

Ok Sun Chong v Scheelje
2021 NY Slip Op 34296(U)
March 24, 2021
Supreme Court, Queens County
Docket Number: Index No. 709111/2018
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

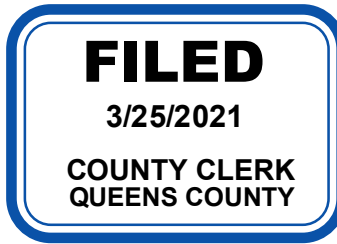
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OK SUN CHONG,

Index
No.: 709111/2018

Plaintiff(s),

Motion
Dated: October 13, 2020

-against-



Motion
Cal. No.:

GUNTHER SCHEELJE,

Motion
Seq. No.: 05

Defendant(s).
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The following papers numbered EF59 - EF65, EF89-EF106, EF108-EF109 read on this motion by defendant for an Order pursuant to CPLR §3212, granting summary judgment in favor of defendant, dismissing the Complaint on the grounds that there are no material questions of law or fact on the issue of liability, and cross-motion by plaintiff for an Order pursuant to CPLR §2201, staying this case pending determination of appeal of this matter.

	PAPERS NUMBERED
Notice of Motion Affid.-Exhibits.....	EF59-EF65
Opposition Affid.-Exhibits.....	EF89-EF91
Notice of Cross-Motion Affid.-Exhibits.....	EF92-EF105
Reply Affid.-Exhibits.....	EF106, EF108-EF109

Upon the foregoing papers it is ordered that this motion by defendant and cross-motion by plaintiff are determined as follows:

Plaintiff commenced the instant action by the filing of a Summons and Complaint on or about June 10, 2018, for injuries allegedly sustained on November 14, 2016. The Complaint alleges that plaintiff, a pedestrian, was struck by the motor vehicle owned and operated by defendant. By Order dated January 28, 2020 [sequence number 3], based on plaintiff's failure to comply with various Orders of the Court and repeated failure to appear for examination

before trial, plaintiff was precluded from offering any testimony in support of her claims. Defendant moves herein for summary judgment on liability. The motion is timely made (see Order dated March 11, 2020 [sequence number 4]). Plaintiff opposes the motion and cross-moves for separate relief.

In support of his motion, defendant contends that his vehicle was proceeding on Roosevelt Avenue at or near its intersection with Parsons Boulevard, in Flushing, New York, when plaintiff entered the roadway outside of the crosswalk and came into contact with the passenger side of defendant's vehicle. Defendant further contends that he did not see plaintiff prior to the accident and only saw plaintiff lying on the ground outside of the crosswalk when he stopped and exited his vehicle after feeling an impact on the passenger side. Defendant was approximately four car lengths away from the intersection when the accident occurred. Defendant argues that plaintiff violated Vehicle and Traffic Law 1152(a) by failing to yield the right of way to defendant's vehicle. As such, defendant contends that he was not the proximate cause of the accident and is entitled to summary judgment on liability.

In opposition to defendant's motion and in support of the cross-motion, plaintiff annexes as an exhibit ("J") a copy of portions of the Notice of Appeal of the Order dated August 5, 2020, filed by plaintiff, which Order sought to renew the Order of this Court dated January 28, 2020, which precluded plaintiff from offering any testimony in support of her claims. Plaintiff argues that this action should be stayed pending determination of plaintiff's appeal in order to avoid the risk of inconsistent determinations and a waste of judicial resources. Plaintiff further argues that summary judgment should be denied inasmuch as plaintiff has not been deposed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence sufficient to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, 25 NY3d 498 [2015]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce admissible evidentiary proof sufficient to establish the existence of a material issue of fact which requires a trial of the action (see, *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Alvarez v. Prospect Hosp.*, *supra*; *Leto v. Feld*, 131 AD3d 590 [2015]).


Upon review of defendant's moving papers, defendant has met his initial burden of demonstrating entitlement to judgment as a matter of law. In opposition, plaintiff failed to meet her shifted burden. Initially the Court notes that although plaintiff's counsel Affirmation in Opposition makes reference to plaintiff's affidavit being attached thereto as Exhibit A, a review of the NYSCEF system reveals that no such affidavit is e-filed as part of this motion record. However, even if this court were to consider the synopsis of plaintiff's alluded to affidavit set forth in plaintiff's attorney's affirmation, same would still be unavailing to raise

an issue of fact inasmuch as plaintiff is precluded from testifying in support of her claims. Where a party is precluded from proving the essential elements of his or her case as against a defendant at trial, summary judgment is warranted in the defendant's favor (*Contarino v. North Shore University Hospital*, 13 AD3d 571 [2004]; *Gholson v. County of Nassau*, 274 AD2d 450 [2000]). Since an order was issued by this Court precluding plaintiff from testifying in support of her claims, plaintiff is barred from now offering an affidavit in support of her claims to oppose defendant's summary judgment motion. Allowing such testimony through affidavit would "perversely undermine the point of the [preclusion] order by allowing [plaintiff] to benefit from the short cut of summary judgment by use of the same evidence that otherwise would have been barred at trial" (*Koch v Sheresky, Aronson & Mayefsky LLP*, 2018 NY Slip Op 30815(U) [2018]). While not persuasive authority for this Court, the lower court in *Ratut v Singh* (186 Misc.2d 350 [2000]) said it best that "[i]t is manifestly unjust to permit the use of a party's affidavit to defeat a motion for summary judgment when that party avoided examination under oath to the point of preclusion".

Accordingly, defendant's motion is granted and summary judgment on the issue of liability is granted in favor of defendant.

The cross-motion by plaintiff is accordingly denied.

Dated: March 24, 2021


MARGUERITE A. GRAYS
J.S.C.

