

**Kemp v New York City Tr. Auth.**

2021 NY Slip Op 34158(U)

April 28, 2021

Supreme Court, Queens County

Docket Number: Index No. 715415/2017

Judge: Joseph Risi

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**FILED**

Short Form Order

**5/4/2021  
01:43 PM**

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI  
A. J. S. C.

IA PART 3

**COUNTY CLERK  
QUEENS COUNTY**

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SHAMEKA KEMP,

Index Number: 715415/2017

Plaintiff,

Motion Date: November 24, 2020

-against-

Motion Sequence #5

NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION  
AUTHORITY, MTA NYC TRANSIT,  
PARATRANSIT DIVISION, ACCESS-A-  
RIDE, PTM MANAGEMENT CORP.,  
GEORGE AJEKUKO, LUNIE PREDESTIN,  
MELISSA EDOUARD, FINSTER COURIER  
INCORPORATED, ELITE EXPRESS, ELITE  
TRANSPORTATION OF NEW JERSEY INC  
and ROBERT KEARNEY,

**DECISION/ ORDER**

Defendants.

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The following EF numbered papers read on the following motion by Defendants Finster Courier Incorporated, Elite Express, Elite Transportation of New Jersey Inc and Robert Kearney for an Order granting summary judgment on the issue of liability and dismissing any and all cross-claims against them.

	<b>Papers Numbered</b>
<b>Notice of Motion, Affirmation in Support, Exhibits, Service .....</b>	<b>EF 94 – 113</b>
<b>Affirmation in Opposition, Exhibits, Service .....</b>	<b>EF 114 – 115</b>
<b>Affirmation in Opposition, Exhibits, Service .....</b>	<b>EF 119 – 129</b>
<b>Reply and Service .....</b>	<b>EF 117 – 118</b>
<b>Reply and Service .....</b>	<b>EF 130 - 136</b>

Upon the foregoing papers, it is ordered that motion is determined as follows:

Plaintiff commenced this action by the filing of a summons and complaint on November 6, 2017, seeking damages for personal injuries allegedly sustained as a passenger in Defendant's Paratransit vehicle which was involved in a motor vehicle accident on November 30, 2016. The accident occurred on North Conduit Avenue at or near the intersection of 182nd Street, County of Queens, City and State of New York. Defendants New York City Transit Authority, Metropolitan Transportation Authority, MTA NYC Transit, Paratransit Division, Access-A-Ride, PTM Management Corp. and George Ajekuko (collectively "NYCTA") filed an answer with cross-claims on January 16, 2018. Defendants Finster Courier Incorporated, Elite Express, Elite Transportation of New Jersey INC and Robert Kearney ("Elite") filed an answer with cross-claims on January 30, 2018. Defendants Lunie Predestin and Melissa Edouard filed an answer with cross-claims on February 22, 2018.

Defendant Elite now moves for summary judgment on the grounds that Defendant driver Kearney did not breach any duty to plaintiff and was not the cause of the subject accident. In support of the motion, Defendant Elite annexes, *inter alia*, an affidavit from Defendant Kerney. In opposition, plaintiff contends that the motion is premature as depositions were not completed. However, the depositions of all parties, have subsequently been held and the deposition transcripts of plaintiff and Defendant Kearney are annexed to Defendant NYCTA's opposition.<sup>1</sup>

On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires

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<sup>1</sup> Defendant Ajekuko's deposition transcript was annexed to the moving papers of a subsequently filed summary judgment motion by **Defendant NYCTA** and thus considered here as part of the Court's record.

denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v. City of New York*, 49 NY2d at 557; CPLR §3212[b]).

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]; *Andre v. Pomeroy*, 35 NY2d 361, 364 (1974); *Taft v. New York City Tr. Auth.*, 193 AD2d 503, 505 [1st Dept. 1993]). As such, the function of the court on the instant motion is issue finding and not issue determination (*see D.B.D. Nominee, Inc. v. 814 10<sup>th</sup> Ave. Corp.*, 109 AD2d 668, 669 [2d Dept. 1985]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Zuckerman v. City of New York, supra*).

It is undisputed that plaintiff was a passenger in the vehicle operated by Defendant Ajekuko at the time of the subject accident. Defendant Kearney states in his affidavit that his vehicle was only impacted after the collision between Defendant Ajekuko and Defendant Edouard. He was traveling in the middle lane on Conduit Avenue. He also stated that Defendant Edouard’s vehicle was traveling in the left lane behind his vehicle prior to the impact. Defendant Ajekuko was on a highway offramp which merged into the left lane of North Conduit Avenue. Defendant Kearney also testified that the impact between Defendant Ajekuko and Defendant Edouard’s vehicles caused both vehicles to move into his lane and impact the trailer attached to the rear of his vehicle.

Defendant Ajekuko testified at his deposition that Defendant Kearney’s vehicle passed him as he was stopped at the highway offramp waiting to merge onto the left lane of North Conduit Avenue prior to the impact between his and Defendant Edouard’s vehicles.

Defendant Edouard testified at her deposition that she was traveling in the left lane of North Conduit Avenue and Defendant Kearney was traveling one lane over to the right. She stated that the primary impact “pushed [her] into the right lane where the truck impacted [her] on the passenger right side.” She stated that Defendant Kearney’s vehicle was not involved in the accident until after the collision between her and Defendant Ajekuko’s vehicle. She also testified that Defendant Kearney did not cause her vehicle to collide with Defendant Ajekuko’s vehicle.


The certified police report states that Defendant Ajekuko was merging onto North Conduit when he sideswiped Defendant Edouard’s vehicle pushing her car into the trailer of Defendant Kearney’s truck.

In opposition, Defendant NYCTA failed to raise any issue of fact sufficient to defeat Defendant Kearney’s entitlement to summary judgment as a matter of law. Despite Defendant NYTCA’s argument that is unclear whether Defendant Edouard moved into Defendant Kearney’s lane of travel and thereby causing the accident, that contention is not at issue here as this subject motion is to ascertain the liability of Defendant Kearney, not Defendant Edouard.

Accordingly, the motion is hereby granted and the complaint and any and all cross-claims are dismissed as to Finster Courier Incorporated, Elite Express, Elite Transportation of New Jersey INC and Robert Kearney only.

This is the decision and Order of the Court.

Dated: April 28, 2021

  
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Hon. Joseph Risi, A.J.S.C.

**FILED**

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