants' vehicle, she is free from liability and that Defendant Shim and the Limo Defendants were negligent and caused the accident. Both the Raw Defendants and Defendant Shim oppose the motion. The Raw Defendants contend that the Plaintiff has failed to make a *prima facie* showing in that Plaintiff has not submitted an affidavit establishing that she was in the Limo Defendants' vehicle at the time of the accident. The Raw Defendants contend that the Plaintiff's attorney's affirmation is not probative. Defendant Shim raises "Partial Opposition" in that he does not oppose the cross-motion in relation to summary judgment as against the Limo Defendants but rather, opposes an award of summary judgment as against him. Defendant Shim asserts the same reasons in support of his position that he did in opposition to the Raw Defendant's motion, as stated above.

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<sup>1</sup> Adriana Gonzalez states that she was a passenger in the Raw Defendants' vehicle at the time of the accident and that Defendant Gonzalez is her husband.

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.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 [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].

#### The Raw Defendants’ Motion

It is axiomatic that, “[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 [2<sup>nd</sup> Dept, 2007]; see also *Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2<sup>nd</sup> Dept, 2017].

Defendant Shim, the only party opposing the motion, fails to raise an issue of material fact. Defendant Shim provides no affidavit in support of his opposition or any other evidence in support of the same. As such he has not rebutted the Raw Defendant's *prima facie* showing and has not articulated that there are facts unknown to him, in relation to the Raw Defendants' liability, that would require further discovery. 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 [2<sup>nd</sup> Dept, 2010]; *see Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724 [2<sup>nd</sup> Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2<sup>nd</sup> 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 [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].

As such the Raw Defendants' motion is granted and the complaint and all cross claims against them are dismissed. However, although the Raw Defendants have been determined to be free from liability in this matter, this determination is not dispositive in relation to whether either or both of the remaining Defendants were negligent and a proximate cause of the accident.

*The Plaintiff's motion for summary judgment*

The Plaintiff has not made a *prima facie* showing that she was a passenger in the Limo Defendants' vehicle. Plaintiff provides no support for her application. The Plaintiff's motion does not contain a sworn statement from the Plaintiff, or anyone else, establishing that she was a

passenger in the Limo Defendants vehicle. *See 3212(b)*. The Plaintiff's motion consists solely of an attorney's affirmation. "An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance." *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456, 826 N.Y.S.2d 152, 153 [2<sup>nd</sup> Dept, 2006]. Although the Plaintiff's motion does not contain her complaint, the Raw Defendants' motion does. Notwithstanding, a reivew of that verified complaint, albeit not contained in the Plaintiff's motion, is not verified by the Plaintiff, but is rather verified by her attorney. A complaint "verified as it is by [an] attorney, is pure hearsay, utterly devoid of evidentiary value" *Feffer v. Malpeso*, 210 A.D.2d 60, 61, 619 N.Y.S.2d 46, 47 [2<sup>nd</sup> Dept, 1994], *quoting Joosten v. Gale, supra*, 129 A.D.2d at 535, 514 N.Y.S.2d 729 [1<sup>st</sup> Dept, 1987].

Moreover, as indicated above, in so far as there has been no determination of fault of the remaining Defendants, there can be no finding of summary judgment in favor of the Plaintiff, in any case. Finally, although in such a circumstance a Plaintiff, as a passenger, could be determined to be a passenger free from liability, the Plaintiff has not established that she was a passenger in the Limo Defendants' vehicle at the time of the accident. Accordingly, the Plaintiff's motion is denied.

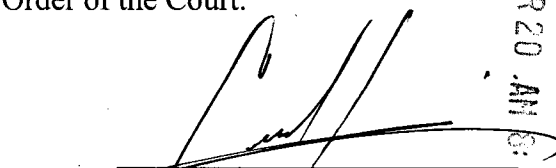
Based upon the foregoing, it is hereby ORDERED as follows:

The Raw Defendants' motion for summary judgment (Motion Sequence #1) is granted and the complaint and any cross claims as against the Raw Defendants are dismissed.

The Plaintiff's motion for summary judgment (Motion Sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
 Carl J. Landicino  
 J.S.C.

2019 MAR 20 AM 8:23  
 KINGS COUNTY CLERK  
 FILED  
