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 11th day of April 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

----------X

ANTHONY D. POWELL, Index No.: 509681/2020

Plaintiff,

-against- DECISION AND ORDER

JIN HUANG LIU and BRITE LAUNDROMAT, Motion Sequence #1

Defendants.

----------X

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	6-12,
Opposing Affidavits (Affirmations)	21-24,
Reply Affidavits (Affirmations)	25

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

This action has been commenced to recover damages for personal injuries allegedly sustained by the Plaintiff Anthony D. Powell (hereinafter the "Plaintiff") on August 31, 2019. On that day the Plaintiff was allegedly assaulted by a non-party individual after Defendant Jin Huang Liu an employee of Defendant Brite Laundromat (hereinafter the "Defendants") purportedly informed this non-party customer that the Plaintiff had stolen his clothes at the Defendant's laundromat located at 8813 Avenue L, Brooklyn, New York.

The Defendants now move (motion sequence #1) for an order pursuant to CPLR 3211(a)(1) and 3212. The Defendants contend that summary judgment should be granted as the Defendants are only required to maintain security measures reasonably related to foreseeable actions. The Defendants contend that this assault was foreseeable, and they had no indication of this non-party's violent behavior. The Defendants rely on the affidavit of Defendant Brite Laundromat Employee, Sau Kwang Wong and the affidavit of Defendant Brite Laundromat Owner, Jin Huang Liu.

The Plaintiff opposes the motion and argues that it is premature as depositions of the parties have not been completed. The Plaintiff also contends that there are triable issues of fact sufficient to deny the Defendant's motion.

CPLR 3211(a)(1)

As to the merits of the Defendants' application made pursuant to CPLR 3211(a)(1), the Court finds that the documents presented by the Defendants do not conclusively resolve the issues raised in the Plaintiff's complaint, sufficient to grant the Defendants' application made pursuant to CPLR 3211(a)(1). The Defendants proffers affidavits from Defendant Brite Laundromat Employee, Sau Kwang Wong and the affidavit of Defendant Brite Laundromat Owner, Jin Huang Liu. However, motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. Doe*, 73 A.D.3d 78, 83–84, 898 N.Y.S.2d 569, 573 [2nd Dept, 2010], quoting *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [2nd Dept, 2002]. Moreover, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)." *Eisner v. Cusumano Const., Inc.*, 132 A.D.3d 940, 941–42, 18 N.Y.S.3d 683, 685 [2nd Dept, 2015], *quoting*

Granada Condo. III Ass'n v. Palomino, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2nd Dept, 2010]. Accordingly, the Defendants application made pursuant to CPLR 3211(a)(1) is denied.

CPLR 3212

It has long been established that "[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 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the 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 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 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 [2nd 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 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

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 A.D.3d 738, 739, 903 N.Y.S.2d 80, 81 [2nd Dept, 2010]; *see Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.,* 59 A.D.3d 578, 872 N.Y.S.2d 724 [2nd Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens,* 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd 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 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2nd Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport,* 143 A.D.2d 792, 792–793, 533 N.Y.S.2d 143 [2nd Dept, 1988]. The Plaintiff has not had the opportunity to conduct depositions or other discovery. There are relevant and material issues related to this case, the facts related to which are exclusively known and controlled by the Defendants. There are outstanding issues raised concerning the safety of the premises, prior acts by the non-party, the doctrine of *respondeat superior*, and piercing the corporate veil. Accordingly, the motion is denied as premature. (CPLR 3212(f)).

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

The Defendants' motion (motion sequence #1) is denied as premature.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.