Marshall v Duplex Cab Corp.

2021 NY Slip Op 34263(U)

September 29, 2021

Supreme Court, Kings County

Docket Number: Index No. 510056/2019

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 29th day of September 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ANTHONY MARSHALL and KALVIN SMITH,

Plaintiff,

-against-

DUPLEX CAB CORP., YASIR ARFAT, THE DOE FUND, INC. and JULIO DERIVE

Defendants.

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Index No. 510056/2019

DECISION AND ORDER

Motion Sequence #1

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed 15-24,
Opposing Affidavits (Affirmations).......... 25, 28,
Reply Affidavits (Affirmations) 30-42, 43-56

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

The instant action concerns a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on July 26, 2016. At the time of the occurrence, both Plaintiffs, Anthony Marshall and Kalvin Smith (hereinafter referred to individually or collectively as the "Plaintiffs"), were passengers in a vehicle owned by Defendant The Doe Fund, Inc. and operated by Defendant Julio Derive (hereinafter referred to as the "Doe Defendants"). The incident occurred when the Doe Defendants' vehicle allegedly collided with a vehicle owned by Defendant, Duplex Cab Corp. and operated by Defendant Yasir Arfat (hereinafter the "Duplex Defendants"). The

collision occurred on Nostrand Avenue at or near its intersection with Gates Avenue in Brooklyn, New York.

The Doe Defendants now move (motions sequence #1) for an order pursuant to CPLR 3212 granting them summary judgment and dismissing the complaint and all cross-claims asserted against them. The Doe Defendants contend that the claims against them are barred pursuant to New York State Workers' Compensation Law Sections 11 and 29(6). Specifically, the Doe Defendants contend that the Plaintiffs were participants in the Doe Fund's Ready, Willing & Able ("RWA") program. The Plaintiffs were apparently enrolled in a RWA street cleaning project across the City for which they received, what the Doe Defendants refer to as, a stipend for their work. The Doe Defendants further contend that as part of this program, they provide Workers' Compensation insurance to all participants. As such, the Doe Defendants argue that the Plaintiffs' sole remedy in relation to the Doe Defendants is the recovery of Workers' Compensation benefits.

Both the Plaintiffs and the Duplex Defendants oppose the motion and contend that it should be denied. The Plaintiffs argue that the Doe Defendants' motion should be denied as they have failed to provide sufficient proof that the Plaintiffs' claims are barred by Workers' Compensation Law Sections 11 and 29(6). Also, the Plaintiffs argue that the motion should be denied because the Plaintiffs are not employees subject to the Workers' Compensation Law. The Duplex Defendants also oppose the motion and contend that there are issues of fact as to whether the Plaintiffs were acting within the scope of their employment when the incident occurred, and that the motion should be denied as premature given that discovery has not been completed.

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 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 the 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]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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. Hous. 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]. However, "[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 instant proceeding, the Court finds that the instant motion is premature and there are outstanding issues which would benefit from the continuance of discovery. 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 Duplex Defendants and the Plaintiffs have raised a material issues which justify the continuation of discovery, and have provided sufficient reason why a motion for summary judgment should be denied at this time. In their affirmations in opposition, the Duplex Defendants and the Plaintiffs note that depositions have not been completed and that "more substantial discovery", such as the Doe client files, would serve to address the issue of whether the Plaintiffs were not employees at the time of the accident. In addition, they contend that without further discovery they are unable to articulate a position as to whether the Plaintiffs were acting in the scope of their employment at the time of the accident. As such this does not constitute mere hope and is not speculative. This documentation is exclusively in the control and possession of the

movant and the nature of the relationship between the Plaintiffs and the Doe Defendants is not known to the Duplex Defendants. *See TD Bank, N.A. v. 126 Spruce St., LLC*, 117 AD3d 716, 717, 985 N.Y.S.2d 599, 601 [2d Dept 2014]; *Postilio v. Deblasi*, 116 AD3d 832, 832, 983 N.Y.S.2d 432 [2d Dept 2014]. The Doe Defendants' provision of documentation to support their position (see supplemental affidavit of Eunice Gilmore, with exhibits) in reply is inappropriate. See *USAA Fed. Sav. Bank v. Calvin*, 145 AD3d 704, 706, 43 N.Y.S.3d 404, 406 [2d Dept 2016]. Moreover, it appears that these documents had not been produced at the time the motion was made. This serves to further support the contention that the motion was premature. Accordingly, the motion for summary judgment is denied as premature.

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

The motion by the Doe Defendants (motion sequence #1) is denied as premature without prejudice to renew upon completion of discovery, upon good cause shown.

The foregoing constitutes the Decision and Order of the Court.

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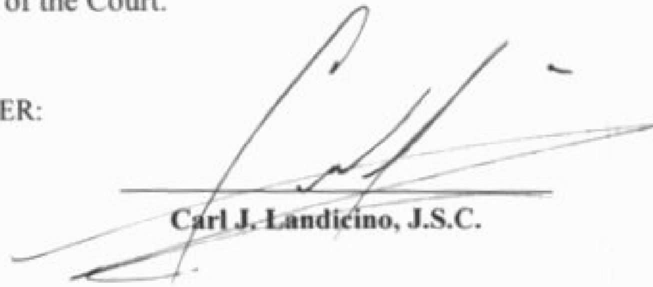

Carl J. Landicino, J.S.C.