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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Aurora Warfield, Lawrence Robinson, Christopher Moss, Peter Tse, Eileen Dee, Edwards Smith, Kevin Smith and Davis Goldman, -v- Plaintiffs

INDEX NO. 107919/2009

MOTION DATE

MOTION SEQ. NO. 003

Laura Conti and Kelsen Conti, Defendants.

The following papers, numbered 1 to 20, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits warfield — No(s). 1

Answering Affidavits — Exhibits Plaintiff's cross-motions for PSJ; Opp to Π's motion/cross-motion; Def's cross-motion for sj on serious inj. — No(s). 2-7, 8, 9

Replying Affidavits in opp to Def's cross-motion; Def's replies on cross-motion — No(s). 10-15; No(s). 16-20

Upon the foregoing papers, it is ordered that ~~this motion is~~ the motion and cross-motions

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

Def's

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAR 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/13

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 107919/2009
Mot Seq 003

Aurora Warfield, Lawrence Robinson, Christopher Moss, Peter Tse, Eileen Dee, Edward Stith, Keisha Stith and David Goldman,

Plaintiffs,

-against-

Laura Conti and Karen Conti,

Defendants.

DECISION/ORDER

HON. ARLENE BLUTH, J.S.C.

For the following reasons, various plaintiffs' motions for partial summary judgment on liability and the defendants' motion against various plaintiffs on serious injury are denied.

The Accident

The moving plaintiffs[1] were at work on a movie shoot in the wee hours of a rainy morning – approximately 3:45AM – on May 6, 2009. They were on the sidewalk in Manhattan's theater district, near the Winter Garden theater. At the same time, defendant Laura Conti, driving a vehicle owned by Karen Conti, was headed down 7th Avenue with two passengers when her friend in the back seat warned her that a cab was approaching very fast on the left. Soon thereafter, Ms. Conti testified at her deposition, the cab passed her then moved to the right immediately in front of her. In order to avoid a collision, Ms. Conti testified, she steered to the right and braked. It is undisputed that her car hit a parked car, causing that parked car to be

[1]The Stith plaintiffs did not appear at oral argument and delivered papers to Chambers the next day; the papers were not considered on this motion.

propelled onto the sidewalk in the vicinity of the plaintiffs. The injured plaintiffs were either hit by the previously parked car or knocked down/knocked into someone or something in the ensuing commotion.

Procedural History

In June 2009 plaintiff Warfield commenced this action. In October 2009 defendants interposed their answer. On August 24, 2010, Justice Silver issued a case scheduling order (filed on August 25th) which, among other things, ordered that "summary judgment motions shall be made no later than 60 days after filing of the note of issue"; this was also in accordance with his published rules. Meanwhile, the other plaintiffs commenced other actions against the defendants based upon the same accident in this and other counties.

Understandably, not wanting to litigate the same accident in several courts, defendants moved to consolidate all the cases. Justice Silver granted the defendants' motion on January 13, 2011 (filed January 26, 2011). As defendants requested, the caption was amended to reflect all the plaintiffs under this index number, which is the one originally assigned just to the Warfield plaintiff. Thereafter, after several discovery conferences and orders, the parties certified that all discovery was complete and the note of issue was filed on June 5, 2012. Warfield filed a motion for partial summary judgment on liability on June 19, 2012 and defendants filed a motion for summary judgment on serious injury on September 10, 2012. Co-plaintiffs, following on Warfield's coattails, filed cross-motions for judgment on liability at various times.

Warfield's motion and co-plaintiff's cross-motions

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v. City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

On June 19, 2012, two weeks after filing the note of issue, plaintiff Warfield moved for partial summary judgment on liability. Various other plaintiffs filed "me too" cross-motions, effectively piggybacking on Warfield's motion and all seeking the same relief. All plaintiffs claim that they cannot be found liable for the happening of the accident, as they were merely on

the sidewalk minding their own business, which was making movies.

Defendants oppose the motions, asserting the emergency doctrine; they claim that the actions Laura Conti took that dark and stormy night were made in a split second and to avoid an accident with the cab. Defendants claim that it is improper for a Court to second-guess a driver's actions in such a situation, as that is within the province of a jury. Plaintiffs claim that the fact that Ms. Conti plowed so hard into the parked car so that it was propelled onto the sidewalk shows that she was driving too fast for the conditions at the time; they also claim that she could have avoided an accident by means other than doing what she did.

"Even assuming the applicability of the emergency doctrine, the ... driver's actions may still be found to be negligent if, notwithstanding the emergency, the acts are found to be unreasonable" [internal quotations and citations omitted], *Negron v Garcia* 85 AD3d 513, 925 NYS2d 58 (1st Dept 2011). *See also Rabassa v Caldas*, 306 AD2d 137, 760 NYS2d 318 (1st Dept 2003) (questions of fact including whether the emergency doctrine applied and whether defendant's actions were reasonable under the circumstances).

Under the circumstances presented here, it is up to the jury to decide, among other things, whether Laura Conti truly faced an emergency, whether she could have avoided the situation with the cab, and whether her actions were reasonable under the circumstances. For those reasons, this Court declines to find Ms. Conti negligent as a matter of law.

However, to the extent plaintiffs seek a finding that none of them was negligent, the Court notes that nowhere do the defendants claim that any of the plaintiffs have any liability for the happening of the accident. This Court likens each of the plaintiffs to an innocent passenger; they did nothing to contribute to the accident. Accordingly, pursuant to CPLR 3212(g), on the

issue of liability, while the Court does not find Laura Conti negligent, this Court does find that each of the plaintiffs was free from culpable conduct in the happening of the accident (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]). To that extent, plaintiffs' motions are granted.

Defendants' Serious Injury motions

By Notice of Cross-Motion filed September 12, 2012, defendants move to dismiss the complaints against all plaintiffs except Warfield (who broke her tibia in the accident) alleging that none of them suffered a "serious injury" under Section 5102 of the Insurance Law. In order for the Court to consider this "Cross-Motion", it must be timely. It was made approximately 90 days after the note of issue was filed. It is uncontested that defendants did not seek or receive permission to file this threshold motion beyond the 60 day deadline claimed applicable by plaintiff Goldman.

Defendants advance several arguments in an effort to save their motion and deem it timely. First, defendants argue that they did not need permission as the 60 day rule did not apply because it was only contained in Justice Silver's rules (rule 2F "**All Dispositive Motions** must be made no later than 60 days after filing of the note of issue - no exception without leave of the court" (emphasis original); defendants claim that it was not in any order and a mere rule does not count. In support of this argument, defendants rely on *Crawford v Clairborne, Inc.*, 11 NY3d 810 (2008). This argument fails for several reasons. Despite what defendants claim, *Crawford* does not stand for the proposition that individual part rules do not count, and only court orders count. In Crawford, the Court found "at the time the PCO [preliminary conference order] was

entered, the IAS Judge had no individual part rule; thus the "per local rule" [language in the PCO] could only have referred to the Local Rules of Supreme Court, New York County. In that the 120-day amended Local Rule was in effect at the time the note of issue was filed, defendants' motion was actually timely." 11 NY3d at 813. So in *Crawford*, the rules counted, but the IAS justice did not have her own rule and deferred to the local rules on the PCO; here, Justice Silver did have his own rule, and that rule set a 60 day deadline.

The other reason this particular argument fails is that there absolutely ***was*** a Court Order, under this index number, requiring dispositive motions to be made within 60 days of the filing of the note of issue. On August 24, 2010 (filed on August 25th), Justice Silver issued a case scheduling order which, among other things, ordered that "summary judgment motions shall be made no later than 60 days after filing of the note of issue". Defendants were represented by the same counsel when that order was issued, which are the same counsel who moved to consolidate all the other plaintiffs' actions under this index number and now (belatedly) move for summary judgment. Thus there was a Court order in this case requiring the serious injury motion within 60 days of the note of issue, and defendants ignored that order twice – once by making the motion and then again in making their argument that there was no such order.

Finally, at oral argument defendants suggested that their cross-motion for summary judgment on serious injury should "relate back" to the time of plaintiff Warfield's motion for partial summary judgment on liability. This precise argument has already been addressed and rejected by the Appellate Division, First Department. While co-plaintiffs "me too" cross-motions seek the same relief as the main motion, defendants' serious injury motion is completely

unrelated and stands on its own.

In *Leonardi v Cruz* 73 AD3d 580, 904 NYS2d 4 (1st Dept 2010), the Court faced the same situation and found the serious injury motion untimely:

> The record establishes that plaintiff sufficiently preserved her argument that Cruz's cross motion for summary judgment was untimely by raising the issue in her opposition to the cross motion. It is undisputed that Cruz's cross motion was made after the expiration of the 120-day period set forth in CPLR 3212 (a) and Cruz did not provide an excuse for the delay in bringing the motion. Accordingly, since plaintiff moved for summary judgment only on the issue of liability, that part of Cruz's cross motion for summary judgment on the issue of serious injury was untimely (see *Covert v Samuel*, 53 AD3d 1147, 1148 [2008]).
>
> Furthermore, although "[a] cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion"*(Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [2006], appeal dismissed 9 NY3d 862 [2007] [internal quotation marks and citations omitted]), the issues of liability and serious injury are not so intertwined or nearly identical (see *Covert*, 53 AD3d at 1148).

Therefore, while cross-motions for summary judgment on liability do relate back in time to the original motion for the same relief, the unrelated cross-motion for summary judgment on serious injury does not. The defendants' cross-motion is denied as untimely.

Accordingly, it is hereby

ORDERED that except for the Stith plaintiffs, who did not participate in these motions, plaintiffs' motion and cross-motions for summary judgment on liability is granted to the extent

that this Court finds that all plaintiffs except the Stiths have no liability and were free from culpable conduct in the happening of the accident; and it is further

ORDERED that the defendants' cross-motion for summary judgment on serious injury is denied as untimely.

This is the Decision and Order of the Court.

Dated: March 8, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC