Martinez v Vila Window Repair, Inc.

2019 NY Slip Op 34952(U) (2019) | Cited 0 times | New York Supreme Court | April 29, 2019

Martinez v Vila Window Repair, Inc. 2019 NY Slip Op 34952(U) April 29, 2019 Supreme Court, Kings County Docket Number: Index No. 510731/2018 Judge: Carl J. Landicino Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. This opinion is uncorrected and not selected for official publication. 510731.QO-l-6- :]o~

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1 of 4 PRESENT: HON. CARL J. LANDICINO, Justice. 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 29 th day of April, 2019.

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PEDRO MARTINEZ, · Plaintiff Index No.:

- against -

VILA WINDOW REP AIR, INC. and "JOHN DOE" (the name being fictitious and intended to designate the driver of the vehicle)

Defendants. -.-X 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 Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.. Opposing Affidavits (Affirmations)................. .... Reply Affidavits (Affirmations)..

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

This action concerns a motor vehicle accident that occurred on December 27, 2017. The

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Plaintiff, Pedro Martinez (hereinafter the "Plaintiff') alleges in his complaint that on that day he was involved in a motor vehicle collision with a parked vehicle owned by Defendant Vila Window Repair, Inc. (hereinafter the "Defendant") on East 2 nd Street at or near 201 East 2 nd Street, County of Kings, City and State of New York.

The Defendant moves (motion sequence #1) for an order pursuant to CPR 3212 granting summary judgment on the issue of liability. Specifically, the Defendant contends that summary judgment should be granted given that there is prima facie evidence that the Defendant did not act negligently and that the Plaintiff was the proximate cause of the alleged condition. The facfe
FILED: KINGS COUNTY CLERK 05/08/2019 INDEX NO. 510731/2018 NYSCEF DOC. NO. 16
RECEIVED NYSCEF: 05/16/2019

2 of 4 Plaintiff opposes the motion and contends that the Defendant's application for summary judgment should be denied and contends that the Defendant has failed to meet its primafacie burden, or alternatively, the Plaintiff contends that the application is premature.

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 [2 nd 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 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, IO AD3d 70, 74 [2 nd Dept, 2004], citing Alvarez v. Prospect Hospital, 68 N.Y.2d320, 324,508 N.Y.S.2d 923,501 N.E.2d 572 [1986]; Winegradv. 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 [2 nd 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 [2 nd Dept, 2006]; see Menzel v. Plotnick, 202 A.D.2d 558, 558-559, 610 N.Y.S.2d 50 [2 nd Dept, 1994].

Turning to the merits of the Defendant's motion, the Court finds that the movant has provided insufficient evidence to meet its prima facie burden. In support of its position, the Defendant relies on the affidavit ofBesar Vila, the manager of Defendant Vila Window Repair, Inc. In his affidavit, Mr. Vila states that at the time the alleged collision occurred "I was at my 2 confusio· n,

[l5 1 FILED: KINGS COUNTY CLERK 05/08/2019 INDEX NO. 510731/2018 NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 05/16/2019

3 of 4 shop nearby with several workers who were standing outside." However, while Mr. Vila acknowledges that he was "nearby" the Defendant's vehicle when the collision occurred, he does not state that he witnessed the collision or that he witnessed the Plaintiffs vehicle at that time. What is more, Mr. Vila acknowledges that he did not park the vehicle. Further, Mr. Vila does not state in his affidavit that he himself witnessed the Defendant's vehicle or observed how it was parked prior to the collision. "While it is appropriate to decide the question of legal cause as a matter of law 'where only one conclusion may be drawn from the established facts' (id.), where

there is any doubt, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." White v. Diaz, 49 A.D.3d 134, 139, 854 N.Y.S.2d 106 Dept, 2008], quoting Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308,315, 414 N.E.2d 666 [1980]; see also Poon v. Nisanov, 162 A.D.3d 804, 79 N.Y.S.3d 227 [2 nd Dept, 2008].

CPLR 3212(b) requires an affidavit and that "[t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." In the instant proceeding, the fact that Mr. Vila was not involved in parking the vehicle at issue and there is no indication that he witnessed the collision, makes the affidavit insufficient to support the Defendant's summary judgment application. "A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's primafacie burden." JMD Holding Corp. v. Cong. Fin. Corp., 4 N.Y.3d 373, 384-85, 828 N.E.2d 604,612 [2005]. As a result, the Defendant has failed to meet itsprimafacie burden. Accordingly, we need not address the sufficiency of the Plaintiffs opposition papers. See Schacker v. Cty. of Orange, 33 A.D.3d 903, 904, 822 N.Y.S.2d 777, 778 [2 nd Dept, 2006].

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4 of 4 .

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

Defendant's motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

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