

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 350760/2009**

Jose R. Mojica-Perez, and Jose Mojica, an infant over the age of fourteen by his father and natural guardian, Jose R. Mojica-Perez
Plaintiffs,

-against-

DECISION and ORDER

Carl F. Schon and BP Products North America, Inc.,

Present:

Defendants.

Hon. Julia I. Rodriguez
----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff Mojica-Perez' motion to dismiss the counterclaim against him, pursuant to CPLR 3211, and defendants' cross-motion to dismiss the complaint or strike the pleadings pursuant to CPLR 3211 or, in the alternative, pursuant to dismiss the complaint or strike the pleadings pursuant to CPLR 3126.

Papers Submitted	Numbered
Pls. Notice of Motion, Affirmation & Exhibits	**1**
Defs. Affirmation in Opposition	**2**
Defs. Notice of Cross-Motion, Affirmation & Exhibits	**3**
Pls. Affirmation in Opposition to Cross-Motion & Exhibits	**4**
Defs. Reply Affirmation	**5**

The Court hereby recalls its decision dated October 3, 2014 and substitutes the following therefore:

The instant action, commenced on December 28, 2009, was brought by Plaintiffs to recover for personal injuries and other damages allegedly sustained as a result of a motor vehicle accident that occurred on June 18, 2009 in which Plaintiff Jose R. Mojica-Perez ("Mojica-Perez") was the driver and his son Jose Mojica ("Mojica") was a passenger in Mojica-Perez' vehicle. In their Amended Verified Answer, Defendants interposed a counterclaim against Mojica-Perez for indemnification and /or contribution for Mojica's claim against them.

On February 27, 2012, Mojica commenced a lawsuit in Civil Court concerning the instant motor vehicle accident naming his father Mojica-Perez as the sole defendant. In that action, Mojica alleged, *inter alia,* that "the said accident occurred solely and wholly by reason of the carelessness, recklessness and negligence of [Mojica-Perez]." In settlement of that action, Mojica signed a release discharging "GEICO, Jose R. Mojica-Perez" from "all actions, causes of action, suits . . . for bodily injury sustained on June 18, 2009." Goldin & Rivin, PLLC filed the complaints as attorneys for the Plaintiffs in both the Supreme Court action and the Civil Court action.

Mojica-Perez now moves for an Order dismissing the counterclaim against him on the basis that the counterclaim may not be maintained because of payment and release and/or that the counterclaim may not properly be interposed in the action, pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(6), respectively.

Defendants cross-move for an Order pursuant to CPLR 3211 dismissing Plaintiffs' complaint or striking Plaintiffs' pleadings due to Plaintiffs inappropriate behavior or, in the alternative, dismissing Plaintiffs' complaint or striking Plaintiffs' pleadings pursuant to CPLR 3126 for the intentional destruction of evidence.

I. Motion to Dismiss the Counterclaim

In support of the motion, through attorneys Kay & Gray, Mojica-Perez argues that because Mojica settled his lawsuit in Civil Court and signed a release discharging any claim against Mojica-Perez concerning the motor vehicle accident, Defendants herein may not maintain an action in counterclaim against him concerning Mojica's injuries related to the accident. In further support of the motion, through attorneys Goldin and Rivin, PLLC, Mojica-Perez contends that the motion to dismiss the counterclaim should be granted because the counterclaim is barred by the three-year statute of limitations.

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First, the counterclaim against Mojica-Perez is not time-barred. As the counterclaim for indemnification and/or contribution relates to the alleged negligence of Mojica-Perez, it is

deemed to have been interposed at the time the claims in the original pleading were interposed. CPLR 203(f). Plaintiff's contention that Defendants failed to give the requisite notice in their original pleading of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading lacks merit. Notably, in their original answer as a third affirmative defense, Defendants allege that 'whatever damages may have been sustained at the time and place alleged in the Complaint by plaintiff was caused, in whole or in part, by the culpable conduct of the plaintiff and without any negligence on the part of [either Defendant]. Clearly, this provided notice to the Plaintiff that the issue of his negligence as the proximate cause of Mojica's injuries was central to the defense of the action.

Second, a release given in good faith by the injured person to one tortfeasor as provided in General Obligations Law §15-108(a) relieves him or her from liability to any other person for contribution as provided in Article 14 of the CPLR. *See Williams v. New York City Tr. Auth.*, 9 A.D.3d 308, 780 N.Y.S.2d 580 (1st Dept. 2004). However, the Court finds that the release here was not given in good faith. Significantly, the same attorneys filed the complaints in the Civil Court action and the Supreme Court action, based on the same occurrence, but failed to inform Defendants of the Civil Court action. While in the Supreme Court action both Plaintiffs allege that the Defendants were solely at fault for the accident, in the Civil Court action Plaintiff Mojica alleges that Mojica-Perez was solely at fault for the accident. Obviously, Goldin and Rivin, PLLC were aware of the pending Supreme Court action when they filed the complaint in the Civil Court action. Nor do they claim otherwise. Notably, within just three months of its commencement the Civil Court action was settled between father and son for $2,500.00. And, the commencement of the Civil Court action just over three years after the Supreme Court action was commenced indicates a clear intention by Goldin and Rivin, PLLC to foreclose any claim for indemnification and/or contribution based on the settlement of the Civil Court action given counsel's belief, albeit erroneous, that a three-year statute of limitations applies to indemnification and contribution causes of action. As such, the Defendants' counterclaim for contribution is not barred by General Obligations Law §15-108(a).

However, inasmuch as any liability on the part of Defendants would be based upon the wrongdoing of driver Schon and not on Defendants' vicarious liability for the conduct of Mojica-Perez, Defendants are not entitled to common-law indemnification from Mojica-Perez. *See Guzman v. Haven Plaza Housing Development Fund,* 69 N.Y.2d 559, 509 N.E.2d 51 (1987); *Reimold v. Walden Terrace, Inc.,* 85 A.D.3d 1144, 926 N.Y.S.2d 153 (2nd Dept. 2011); *Corley v. Country Squire Apartments,* 32 A.D.3d 978, 820 N.Y.S.2d 900 (2nd Dept. 2006).

Based on the foregoing, the Plaintiff's motion to dismiss the counterclaim is **granted solely to the extent that the Defendants' counterclaim for indemnification is hereby dismissed.**

II. Defendants' Cross-Motion to Dismiss the Complaint or Strike the Pleadings

In support of their cross-motion, Defendants assert that as a result of Plaintiffs numerous improprieties their defense has been prejudiced and Plaintiff has gained unfair benefits. Defendants contend that the only remedies that will rectify Plaintiffs' improprieties would be to dismiss Plaintiffs' claims, with prejudice, or the striking of Plaintiffs' complaint, with prejudice pursuant to CPLR 3211. Alternatively, Defendants contend that Plaintiffs' cause of action should be dismissed and/or the complaint stricken with prejudice based on CPLR 3126 and/or the spoliation of evidence.

Specifically, Defendants contend that Plaintiffs have improperly split the question of how much liability is owed by Mojica-Perez and how much could be owed by Defendants into two separate cases, the Supreme Court action and the Civil Court Action. Defendants also contend that they were necessary parties to the Civil Court action pursuant to CPLR 1001(a) and that the failure to include the Defendants in the Civil Court action necessitates that the Court dismiss the instant action. Defendants further contend that when Mojica-Perez sent the subject automobile to a junkyard in June 2009, he was represented by counsel such that he was or should have been aware that a lawsuit had been filed or soon would be and that the vehicle would be needed. Defendants argue that an examination of the automobile is "crucial" to Defendants' defense of this matter because the location of the damage from the collision would have established

definitively that Mojica-Perez was at fault for the collision. Defendants assert that their defense has been severely prejudiced due to Plaintiffs' failure to produce evidence and having it destroyed, and that, for this reason, Plaintiffs pleadings should be stricken or their lawsuit dismissed entirely. Further, Defendants argue that Plaintiffs' claims should be dismissed under the doctrine of judicial estoppel because they adopted an opposing position in the Supreme Court action to the position they adopted in the Civil Court action.

In opposition to the cross-motion, through attorneys Goldin and Rivin, Plaintiff contends that the cross-motion is procedurally defective because Defendants are seeking relief against a non-moving party in violation of CPLR 2215. The crux of Goldin and Rivin's strained argument is that although their office submitted an affirmation in support of the main motion, "the moving party is the Law Office of Kay & Gray (attorneys for Plaintiff on the Counterclaim)" because they filed the motion and, therefore, Goldin and Rivin "cannot be subject to a cross-motion" because it was not the moving party. However, it is the Plaintiff, not his attorney, that is the moving party and it is the Plaintiff, not his attorney, who is the subject of the instant cross-motion. Therefore, this argument lacks merit.

In the alternative, Plaintiff, through attorneys Goldin and Rivin, argues that the "splitting doctrine" and judicial estoppel are inapplicable here, there was no spoliation of evidence and that Defendants have been provided with all discovery required under the rules of discovery. Plaintiff contends that there were no judicial or factual determinations, rulings, admissions and/or denials of liability prior to the settlement of the Civil Court action, nor was any discovery exchanged, depositions held, independent medical examinations conducted or motion practice in the Civil Court action and, therefore, Defendants have not been estopped from fully litigating their action. Plaintiff also contends that judicial estoppel is inapplicable because the Civil Court action did not precede the Supreme Court action. Plaintiff further contends that there was no spoliation of evidence here because Plaintiff "junked" his vehicle due to the damage sustained in the accident and was under no obligation to keep the vehicle. Plaintiff notes that defendants have proffered no correspondence, notices or documentation to indicate that they ever put him on notice not to dispose of the vehicle. Plaintiff also notes that he exchanged color photos, which

he took of the vehicle after the accident, with the Defendants and that both Plaintiffs appeared for depositions before trial and gave sworn testimony as to how the accident happened.

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Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. *See Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 626 N.Y.S.2d 527 (2nd Dept. 1995). The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. *See Id* at 436. It is undisputed that no factual or legal findings were made by the Civil Court in this action. And, as Plaintiff notes, the Civil Action was commenced after the Supreme Court action. As such, this doctrine is inapplicable here.

Generally, a party may not split a cause of action and maintain successive actions for different parts of it. *See Roe v. Smith,* 278 N.Y. 364, 16 N.E.2d 366 (1938). This rule is intended to prevent expensive, vexatious and oppressive litigation. *See General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland v. Zerbe Const. Co.*, 269 N.Y. 227, 199 N.E. 89 (1935). A judgment on the merits in the first action will be a conclusive bar to the second. *See Roe v. Smith,* 278 N.Y. 364, 16 N.E.2d 366 (1938); *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449, 607 N.Y.S.2d 391 (2nd Dept. 1994); *Golden v. Ramapo Imp. Corp.*, 78 A.D.2d 648, 432 N.Y.S.2d 238 (2nd Dept. 1980). Here, there has been no judgment on the merits as the Civil Court action was settled without the Court's involvement. While the Court frowns on such tactics, it is not a sufficient basis upon which to grant the requested relief.

CPLR 1001(a) provides that persons who ought to be parties if complete relief is to be accorded between the parties who are parties to the action or who might be in-equitably affected by a judgment in the action shall be made plaintiffs or defendants. While this would have been a sufficient basis upon which to add the Defendants to the Civil Court action had such motion been

made in that forum, it is not a sufficient ground for dismissing Plaintiffs' complaint or striking the pleadings in this forum.

With regard to the Defendants' contention that Plaintiffs' cause of action should be dismissed and/or the complaint stricken with prejudice based on CPLR §3126 and/or spoliation of evidence because Mojica-Perez had his automobile towed to a junk yard "at or about the same time as the filing of the Complaint," the Court declines to dismiss the Complaint or strike the pleadings on those grounds but defers ~~those issues~~ the issue of spoilation to the trial judge.

For the foregoing reasons, the Defendants' cross-motion for an order dismissing Plaintiffs' complaint or striking Plaintiffs' pleadings is **denied**.

Dated: Bronx, New York
August 17, 2015

Hon. Julia I. Rodriguez, J.S.C.