

Gabriel v Balan

2019 NY Slip Op 35231(U)

October 1, 2019

Supreme Court, Kings County

Docket Number: Index No. 524901/2018

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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 October, 2019.

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

Justice.

-----X
MARGARETTE L. GABRIEL and JAYVON
PIERRE-LOUIS,

Plaintiff(s),

Index No.: 524901/2018

- against -

DECISION AND ORDER

MARIE J. BALAN and JEAN R. LAMOUR,
Defendant(s)

Motion Sequence #1

-----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,</u>
Opposing Affidavits (Affirmations).....	<u>3, 4</u>
Reply Affidavits (Affirmations).....	<u>5</u>

After a review of the submitted papers the Court determines as follows:

This action concerns a motor vehicle accident that occurred on April 27, 2017. On that day, the Plaintiff Jayvon Pierre-Lous (hereinafter the "Plaintiff Passenger") was a passenger in a vehicle operated by Plaintiff Margarett L. Gabriel (hereinafter "Plaintiff Driver") which was involved in a collision concerning two other vehicles (the "Middle Vehicle"). The rear vehicle was owned and operated by Defendant Marie J. Balan ("Defendant Balan" or "Rear Vehicle Defendant") and the front vehicle was operated by Defendant Jean R. Lamour (hereinafter the "Defendant Jean" "Front Defendant). The parties concede that the accident occurred at and near the intersection of Paerdegat Avenue North and Paerdegat 10 Street, County of Kings, State of New York. Defendant

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Lamour moves (Motion Sequence #1) for summary judgment dismissing the complaint and all cross-claims against him. Plaintiffs and co-Defendant Balan oppose the motion¹.

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

¹The Court notes that the Order on Consent, scheduling the motion for Oral Argument, provides that the Affirmation in Opposition contained in co-Defendant Balan’s papers as Exhibit A, is the Affirmation in Opposition of the Plaintiff.

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, this is generally only applicable if further 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]. The opposing parties contend that the motion is premature. However, the opposing parties 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]. “Mere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient.” *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488, 810 N.Y.S.2d 500, 501 [2nd Dept, 2006].

Defendant Lamour’s Motion for Summary Judgment

Turning to the merits of Defendant Lamour’s motion, the Court finds that the movant has provided sufficient evidence to meet his *prima facie* burden. The Court finds that the affidavit of Defendant Lamour presented in support of his motion is sufficient to establish the movant’s *prima facie* burden.

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]. The opposing parties have failed to raise a material issue of fact. What is more, the opposing parties

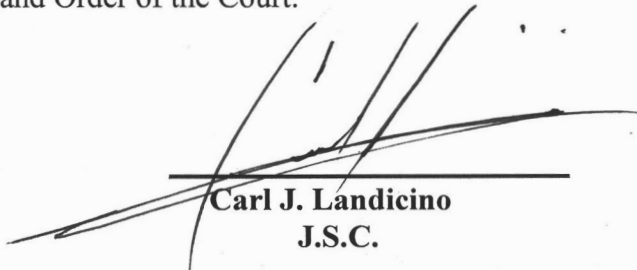
present no affidavit in support of their positions. The opposing parties' contentions, as contained in their respective counsels' affirmations, are insufficient to raise an issue of fact that would prevent this Court from granting summary judgment to the movant. *See Hakakian v. McCabe*, 38 A.D.3d 493, 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]. Accordingly, Defendant Lamour's motion for summary judgment is granted.

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

Defendant Lamour's Motion (motion sequence #1) is granted. The action and all cross claims as against Defendant Lamour are dismissed.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino
J.S.C.

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