

**Sencion v Curto**

2018 NY Slip Op 31845(U)

July 31, 2018

Supreme Court, New York County

Docket Number: 160547/2016

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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SERGIO ANTONIO MINAYA SENCION  
Plaintiff,

- v -

STEFANIA CURTO,  
Defendant.

INDEX NO. 160547/2016

MOTION DATE 07/03/2018

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that plaintiff's motion for an order granting leave to amend the Complaint; deem the Amended Complaint properly served nunc pro tunc; and for summary judgment on the issue of liability pursuant to CPLR 3212 is granted. The underlying action stems from a motor vehicle incident which occurred on April 13, 2016 on Morningside Drive near the corner of West 113<sup>th</sup> Street in the County, City, and State of New York, when a vehicle operated by plaintiff Sergio Antonio Minaya Sencion was rear-ended by a vehicle operated by defendant Stefania Curto and allegedly resulted in the serious injury of plaintiff. The decision/order of the court is as follows:

**Leave to Amend**

The branch of plaintiff's motion seeking leave to amend and deem the Amended Complaint properly served nunc pro tunc is granted. Leave to amend pleadings is generally freely granted, absent prejudice and surprise (*See Edenwald Contr. Co. v City of New York*, 60

NY2d 957, 959 [1983]; *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1<sup>st</sup> Dep't 2006]). To find prejudice, there must be some indication that the defendant has been hindered in the preparation of his case or prevented from taking some measure in support of his position (*See Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 [1<sup>st</sup> Dep't 2000]). Pursuant to CPLR 3025(b) "a party may amend his or her pleading or supplement it by setting forth addition or subsequent transactions or occurrences, at any time by leave of court." "The movant need not establish the merit of her proposed new allegations, but only that 'the proffered amendment is not palpably insufficient or clearly devoid of merit'" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645 [1<sup>st</sup> Dep't 2015] quoting *MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1<sup>st</sup> Dep't 2010]). The party opposing a motion to amend must demonstrate prejudice or surprise to said party due to the proposed amendment (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957 [1983]).

Here, plaintiff seeks leave to amend its Complaint to correct a mistakenly listed license plate number from 8633756 to the correct plate number S633756. Plaintiff incorrectly identified the plate number from the police report of the underlying incident. Plaintiff notes that it has not delayed in seeking to amend the complaint (*Kiaer v Gilligan*, 63 AD3d 1009 [2 Dep't 2009] [finding that where a driver did not delay in seeking to amend a complaint to add the owner of a vehicle who had the same name as the original defendant as a defendant, the court found no showing of palpable insufficiency or patent lack of merit and granted leave to amend]). Plaintiff, like the plaintiff in *Kiar*, seeks to rectify a simple mistake. Plaintiff has demonstrated that the defendants will be neither prejudiced nor surprised by the proposed amendment. Thus, plaintiff's motion to amend and deem the Amended Complaint served nunc pro tunc is granted.

### Summary Judgment (Liability)

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

“A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident” (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep’t 2017]).

Here, plaintiff has demonstrated that defendant rear-ended plaintiff’s vehicle which was stopped in traffic. Plaintiff has made a prima facie case of negligence and the burden shifts to defendant to raise a triable issue of fact. In opposition, defendant alleges that there is an indication as to whether plaintiff stopped short and was the proximate cause of the accident. However, the law is clear that the claim that a leading vehicle stopped suddenly, standing alone, is insufficient to raise a triable issue of fact (*Cruz v Lise*, 123 AD3d 514 [1st Dep’t]). Defendant has failed to raise a triable issue of fact and has not proffered evidence to rebut the presumption that defendant was negligent. Thus, the branch of plaintiff’s motion for summary judgment on the issue of liability against defendants is granted.

Accordingly, it is

ORDERED that the branch of plaintiff’s motion for leave to amend the Complaint and deeming the Amended Complaint properly served nunc pro tunc is granted, and the amended

complaint in the proposed formed annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is granted; and it is further

ORDERED that an immediate trial be held as to the damages to which plaintiff is entitled; and it is further

ORDERED that plaintiff shall, within 30 days from entry of this order, serve a copy of this order with notice of entry upon defendants and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision/Order of the Court.

7/31/2018  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE