Jin Biao Xiong v Fazylov
2016 NY Slip Op 31891(U)
September 6, 2016
Supreme Court, Queens County
Docket Number: 700210/2014
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JIN BIAO XIONG, JING CHEN, LI FANG WANG and ZHI LAN XIE,

Plaintiffs,

- against -

MIKHAIL FAZYLOV, ROMAN FAZYLON and RYAN LAPOINTE

Defendants.

- x

Index No.: 700210/2014

Motion Date: 8/15/16

Motion Cal. No.: 141

Motion Seq.: 7

The following papers numbered read on this motion by JIN BIAO XIONG for an Order pursuant to CPLR 2221(e), granting leave to renew/modify this Court's Order dated January 6, 2015 on the ground of newly discovered evidence, and for an Order granting summary judgment pursuant to CPLR 3212, dismissing the counterclaim asserted against JIN BIAO XIONG on the grounds that he bears no liability for the subject accident; and on this cross-motion by RYAN LAPOINTE for an Order pursuant to CPLR 3025 to amend his answer to include a counterclaim against JIN BIAO XIONG:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 69 - 84
LaPointe's Opposition-Exhibits.....	1 - 3
Notice of Cross-Motion-Affirmation-Exhibits.....	4 - 7

In this action for negligence, plaintiffs seek to recover damages for personal injuries they each allegedly sustained as a result of a three-vehicle, chain reaction accident, that occurred on November 15, 2013, on the eastbound lanes of the Brooklyn-Queens Expressway at or near its intersection with Scott Avenue, Queens County, New York. Plaintiff, Jin Biao Xiong, the driver of the lead vehicle, alleges that he was stopped in traffic when his vehicle was struck in the rear by the second vehicle owned and operated by defendant Ryan Lapointe. The third vehicle in the chain, operated by Roman Fazylov, then struck the Lapointe vehicle.

This action was commenced by the filing of a summons and complaint on January 10, 2014. The Fazylov defendants joined issue by serving a verified answer with a cross-claim and a counterclaim against plaintiff Xiong dated March 21, 2014. On April 4, 2014, an answer with cross-claim was served on behalf of defendant Ryan Lapointe. A reply to counterclaim was served by Xiong on April 2, 2014.

Xiong moved for summary judgment dismissing the counterclaim against him. By Short Form Order dated January 6, 2015, this Court denied Xiong's motion, finding that defendant Fazylov raised a triable issue of fact by providing evidence of a nonnegligent explanation for the collision. Specifically, Fazylov stated that there was no traffic in front of Xiong's vehicle and Xiong's vehicle stopped abruptly for no apparent reason. Based on such, this Court found that there was a question of fact as to the comparative negligence of Xiong. Xiong now moves to renew the prior order, and upon renewal, dismiss the counterclaim asserted against him.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; see Coll v Padilla, 5 AD3d 716 [2d Dept. 2004]; Rizzotto v Allstate Ins. Co., 300 AD2d 562 [2d Dept. 2002]). A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (see May v May, 78 AD3d 667 [2d Dept.2010]; see also Renna v Gullo, 19 AD3d 472 [2d Dept. 2005]). The question of what constitutes a reasonable justification and the answering of this question is within the Supreme Court's discretion (see Rowe v NYCPD, 85 AD3d 1001 [2d Dept. 2011]). Leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (*see* Fardin v 61st Woodside Assoc., 125 AD3d 59 [2d Dept. 2015]; Singh v. Avis Rent A Car Sys., Inc., 119 AD3d 76 [2d Dept. 2014]; Commisso v Orshan, 85 AD3d 845[2d Dept. 2011]).

Here, Xiong presents the transcripts of the examinations before trial of the parties as newly discovered evidence in support of his motion to renew. Xiong contends that based on the evidence, he is free from liability for the subject accident as his vehicle was struck in the rear by the Lapointe vehicle.

Xiong appeared for an examination before trial on April 14, 2015. Immediately before the accident, the vehicles in front of his vehicle had slowed and stopped. His vehicle was stopped for four to five second prior to the impact, and at the time of the impact. He felt two impacts.

Plaintiff Li Fang Wang, a passenger in Xiong's vehicle, was deposed on April 14, 2015. She testified that prior to the accident, vehicles ahead of Xiong's vehicle had come to a stop. Xiong then came to a stop slowly. The Xiong vehicle was stopped for a while before the accident occurred. She felt two impacts to the vehicle. Plaintiff Jing Chen, a rear seated passenger in Xiong's vehicle, was deposed on April 27, 2015. She testified that the Xiong vehicle came to a stop due to a traffic jam ahead. Within minutes after the Xiong vehicle was stopped, she felt an impact. Plaintiff Zhi Lan Xie, another rear-seated passenger in the Xiong vehicle, was also deposed on April 27, 2015. She testified that the Xiong vehicle was stopped at the time of the accident and was stopped for around one minute before the impact.

Lapointe was deposed on November 16, 2015. He testified that traffic was medium and he was driving forty to forty-five miles per hour at his highest rate of speed. At the time of the impact, the Xiong vehicle was stopped. Immediately before the impact, he was traveling less than ten miles per hour. He testified that under three to five seconds passed from the time the Xiong vehicle stopped and his vehicle made contact with it.

Roman Fazylov was deposed on January 8, 2016. The vehicle he was operating came into contact with the Lapointe vehicle. Prior to the accident he had been driving fifty-five miles per hour at his highest rate of speed. At the time of impact, Lapointe's vehicle was in the process of stopping. The Lapointe vehicle was brought to an abrupt stop. He was traveling five to ten miles per hour at the time of impact. Five seconds prior to impact, his foot was on the accelerator. Immediately before impact, his foot was on the brake.

Counsel for Xiong, Vikrum S. Panesar, Esq., contends that based on the deposition testimony of the parties, Xiong bears no liability for the subject accident because his vehicle was hit in the rear. Counsel contends that a short stop is not enough to defeat a summary judgment motion (citing Harrington v Kern, 52 AD3d 473 [2d Dept. 2008]).

In opposition, counselors for Lapointe, Brian J. Murray and Peter Dennin, Esqs., contend that based on the deposition testimony of Xiong, Xiong is the responsible party. Counselors also moves to amend Lapointe's answer to include a counterclaim against Xiong. Counselors argue that material issues of fact exist precluding summary judgment on the counterclaim. Specifically, Lapointe testified that Xiong abruptly stopped on the highway, the traffic had been free-flowing when Xiong applied his brakes, there was nothing in front of Xiong that would have made it necessary for Xiong to apply his brakes, and as soon as he saw the Xiong vehicle's brake lights, he immediately stopped his vehicle. Fazylov testified that he did not have time to stop due to the front car abruptly stopping. Based on such, counselors contend that issues of fact exist as to comparative negligence on the part of Xiong.

Upon a review of the motion, opposition, and cross-motion this Court finds as follows:

The submitted deposition testimony conforms with the prior affidavits submitted by the parties. As such, this Court adheres to its prior decision finding that an issue of fact exists as to the comparative negligence of Xiong as the parties have presented different versions of the accident. Accordingly, there are issues of credibility that must be determined by the trier of fact rather than on a motion for summary judgment. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]). Here, the parties have presented differing versions as to how the accident occurred, including whether there was traffic in front of Xiong's vehicle, thus there are triable issues of fact (see Boockvor v Fischer, 56 AD3d 405 [2d Dept. 2008]; Makaj v Metropolitan Transp. Auth., 18 AD3d 625 [2d Dept. 2005]).

Regarding the cross-motion, CPLR § 3025(b) allows a party to amend its pleadings by setting forth additional transactions or occurrences at any time by leave of court or by stipulation of all parties. In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; Russo v Lapeer Contr. Co., Inc, 84 AD3d 1344 [2d Dept. 2011]; Martin v Village of Freeport, 71 AD3d 745 [2d Dept. 2010]; Malanga v Chamberlain, 71 AD3d 644 [2d Dept. 2010]). Mere lateness is not a barrier to an amendment in the absence of significant prejudice (see Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]).

Here, the proposed amendment is not palpably insufficient or devoid of merit, and there is no prejudice to plaintiff by allowing Lapointe leave to amend his answer (see CPLR 3025[b]; Emilio v Robison Oil Corp., 28 AD3d 417[2d Dept. 2006]). Plaintiff Xiong was aware of the proposed counterclaim as Fazylov previously asserted a counterclaim against Xiong, which defendant Lapointe now seeks to assert.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that plaintiff JIN BIAO XIONG's branch of his motion to renew is granted, and upon renewal the original determination of the Court is adhered to in its entirety; and it is further

ORDERED, that defendant RYAN LAPOINTE's cross-motion to amend his answer is granted, and defendant Ryan Lapointe shall serve a copy of the verified amended answer with counterclaim demands in the proposed form annexed to the moving papers as Exhibit A along with of a copy of this order with notice of entry; and it is further

ORDERED, that plaintiff JIN BIAO XIONG shall serve a reply to counterclaim within 20 days from the date of said service.

Dated: Long Island City, NY
September 6, 2016

ROBERT J. McDONALD
J.S.C.