

Aljitan v Nevville

2020 NY Slip Op 35749(U)

September 11, 2020

Supreme Court, Kings County

Docket Number: Index No. 505885/2019

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

Defendant Norbert D. Mitchell also moves (motion sequence #2) for an order, pursuant to CPLR 3212, granting him summary judgment, on the issue of liability. Defendant Mitchell states that he was travelling in the right lane, and gradually slowed for traffic. He maintains that as he was slowing he was struck in the rear by Defendant Nevfille, who was driving Defendant Bullet 1 Express, Inc.'s vehicle, causing him to impact one of the vehicles at the scene. There is no opposition to this motion.

Generally, “[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 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853 [1974]. The proponent for 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 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 N Y2d 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.” *Graham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 A.D2d 58, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994]. It is true that “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.”

Tsyganash v. Auto Mall Fleet Mgmt., Inc., 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the motion by Defendant Bin Yeu Qin, (motion Seq. # 1) the Court finds that he has met his *prima facie* burden. In support of his application, the Defendant Bin Yeu Qin relies on his affidavit, and a Police Accident Report. In his affidavit Defendant Bin Yeu Qin states that he came to a stop due to traffic and that, “[a]s I was stopped for three to five seconds I was struck in the rear. I later learned that the vehicle that struck me was being operated by one of the Plaintiff Ayman Aljitan.” 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 AD3d 818, 980 N.Y.S.2d 564 [2nd Dept 2014]), the affidavit of Defendant Bin Yeu Qin is sufficient for him to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because “[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 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007].

In opposition to the motion, neither the Plaintiff nor Defendant Mitchell raise a material issue of fact that would prevent this Court from granting the motion made by Defendant Bin Yeu Qin. The opponents of the motion provide no affidavits or other evidence that would raise a material issue of fact. As to the opposition’s position that the motion (motion sequence #1) is premature, 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 AD3d 738, 739, 903 N.Y.S.2d 80, 81 [2d Dept 2010]; *see Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 AD3d 578, 872 N.Y.S.2d 724 [2d Dept 2009]; *Juseinoski v. New York Hosp. Med. Ctr.*

of Queens, 29 AD3d 636, 637, 815 N.Y.S.2d 183 [2d 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 AD3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2d Dept 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 AD2d 792, 792–793, 533 N.Y.S.2d 143 [2d Dept 1988].

The parties opposing this motion (motion sequence #1) have not shown that the motion is premature. The opposing parties have not indicated that facts to oppose the motion cannot be stated and that further discovery is needed. Speculation of what might be discovered is insufficient since all parties were at the scene . There were no party affidavits proffered in opposition. As such, the Movant has made an un rebutted *prima facie* showing that Defendant Bin Yeu Qin was neither negligent nor a cause of the collision. See *Hakakian v. McCabe*, 38 AD3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept 2007]; see also *Tumminello v. City of New York*, 148 AD3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept 2017].

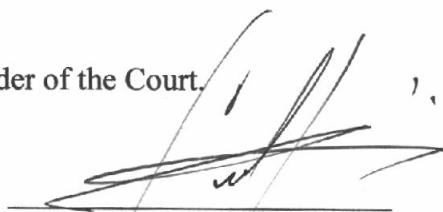
Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendant Bin Yeu Qin for summary judgment (motion sequence #1) is granted. The action and all cross claims against Defendant Bin Yeu Qin are accordingly dismissed.

The motion by Defendant Mitchell (motion sequence #2) is granted as unopposed and the complaint is dismissed as against Defendant Mitchell.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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