

**Heeralall v Bacchus**

2023 NY Slip Op 34968(U)

February 28, 2023

Supreme Court, Queens County

Docket Number: Index No. 715523/129

Judge: Timothy J. Dufficy

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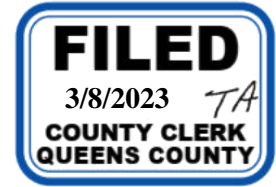
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**



-----X  
**JEWAN HEERALALL,**

**Plaintiff,**

**Index No. 715523/129**

**-against-**

**Mot. Date: 12/6/22**

**Mot. Seq.: 2**

**WAZIM BACCHUS,**

**Defendant,**

-----X  
The following papers were read on this motion by defendant seeking summary judgment, pursuant to CPLR 3212,; and, on a cross motion by plaintiff, seeking, along with the denial of defendant’s motion, certain discovery, pursuant to CPLR 3101.

**PAPERS  
NUMBERED**

Notice of Motion - Affirmation - Affidavit - Exhibits .....	E26-E31
Notice of Cross Motion - Affirmation - Exhibits .....	E34-E38
Reply Affirmation .....	E39

Upon the foregoing papers, it is ordered that defendant’s motion for summary judgment, dismissing the complaint, is denied; and, plaintiff’s cross motion, seeking discovery, is granted, as set forth below.

In this personal injury action, the plaintiff, employed by non-party Zim Construction, Inc., as a construction worker, alleges that he incurred serious injuries, on April 30, 2019, at premises, located at 101-51 107<sup>th</sup> Street, Richmond Hill, New York, a property owned by defendant. Defendant, the president of Zim Construction, Inc., claims he is not the “Wazim Bacchus” who owned the premises at the time of the plaintiff’s accident, but that such property was owned by one “Wazim S. Bacchus.”

Defendant moves for summary judgment, dismissing the claim against him. Plaintiff opposes, and cross-moves for denial of defendant’s motion, and for an order directing the deposition of defendant’s father, Kamrool Bacchus, and the production of a copy of the contract for services entered into between Zim Construction, Inc. and the homeowner of the subject property.

"[T]he proponent of a summary judgment motion 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Only if a *prima facie* demonstration has been made, does the burden shift to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (see *Alvarez v Prospect Hospital*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Roos v King Constr.*, 179 AD3d 857 [2d Dept 2020]). On defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (see *Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]; *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (see *Ayotte v Gervasio*, 81 NY2d 1062; *Khadka v American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Charlery v Allied Transit Corp.*, 163 AD3d 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Defendant's evidence in support of his motion, based entirely on his own, self-serving conclusions and devoid of any corroborating documentation, fails to demonstrate entitlement to summary judgment. Material issues of fact have been left unresolved, which must be

determined by a trier of the facts (*see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712 [2d Dept 2020]; *Flaccavento v John's Farms*, 173 AD3d 1141 [2d Dept 2019]).) Defendants' "own submissions demonstrated that there are triable issues of fact" (*Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; *see Lozado v St. Patrick's RC Church*, 174 AD3d 879 [2d Dept 2019]; *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865 [2d Dept 2016]) regarding the essential contention herein, *i.e.*, that defendant is not the owner of the subject premises. Defendant's bare denials are unaccompanied by any evidence to support such contentions. With such failures of proof, an outstanding issue of fact as to ownership remains, warranting denial of *prima facie* entitlement to summary judgment as a matter of law.

Further, while a motion for summary judgment may be made at any time "after issue has been joined" (CPLR 3212), such a motion may be denied, as premature, if the non-moving party can demonstrate that further discovery might lead to relevant evidence or that the facts necessary to justify opposition to the motion were exclusively within the knowledge and control of the moving party (*see Johnson v New York City Hous. Auth.*, 185 AD3d 800 [2d Dept 2020]; *Pinella v Crescent St. Corp.*, 176 AD3d 985 [2d Dept 2019]; *Breillmeier v Leal*, 145 AD3d 753 [2d Dept 2016]; *Bonilla v Bangert's Flowers*, 132 AD3d 618 [2d Dept 2015]). While the mere hope that evidence adequate to defeat the motion may be ascertained during discovery is insufficient to defeat summary judgment (*see Sterling Nat'l. Bank v Alan B. Brill, P.C.*, 186 AD3d 515 [2d Dept 2020]; *U.S. Bank N.A. v Wiener*, 171 AD3d 1241 [2d Dept 2019]; *Lamore v Panapoulos*, 121 AD3d 863 [2014]), in the case at bar, movant has failed to demonstrate "the absence of all factual issues so that a determination as to the rights of the parties could be determined as a matter of law" (*Guthart v Nassau County*, 178 AD3d 777, 778 [2d Dept 2019]), and plaintiff's opposition - based on defendant's own testimony that he took no part in the "daily operations" of Zim Construction, Inc.; has no knowledge of the terms of the subject contract between the corporation and owner of the premises; and, has no personal knowledge of the subject accident herein - proffers an evidentiary basis to suggest that further discovery might lead to such relevant evidence and facts sufficient to defeat summary judgment (*see Pineda v Elias*, 125 AD3d 738 [2015]; *Pina v Merolla*, 34 AD3d 663 [2006]).

As such, defendant's motion seeking summary judgment as a matter of law is denied (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. v Medical Center*, 64 NY2d 851; *Board of Directors of Squire Green at Pawling Homeowners Ass'n., Inc. v Bell*, 89 AD3d 657 [2d Dept 2011]).

Turning to plaintiff's cross motion for discovery, CPLR 3101 (a) (1) states, in relevant part, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by ... a party" (*see Siegel v Snyder*, 2021 NY Slip Op. 07264 [2d Dept 2021]). While the right to disclosure under this statute is broad, it is not unlimited (*see Forman v Henkin*, 30 NY3d 656 [2018]). "[T]he principal of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have 'broad power to regulate discovery to prevent abuse' " (*Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 [2d Dept 2007] quoting *Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874 [2d Dept 1980]; *see McAlwee v Westchester Health Associates, PLLC*, 163 AD3d 547 [2d Dept 2018]). "[L]itigants are not without protection against unnecessarily onerous application of the discovery statutes" (*Matter of Malitz Family Trust*, 187 AD3d 915, 916 [2d Dept 2020] quoting *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY 952, 954 [1998]).

On a motion for summary judgment, in order for the court to accept the defendant's evidence in a light most favorable to the non-moving plaintiff, *i.e.*, without dispute or conflicting inferences, and with absolute credibility, such alleged factual basis must first abide the opportunity for the plaintiff to complete discovery, which has not yet occurred herein. As the plaintiff was "not afforded an opportunity to ascertain any of the essential facts, summary judgment would be a wholly inappropriate remedy. The motion ... reveals that the most basic issues of fact remain unanswered .... The motion shouldn't have been made when it was, if at all" (*Lewis v Agency Rent-A-Car*, 168 AD2d 435, 436 [2d Dept 1990]; *see Pinella v Crescent St. Corp.*, 176 AD3d 985 [2d Dept 2019]; *Gaston v Vertsberger*, 176 AD3d 919 [2d Dept 2019]; *Guzman v City of New York*, 171 AD3d 653 [1<sup>st</sup> Dept 2019]). "[A]ny matter which may lead to the discovery of admissible proof is discoverable ... even if the facts themselves are not admissible" (*Madigan v Berkeley Capital, LLC*, 205 AD3d 900, 904 [2d Dept 2022], quoting *Cajamarca v Osatuk*, 163 AD3d 619, 620 [2d Dept 2018]). Here, it appears that discovery, in the form of a deposition of Kamrool Bacchus, might lead to evidence or facts "material and necessary in the prosecution or defense of the action" (*CPLR 3101 (a)*; *see Rrengo v New York City Trans. Auth.*, 204 AD3d 1049 [2d Dept 2022]; *101CO, LLC v Sand Land Corp.*, 189 AD3d 942 [2d Dept 2020]; *Friedlander Organization, LLC v Ayorinde*, 94 AD3d 693 [2d Dept 2012]). As such, plaintiff's cross motion for a deposition of Kamrool Bacchus, and for discovery of the contract between Zim Construction, Inc. and the owner of the subject property, is granted.

As “[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court” (*Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]; see *Rrengo v New York City Trans. Auth.*, 204 AD3d 1049; *Venables v Rovegno*, 195 AD3d 876 [2d Dept 2021]; *Abedin v Palominos Osorio*, 188 AD3d 764 [2d Dept 2020]), the defendant is directed to exchange a copy of the subject contract, on or before March 31, 2023, and, following such exchange, *sua sponte*, to present for deposition Kamrool Bacchus, at a place, date and time to be agreed upon by counsel, but in no event later than April 14, 2023. There shall be no adjournment of such deposition’s outside date without prior consent of the court. Failure to complete such deposition in compliance with this Order shall result in either a waiver of the right to such deposition, or in consideration of a motion to penalize, whichever is appropriate.

The parties’ remaining contentions and arguments are either without merit, or need not be addressed in light of the aforesaid determinations.

Accordingly, it is

**ORDERED** that defendant’s motion for summary judgment, dismissing the complaint, is denied; and it is further

**ORDERED** that plaintiff’s cross motion, seeking discovery, is granted, as set forth above.

**Dated: February 28, 2023**



**TIMOTHY J. DUFFICY, J.S.C.**

