To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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NATHANIEL GREEN,

Plaintiff,

-against-

ULTIMATE AUTOBODY, LLC, GREGORY BEOBID and P. ROOPNARINE,

Defendants.

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DECISION AND ORDER

Index No. 59272/18
Motion sequences # 1& 2

COLANGELO, J.,

The following papers were read and considered on Plaintiff's motion for an Order granting leave to amend the complaint and supplement the summons to add additional defendants as well as well as to correct the names of the party Defendants from Gregory Beobid to Gregory Beobide and P. Roopnarine to Prady Roopnarine (Motion Sequence #1); and Defendant Beobide's motion for summary judgment (Motion Sequence #2):

Motion Sequence #1

Notice of Motion-Affirmation-Memorandum of Law-Exhibits 1-5	22-29
Affirmation in Further Support of Motion-Memorandum of Law	44-45

Motion Sequence #2

Notice of Cross-Motion-Affirmation-Affidavit-Exhibits A-H-Memorandum of Law	30-41
Reply Affirmation-Supplemental Reply Affirmation-Exhibit 1	46-48

This is an action for personal injuries arising out of a motor vehicle accident that occurred on June 15, 2017. Plaintiff Nathaniel Green ("Plaintiff") commenced the action by filing a Summons and Verified Complaint on June 13, 2018 (Pl. Exh. A) which was thereafter served

upon Defendants. On September 5, 2018, Defendants G&M Automotive Enterprises, Inc., d/b/a Ultimate Autobody, sued herein as Ultimate Autobody, LLC, and Gregory Beobide, sued herein as Gregory Beobid, joined issue. (Pl. Exh. B). According to Plaintiff's counsel, Ronald Ramo, Esq., at the time of the instant motion, it was unclear whether Defendant Roopnarine had interposed an answer, but he appeared at the preliminary conference and has since been deposed. (Ramo Aff. ¶5).

The Answer served by Defendant Beobide denied the material allegations of the complaint, raised various affirmative defenses, and according to Defendant Beobide's counsel, George J. Calcagnini, Esq., also put Plaintiff on notice that the wrong entity was sued when Ultimate Autobody, LLC was named as a Defendant. To avoid any possible claims of a default by the actual entity that operated the shop at the time fo the alleged incident, G&M Automotive Enterprises, Inc., d/b/a Ultimate Autobody joined in Defendant Beobide's answer even though it is not actually a party in this case. (Calcagnini Aff. ¶4). Plaintiff's counsel was also put on notice that the wrong entity was named at the preliminary conference held on December 18, 2018, where Defendant's counsel "inserted as to defenses that: Plaintiff named the wrong LLC as the operator of the auto body shop." (*Id.* ¶5). According to Mr. Calcagnini, he repeatedly advised Plaintiff's counsel that Defendant Ultimate Autobody, LLC was an entity that operated out of the premises many years prior to the alleged incident, and that it now operates a shop in Peekskill which is owned by William Honovich. He contends that Plaintiff's counsel ignored the information until now, when the case is ready to be certified for trial. (*Id.* ¶6).

It is undisputed that all document discovery and depositions have been completed. At the last Compliance Conference held on June 17, 2019, Plaintiff's counsel was given until July 30,

2019 to conduct two non-party depositions. According to the Compliance Conference Referee Report & Order, the case was marked FINAL to certify as trial ready on July 31, 2019 (Defs Exh. D), and a trial readiness order was entered on August 2, 2019. (NYSCEF Doc. 65).

It is well-settled that where leave is sought to amend a caption and to serve and file a supplementals summons and amended complaint, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" *Clarke v. Laidlaw Tr., Inc.*, 125 A.D.3d 920 (2d Dept. 2015). It follows conversely, that where delay is prejudicial to the adverse party, then leave is properly denied.

In this case, this Court finds that Plaintiff was put on notice that he sued the wrong entity when Ultimate Autobody, LLC was named as a Defendant. G&M Automotive Enterprises, Inc. d/b/a Ultimate Autobody joined in Defendant Beobide's answer over a year ago, on September 5, 2018. Further, a reflected in the the Preliminary Conference Stipulation, Defendant's counsel inserted the following language, "[t]he Plaintiff named the wrong LLC as the operator of the auto body shop." (Def. Exh. C).

The case has been certified as trial ready. To permit Plaintiff to add additional parties on the eve of trial would cause unnecessary and prolonged delay that in this Court's view, would prejudice the Defendants. Any new party would be entitled to conduct discovery and the action would literally set the case back to the beginning. Plaintiff is able to commence a separate action against the proposed new defendants.

Defense counsel further contends that the proposed supplemental complaint is palpably devoid of merit. In light of this Court's determination that undue prejudice will result from what

would necessarily be a long delay if new parties were added, this Court need not discuss the lack of merit to the proposed supplemental complaint.

Accordingly, Plaintiff's motion to serve and file a supplemental summons and complaint is denied.

Defendant Beobide has also moved for an Order granting summary judgment dismissing Plaintiff's claims against him. His Affidavit, which is submitted in support of his cross-motion, states that his only personal connection to this case is his ownership of the real property adjacent to the street where the alleged incident occurred. Plaintiff testified at his deposition that he was hit by a vehicle on Chesnut (Def. Exh. E, p. 39, lines 4-6), which is a public street. Defendant Beobide was the majority shareholder of property located at 304 East Third Street in Mount Vernon, which property lies at the corner of East Third Street and Chestnut Place. The property was leased to G&M Automotive Enterprises, Inc. at the time of the incident. The deposition testimony of Prady Roopnarine describes how the accident occurred. (Pl. Exh. 1).

Mr. Roopnarine testified that at the time of the incident, he was employed by Ultimate Auto, and was told to move the vehicle that was parked in the lot into the auto body garage through the back entrance on Chestnut Avenue. (*Id.*, p.12). Mr. Roopnarine was backing up and coming out of the driveway and Plaintiff was walking and coming towards the main road. Plaintiff claims he was stuck on hip. (*Id.*, pp. 14-15). Mr. Roopnarine was driving in reverse to exit the parking lot on the main street. (*Id.*, p.17). When he backed out of the lot, the back of the car went halfway into the street. (*Id.*, p.26).

The Complaint is devoid of allegations as to Defendant Beobide's liability as a landlord of the premises in this case. There are no allegations that the premises were unsafe, defective, or

improperly maintained. There is no basis to assert liability against Defendant Beobide for an automobile accident that occurred on a public street between a pedestrian and an automobile driven by an employee of an auto body shop that leased the premises from Defendant Beobide.

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

On a motion for summary judgment, the moving party has the burden to establish " a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Voss v. Netherlands Ins Co.*, 22 N.Y.3d 728 (2014), *quoting Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985), *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993), *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974), *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his burden of making a prima facie showing of

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." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985).

Summary judgment is a drastic remedy that "should not be granted where there is any doubt as to the existence of a triable issue" (*Id.* at 853). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court. *Russell v A. Barton Hepburn Hosp.*, 154 A.D.2d 796, 797 (3rd Dept. 1989); *See also, Mascots v Oarlock*, 23 A.D.2d 943, 944 (3rd Dept. 1965). "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented . . . .This drastic remedy should not be granted where there is any doubt as to the existence of such issues, ...or where the issue is 'arguable' . . ; 'issue finding, rather than issue-determination, is the key to the procedure' ". . . *Pirrelli v Long Island Railroad*, 226 A.D. 2d 166 (1st Dept. 1996) *quoting Sillman v Twentieth Century-Fox*, 3 N.Y.2d 395, 404 (1957).

This Court finds that Defendant Beobide has made a prima showing of entitlement to judgment as a matter of law. Not only has it been established that the incident did not occur on premises owned by him, the complaint fails to allege any claim of negligence arising from his ownership of the premises.

Plaintiff has failed to raise a triable issue of fact in opposition to the motion.

Accordingly and based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for leave to serve and file the a supplemental summons and complaint to add additional parties is denied; and it is further

ORDERED that Defedant Beobide's motion for summary judgment is granted and Plaintiff's complaint is dismissed as to him; and it is further

ORDERED that Plaintiff may amend the caption from P. Roopnarine to Prady Roopnarine; and it is further

ORDERED that the remaining parties and counsel shall appear at the Settlement Conference Part, courtroom 1600, on November 12, 2019 at 9:00 AM to schedule a trial of this action.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 3, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.