

Elder v Bella Bus Corp.
2019 NY Slip Op 34860(U)
August 1, 2019
Supreme Court, Kings County
Docket Number: Index No. 511113/2018
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 1st day of August, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
SHANTIA ELDER,

Plaintiffs,

- against -

BELLA BUS CORP. and HENRY TSE,

Defendants.

-----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.....	<u>1/2, 7</u>
Opposing Affidavits (Affirmations).....	<u>3, 4</u>
Reply Affidavits (Affirmations).....	<u>5</u>
Memorandum of Law	<u>6</u>

Upon the foregoing papers, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on July 29, 2016. On that day the Plaintiff Shantia Elder (hereinafter the "Plaintiff") was apparently a passenger on a bus owned by Defendant Bella Bus Corp. (hereinafter "Defendant Bella"). The Defendant alleges that the Plaintiff was employed as a bus matron for Defendant Bella at the time of the accident. The Plaintiff alleges that, on the date of the accident, Defendant Bella's bus was on the Van Wyck Expressway at or near its intersection with Jewel Avenue, when it collided with a vehicle owned and operated by Defendant Henry Tse (hereinafter "Defendant Tse").

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Defendant Bella now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint and cross-claims against it. Defendant Bella argues that the Plaintiff's claim is barred by Workers' Compensation Laws §§ 11 and 29. Specifically, Defendant Bella argues that the complaint should be dismissed as against it because the Plaintiff was employed by Defendant Bella at the time of the alleged incident.

The Plaintiff and Co-Defendant Tse oppose the motion and argue that it should be denied. In opposition, the Plaintiff argues that the movants have failed to meet their *prima facie* burden and have failed to establish, as a matter of law, that the Plaintiff was an employee of Defendant Bella. Specifically, the Plaintiff and Co-Defendant Tse argue that the movant relies almost exclusively on the affidavit of Sal Rashid, director of insurance and risk management for Total Transportation Corp. The opposing parties contend that this affidavit is self serving, and alone is insufficient to show as a matter of law that the Plaintiff was an employee of Defendant Bella, at the time of the accident.

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].

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].

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. Although a request for a Preliminary Conference has been made there is no indication that one occurred. Also, examinations before trial of the parties should be conducted. While Defendant Bella contends that it was the Plaintiff’s employer at the time of the alleged incident, the fact that the Plaintiff has provided documents that suggest that her employer at the time of the

accident was non-party Brooklyn Transportation Corp., and that Workers' Compensation coverage has not been provided, prevents this Court from granting summary judgment at this time. Accordingly, the motion for summary judgment is denied as premature, without prejudice to renew, on good cause shown.

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

Defendant Bella's motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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