

<b>Capicchioni v Noble Parking LLC</b>
2021 NY Slip Op 30868(U)
March 9, 2021
Supreme Court, Kings County
Docket Number: 501373/2020
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 9th day of March 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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EDWARD CAPICCHIONI,

Index No.: 501373/2020

Plaintiff,

-against-

NOBLE PARKING LLC, NOBLE GARAGE LLC, ICON PARKING SYSTEMS, LLC, ICON PARKING HOLDINGS, LLC formerly known as CITIZENS ICON HOLDINGS, LLC, ICON PARKING MANAGEMENT, LLC, formerly known as CITIZENS ICON MGMT LLC and ELIAS DISLA,

DECISION AND ORDER

Motions Sequence #2, #3

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed ..... 21-27, 35-47,

Opposing Affidavits (Affirmations)..... 49-60, 65-66

Reply Affidavits (Affirmations) ..... 68, 70

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of a motor vehicle accident which allegedly occurred on February 15, 2019. Plaintiff, Edward Capicchioni (hereinafter the "Plaintiff") alleges in his Amended Complaint that he suffered personal injuries when the vehicle owned by his wife, non-party Francine Capicchioni, while being operated by Defendant Elias Disla, was driven over his left foot.

Defendants Noble Parking, LLC, Icon Parking Systems, LLC, Icon Parking Holdings, LLC formerly known as Citizens Icon Holdings, LLC and Icon Parking Management, LLC formerly known as Citizens Icon Mgmt LLC (hereinafter referred to individually or collectively as the “Parking Defendants”) now move (motion sequence #2) for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the Amended Complaint. The Parking Defendants contend that the Amended Complaint as against them should be dismissed based upon documentary evidence. The Parking Defendants contend that they did not operate, maintain, control, nor manage the parking garage located at 310 East 40<sup>th</sup> Street. In support of this motion, the Parking Defendants rely primarily on the affidavit of Spencer Steifel, General Counsel for Icon Parking Holdings, LLC, formerly known as Citizen Icon Holdings, LLC, the purported indirect parent and manager of Noble Parking, LLC, Noble Garage, LLC, Icon Parking Systems, LLC, and Icon Parking Management, LLC. Neither Defendants Disla nor Noble Garage, LLC have moved. Defendant Noble Garage, LLC has admitted in its answer that Disla was working in its employ at the time of the accident.

The Plaintiff opposes the motion and cross-moves for separate relief. In his opposition, the Plaintiff contends that the affidavit of Spencer Steifel is not documentation contemplated by CPLR 3211(a)(1) and as a result, that aspect of the Parking Defendants’ motion should be denied. What is more, the Plaintiff contends that the Amended Complaint sufficiently states a cause of action. The Plaintiff cross-moves (motion sequence #3) for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability as against the Defendants. The Plaintiff argues that Defendant Disla’s negligence caused the Plaintiff’s injuries. As to the responsibility of each of the remaining Defendants, the Plaintiff contends that there is evidentiary material that referred to the remaining Defendants. The Plaintiff points his parking receipt/check that referred to Noble Parking LLC and signage at the parking garage referring to “Icon.” The Plaintiff contends that this supports Plaintiff’s

allegation that the other Defendants had a role in the management or had ownership or control of the parking garage at issue. The Defendants oppose the motion made by the Plaintiff and contend that it is premature.

### Motion Sequence #2

**On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.**

*Kinnear v. Cefoli*, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, “[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” Furthermore, “[a]lthough on a motion to dismiss plaintiff’s allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

**“[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84 NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).**

*Feggins v. Marks*, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019].

The Court denies the Parking Defendants' application made in relation to the dismissal of the Amended Complaint. "A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Sullivan v. State*, 34 AD3d 443, 445, 824 N.Y.S.2d 135, 136 [2d Dept 2006], quoting *Nevin v. Laclede Prof'l. Prod., Inc.*, 273 AD2d 453, 711 N.Y.S.2d 735 [2d Dept 2000]. In the instant matter, the Parking Defendants contend that the affidavit of Spencer Steifel, General Counsel for Icon Parking Holdings LLC, is sufficient to meet this burden. In his affidavit, Mr. Steifel states that the various Parking Defendants did not employ Defendant Disla and did not manage the subject premises where the incident occurred. However, "[n]either affidavits, deposition testimony, nor letters are considered 'documentary evidence within the intendment of CPLR 3211(a)(1)'" *Granada Condo. III Ass'n v. Palomino*, 78 AD3d 996, 997, 913 N.Y.S.2d 668, 669 [2d Dept 2010]. Therefore, the application in relation to the dismissal of the Amended Complaint pursuant to CPLR 3211(a)(1) is denied.

Turning to the merits of the Parking Defendants' application made pursuant to CPLR 3211(a)(7), the Court finds that the Plaintiff has sufficiently plead the causes of action alleged. "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Makris v. Darus-Salaam Masjid, New York, Inc.*, 91 AD3d 729, 730, 936 N.Y.S.2d 325, 326 [2d Dept 2012]. However, "on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party" *Sokol v. Leader*, 74 AD3d at 1181, 904 N.Y.S.2d 153 [2d Dept 2010].

The Defendants have failed to show that no significant dispute exists regarding management and control of the subject premises. As a result, the application to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7) is denied and the Parking Defendants' motion (sequence #2) is denied in its entirety.

### Motion Sequence #3

“Summary 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 131, 320 N.E.2d 853 [1974]. The party seeking 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 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 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 [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. Rous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 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 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the Plaintiff's application (motion sequence #3) for partial summary judgment on the issue of liability, the Court finds that the Plaintiff has met his *prima facie* burden in relation to Defendants Elias Disla and Noble Garage LLC. The Plaintiff relies primarily on a video of the accident at issue, the Police Accident Report, the affidavit of the Plaintiff and the affidavit of Francine Capicchioni, the Plaintiff's wife. The Plaintiff's affidavit states (Plaintiff's Motion, Exhibit J, Paragraph 9) that "[w]hile I was leaning into the rear seat from the rear driver's side door, the parking attendant, who I later learned was defendant Elias Disla, did not wait for me to finish and did not wait for me to move away from the vehicle, and drove the vehicle forward, struck me and ran over my left foot." As part of her affidavit, the Plaintiff's wife, Francine Capicchioni, stated (Plaintiff's Motion, Exhibit K, Paragraph 8) that "[t]he vehicle struck my husband and the rear driver's side tire ran over his foot." The Police Accident Report, which was certified, contained an admission from Defendant Disla that he drove over the Plaintiff's foot, and as a result is admissible. *See Memenza v. Cole*, 131 AD3d 1020, 1022, 16 N.Y.S.3d 287, 289 [2d Dept 2015]. Also, a review of the video provided as part of the motion supports the Plaintiff's position. In addition, Paragraph 13 of the Amended Answer admits that Defendant Disla was driving the subject vehicle in the course of his employment with Noble Garage, LLC. Taken together this evidence is sufficient for the Plaintiff to establish a *prima facie* showing. *See Gaston v. Vertsberger*, 176 AD3d 919, 920, 111 N.Y.S.3d 314, 315 [2d Dept 2019]; *see also Lazarre v. Gragston*, 164 AD3d 574, 575, 81 N.Y.S.3d 541, 542 [2d Dept 2018].

In opposition, the Court finds that the Defendants have not raised an issue of fact in relation to Plaintiff's initial showing. The affidavit of Defendant Elias Disla states that Francine Capicchioni "gave me a hand signal in which I relied on to proceed and move the vehicle." This evidence, without more, is

insufficient as a matter of law to rebut the Plaintiff's *prima facie* showing that the actions of Defendant Elias Disla were negligent and a proximate cause of the accident. An act by a driver in striking a pedestrian, even when that pedestrian relied on a third party's gesture to walk, generally constitutes "a superseding, intervening act that breaks the causal nexus." *Esen v. Narian*, 155 AD3d 612, 613, 63 N.Y.S.3d 493, 494 [2d Dept 2017]. In the instant proceeding, even assuming, *arguendo*, that non-party Francine Capicchioni gestured to Defendant Disla to proceed forward, Defendant Disla's failure to see what was there to be seen and driving the vehicle over the Plaintiff's foot constituted negligence and a proximate cause of the accident. As a result, the purported gesture by Francine Capicchioni is not sufficient to raise a material issue of fact in relation to Plaintiff's motion. *See Levi v. Nardone*, 178 AD3d 692, 694, 115 N.Y.S.3d 101, 104 [2d Dept 2019].

In addition, the matter is not premature as it relates to Defendants Elias Disla and Noble Garage LLC. A motion is generally only premature if further discovery would lead to information not in the possession of the opponent of the motion. *See Cajas-Romero v. Ward*, 106 AD3d 850, 852, 965 N.Y.S.2d 559, 561 [2d Dept 2013]; *Boorstein v. 1261 48th St. Condo.*, 96 AD3d 703, 704, 946 N.Y.S.2d 200, 202 [2d Dept 2012]. The Defendant has failed to show that this requirement has been met in the instant proceeding. The Defendants Elias Disla and Noble Garage LLC cannot point to any facts not in their possession which would justify further discovery. Accordingly, the Plaintiff's motion for partial summary judgment on the issue of liability is granted against Defendants Elias Disla and Noble Garage LLC, and the first affirmative defense alleging culpable conduct attributable to the Plaintiff and the fifth affirmative defense asserting the failure to state a cause of action are dismissed.

However, the Plaintiff's motion for summary judgment is denied as to the Parking Defendants. A motion for summary judgment can be deemed premature when it is made prior to joinder of issue. *See Enriquez v. Home Lawn Care & Landscaping, Inc.*, 49 AD3d 496, 497, 854 N.Y.S.2d 410, 411 [2d Dept

2008]. "A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to." *JBBNY, LLC v. Begum*, 156 AD3d 769, 770, 67 N.Y.S.3d 284, 286 [2d Dept 2017], quoting *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 97, 479 N.E.2d 810, 812 [1985]. In the instant proceeding, only Defendants Elias Disla and Noble Garage LLC have filed and served an answer. Accordingly, the motion for summary judgment (motions sequence #3) is denied as against the Parking Defendants.

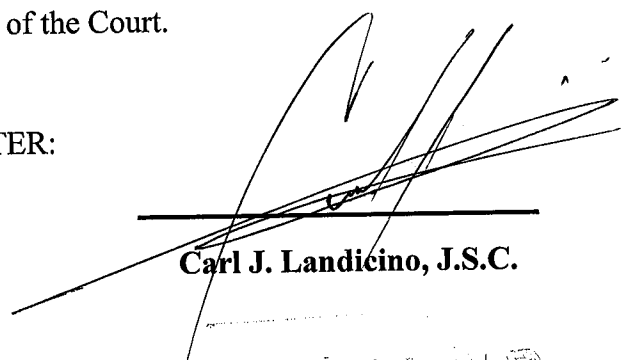
Based on the foregoing, it is hereby ORDERED as follows:

The Parking Defendants' motion (motion sequence #2) is denied. These Defendants shall have 30 days from service of notice of entry of this Decision and Order to serve and file an answer to the Amended Complaint.

The Plaintiff's motion (motion sequence #3) is granted solely to the extent that partial summary judgment on the issue of liability is granted to the Plaintiff as against Defendants Elias Disla and Noble Garage LLC, and the first (culpable conduct) and fifth (failure to state a cause of action) affirmative defenses of Defendants Elias Disla and Noble Garage LLC are dismissed. The Court also finds that Defendant Disla was negligent and a proximate cause of the accident.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
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Carl J. Landicino, J.S.C.

FILED  
MAR 17 2021  
KINGS COUNTY CLERK'S OFFICE