SCAM

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 34
NASSAU COUNTY

QUANNE TOMLINSON and CAROLINE THEARD.

Plaintiffs.

Sequence No.: *001 & 001*
Index No.: 015574/04

- against -

BMW FINANCIAL SERVICES NA, LLC, DAVEREL HALL, MARCIA HALL and FINANCIAL SERVICES VEHICLE TRUST.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
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Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, the motion, pursuant to CPLR 3212(b), by the Plaintiff, Quanne Tomlinson ("Tomlinson") for an order, granting summary judgment against the Defendants, BMW Financial Services, N.A., LLC ("BMW") and Daverel Hall and Marcia Hall (collectively known as the "Halls") and setting the matter down for a Trial on the issue of damages, is denied without prejudice to a renewal thereof after the completion of discovery herein.

Motion, pursuant to CPLR 3212, by the Plaintiff, Caroline Theard ("Theard") for an order, (1) granting summary judgment against the Defendants, BMW Financial Services NA, LLC, Financial Services Vehicle Trust (also known herein as "BMW"), (2) setting the matter down for an immediate inquest as to damages and (3) granting a special preference pursuant to CPLR 3212(c) is denied without prejudice to a renewal thereof upon the completion of discovery herein.

The aforementioned actions, Action 1, brought by Plaintiff, Quanne Tomlinson, and Action 2, brought by Plaintiff, Caroline Theard, arise out of a single car motor vehicle accident that occurred on July 12, 2004 at or about 4:30 a.m., in which four out of the six vehicle occupants died when the vehicle, a BMW bearing New York license plate number BKN 7905, traveling eastbound on the Northern State Parkway in the county of Nassau, left the roadway and

ultimately struck a tree. At the time of the accident, Richard Hall, was operating the motor vehicle. Defendant, BMW Financial Services, NA, LLC, is the title owner of the vehicle and Defendants, Daverel and Marcia Hall are the registered owners of that BMW. Plaintiffs, Tomlinson and Theard are the only surviving occupants of the BMW.

On or about November 2, 2004, Plaintiff, Quanne Tomlinson, commenced an action against the Defendants, seeking to recover money damages for injuries he sustained in the above referenced motor vehicle accident. In the Tomlinson Action, issue was joined by Defendants BMW and Hall, by the service of a Verified Answer, on or about December 22, 2004.

Subsequently, on or about December 23, 2004, Plaintiff, Caroline Theard commenced an action against the Defendants, seeking to recover money damages for injuries she sustained in the above referenced motor vehicle accident. In the Theard Action, issue was joined by Defendants, BMW and Hall, by the service of a Verified Answer, on or about January 12, 2005. On February 7, 2005, this Court issued an order consolidating Action 1and Action 2 under Index Number 015574/04.

Upon the instant application, both Plaintiffs move, independently, pursuant to CPLR 3212, for summary judgment against the Defendants on the issue of liability. The motions are denied as premature. It should be noted at the outset that although Plaintiff, Caroline Theard, failed to submit valid proof of service for the instant motion for summary judgment on the Defendants, this Court will nonetheless consider the Plaintiff's motion papers because the Defendants addressed and served their opposition to the summary judgment motions as to each Plaintiff.

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *See,* Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. State Bank v. McAuliffe, 97 AD2d 607. However, once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. *See,* Alvarez v. Prospect Hosp., 68 NY2d 320, 324; Zuckerman v. City of New York, *supra,* at 562.

In support of their motion for summary judgment, Plaintiffs, in addition to submitting their own affidavits, submit copies of the police accident report that was generated shortly after the time of the accident.

It is well settled that the report of a policeman who does not witness the accident, and bases his report on statements of others that are not engaged in police business, is inadmissible hearsay in a negligence action. *See,* Civil Practice Act, §374-a; Johnson v. Lutz, 234 N.Y.S. 328;

Snorac, Inc. v. Charles, 3 Misc.3d 1102. Nonetheless, there is persuasive authority for the proposition that a police accident report should be "credited by [the court] and used to support the grant of summary judgment" where it is not the only evidence offered to support summary judgment and, each piece of evidence is unrebutted and gives the same account of the accident. *See,* Donovan ex rel. Estate of Donovan v. West Indian American Day Carnival Association, Inc., 6 Misc.3d 1016(A), 2005 WL 236404 (N.Y.Sup.), 2005 N.Y. Slip Op. 50052(U) (Sup. Ct. Kings Cty. 1/5/05, Index Number 33049/00*) citing* Bendik v. Dybowski, 227 A.D.2d 228, 231-232, *in dissent, citing* Rue v. Stokes, 191 A.D.2d 245. In this case, the Plaintiffs in moving for summary judgment submit merely the police accident report and the affidavits of the Plaintiffs.

At this juncture, based upon the papers submitted for this Court's consideration, it is difficult to determine whether Plaintiffs' only admissible evidence, i.e., the affidavits, are unrebutted or whether there is another account of the accident. As such, even under the recent ruling of the Supreme Court, Kings County, Plaintiffs' submission of the police report does not constitute competent evidence to support their motion for summary judgment. Nevertheless, in this case, the Plaintiffs, based on their affidavits alone, have demonstrated their entitlement to judgment as a matter of law.

It is well settled that once the movant has made their prima facie case for summary judgment, the burden shifts to the party opposing the motion to submit evidence, in admissible form, showing the existence of a material issue of fact. Thus, in this case, the burden shifts to the Defendants to demonstrate the existence of a material issue of fact. It is to be noted that pursuant to the provisions of CPLR 321, since the "Consent to Change Attorney" form has yet to be filed with this Court, this Court is precluded from considering Defendants "soon to be" attorney's opposition to the Plaintiffs' motion for summary judgment.

The Defendants, BMW and the Halls, through their original attorney of record, ground their opposition to Plaintiff's motion for summary judgment on the provisions of CPLR 3212(f); specifically, that Plaintiffs' summary judgment motion is prematurely brought.

Pursuant to CPLR 3212(f):

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Under CPLR 3212(f), summary judgment should be denied as premature where the opposing party has not yet had adequate opportunity to conduct discovery. *See,* Busby v.

Ticonderoga Cent. School Dist., 222 A.D.2d 882, 636 N.Y.S.2d 131. However, where there is evidence of some delay in discovery, the opposing party seeking discovery must proffer "a convincing excuse for not having undertaken the desired discovery sooner." *See,* Hughes Training, Link Div. v. Pegasus Real-Time, 255 A.D.2d 729, ----, 680 N.Y.S.2d 721, 722. A summary judgment motion is not defeatable on the ground that more discovery is needed, where, "the side advancing such an argument has failed to ascertain the facts due to its own inaction." *See,* Meath v. Mishrick, 68 N.Y.2d 992, 994, 510 N.Y.S.2d 560.

In this case, however, there is not any evidence that the Defendants have been inactive in conducting discovery. Although the Plaintiff, Caroline Theard, on February 8, 2005, through her attorney, sent a letter to the Defendants' attorney making note of the Plaintiff's availability to being deposed, it is duly noted that Plaintiff, Theard, made this motion for summary judgment on February 2, 2005, six days earlier. This court also notes that these actions are less than six months old.

As such, with these guidelines in mind, and giving the Defendants, the benefit of every favorable inference, (See,Robinson v. Strong Memorial Hosp., 98 A.D.2d 976*; see also,* Blake-Veeder Realty, Inc. v. Crayford, 110 A.D.2d 1007), it is this Court's conclusion that Plaintiff's motion for summary judgment is premature, thus precluding a grant of summary judgment in Plaintiffs' favor at this time.

So Ordered.

A.J.S.C.

Dated: May 3, 2005

ENTERED

MAY 11 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE