

Beard v L.K. Comstock & Co., Inc.

2019 NY Slip Op 34946(U)

January 18, 2019

Supreme Court, Kings County

Docket Number: Index No. 508733/2018

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KINGS COUNTY CLERK
FILED

2019 JAN 29 AM 10:44

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 18th day of January, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
THERESA BEARD,

Plaintiffs,

Index No.: 508733/2018

- against -

DECISION AND ORDER

L.K. COMSTOCK & COMPANY, INC., BARTHOLOM LIDONNI, KEVIN BEARD, and SERENA CARTER,

Motion Sequence #2, #3

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, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>5, 6, 7,</u>
Reply Affidavits (Affirmations).....	<u>8, 9</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 August 23, 2017. On that day, the Plaintiff, Theresa Beard (hereinafter the "Plaintiff") was a passenger in a vehicle, operated by Defendant Kevin Beard and owned by Defendant Serena Carter (hereinafter the "Carter Defendants"), which was involved in a motor vehicle accident with a vehicle operated by Defendant Bart Lidonni s/h/a Bartholom Lidonni, and owned by Defendant L.K Comstock & Company, Inc. (hereinafter the "Comstock Defendants"). The Plaintiff alleges that the incident took place shortly after the Carter Defendants' vehicle stopped at a red light at or near 132 Flushing Avenue, west of Claremont Avenue in Brooklyn, New York.

The Plaintiff now moves for summary judgment (motion sequence #2) on the issue of liability. Plaintiff contends that she was a passenger in the Carter Defendants' vehicle, which was

stopped at a red light, when the Comstock Defendants' vehicle collided with the Carter Defendants' vehicle. The Plaintiff further contends that her conduct did not contribute to or cause the collision. The Carter Defendants also move (motion sequence #3) for an order pursuant to CPLR 3212, granting summary judgment to the Carter Defendants and dismissing the summons and complaint and any and all cross-claims against them. The Carter Defendants also contend that their vehicle was stopped at a red traffic light when they were hit in the rear by the Comstock Defendants' vehicle. They also contend that their conduct did not contribute to or cause the accident. In opposition, the Comstock Defendants contend that the instant motions should be denied as the Plaintiff and the Carter Defendants have failed to meet their *prima facie* burden. The Comstock Defendants also argue that the motions are premature.

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].

Generally, in relation to summary judgment motions, ““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]. 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 [2nd Dept, 2013]; *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012].

Turning to the merits of the motion (motion sequence #2) by the Plaintiff, the Court finds that the movant has provided sufficient evidence to meet her *prima facie* burden. The Court also finds that the motion (motion sequence #3) by the Carter Defendants, which is supported by an affidavit by Defendant Kevin Beard and the Police Accident Report, has established a *prima facie* showing. The Court finds that the affidavits presented in support of each motion are sufficient to establish the movants’ respective *prima facie* burdens and that the Defendants have “failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the defendant.”” *Boorstein v. 1261 48th St. Condo.*, 96 A.D.3d 703, 704, 946 N.Y.S.2d 200, 202 [2nd Dept, 2012].

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 [2nd Dept, 2007]. Even assuming, *arguendo*, that the Police Accident Report attached to the Plaintiffs’ motion is not admissible, given that the Police Officer did not witness the alleged incident (*see Adobea v. Junel*, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]), the affidavit of the Plaintiff is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 A.D.3d 951, 82 N.Y.S.3d 130 [2nd Dept, 2018].

In opposition to the motions, the Defendants have failed to raise a material issue of fact that would prevent this Court from granting the motion. The Defendants point to the Plaintiff’s affidavit and the affidavit of Defendant Kevin Beard and argue that they are insufficient to support the respective movants’ *prima facie* showing. This Court disagrees given that each affidavit explains that the Plaintiff’s vehicle was struck in the rear while stopped at a red light. The Defendants present no affidavit in support of their position. This, without more, is insufficient to raise an issue of fact that would prevent this Court from granting summary judgment to the movants. *See Hakakian v. McCabe*, 38 A.D.3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept, 2007]; *see also Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017].

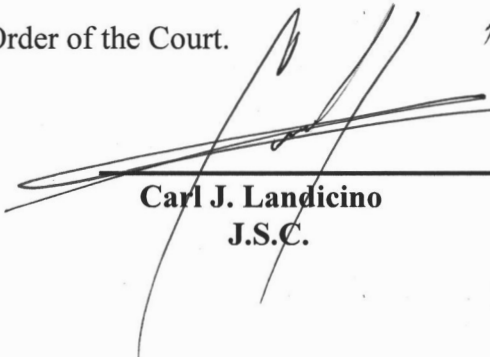
Based upon the foregoing, it is hereby ORDERED as follows:

Plaintiff’s Motion (motion sequence #2) is granted. The matter shall proceed to a trial on damages only as against the Comstock Defendants.

The Carter Defendants’ motion (motion sequence #3) is granted and the complaint and any cross claims are dismissed as to the Carter Defendants.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

2019 JAN 29 AM 10:44
KINGS COUNTY CLERK
FILED