[* 1]

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___

----------X

PRESTON BROWN, et al.

Index №. 306149/2013

-against-

Hon. MARY ANN BRIGANTTI

SAYED CHAWDHURY, et al.

Justice Supreme Court

----------X

The following papers numbered 1 to _____9____ were read on this motion (Seq. No. ____4____)
for _**AMEND PLEADINGS AND DISMISS**____ noticed on ____October 23, 2017_____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits (Correspondence from Plaintiff Counsel)	No(s).	3,4,5,6,7
Replying Affidavit and Exhibits	No(s).	8,9

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers, the defendants Kassy Eso ("Eso") and Luis Angel Velez Jr. ("Velez") move for an order (1) pursuant to CPLR 3025(b), granting them leave to amend their answer to assert additional defenses of res judicata, collateral estoppel, and fraud and deeming the amended answer annexed to the moving papers as served; (2) pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7), dismissing the plaintiffs' complaint and any cross-claims asserted against the defendants Eso and Velez, and (3) for such other and further relief as the Court deems just, proper and equitable. Co-defendants Sayed Chawdhury ("Chawdhury") and Forego Taxi Corp. ("Forego") (collectively with Eso and Velez, "Defendants") cross-move for an order dismissing the plaintiffs' complaint and any cross-claims asserted against them pursuant to CPLR 3211(a)(5) and (a)(7). The plaintiffs Preston Brown ("Brown") and Marquis Eaddy ("Eaddy")(collectively, "Plaintiffs") oppose the motion and cross-motion.

Background

This matter arises out of an alleged motor vehicle accident that occurred on July 12, 2012, between two vehicles. Plaintiffs were allegedly passengers in a vehicle owned by Forego and operated by Chawdhury. That vehicle allegedly came into contact with a vehicle owned by Eso and operated by Velez. On December 28, 2016, Eso's insurance carrier 21st Century Security Insurance Company ("21st") commenced a declaratory judgment action in Supreme Court, Nassau County against several defendants including the plaintiffs and defendants herein- Brown, Eaddy, Eso, Chawdhury, Forego, and Velez. 21st sought a declaration that the policy issued to Eso was null and void with respect to, among other incidents, this July 12, 2012 accident, and a declaration that it had no duty to defend, indemnify, or to provide coverage for no-fault and/or uninsured and/or underinsured claims made by any person in connection with that loss. The complaint in that action alleged that the defendants intentionally staged the

subject accident about four months after the 21st policy was issued to Eso, and thereby committed insurance fraud. The defendants in this matter, except for Forego, defaulted in the declaratory judgment action. By order dated July 24, 2017, Supreme Court, Nassau County issued a decision and order granting 21st a default judgment against the defaulting parties including Brown and Eaddy. By judgment dated July 28, 2017, it was ordered, adjudged, and declared that the policy issued to Eso was "null and void with regard to the ... July 12, 2012 accident[]" and that 21st had no duty to defend or indemnify any person under the Eso policy "in any action or proceeding brought for damages arising out of personal injury or property damage as a result of the subject occurrence[]" and that 21st had "no duty to provide coverage for any claim for no-fault and/or uninsured/underinsured motorist coverage, or bodily injury claim made by or on behalf of or any person or entity in connection with the subject losses." Defendants made this motion on or about October 2, 2017.

Standard of Review

It is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 [1st Dept 2011] *citing* CPLR 3025[b]). Leave to amend should be granted so long as the proposed amendment is not "palpably insufficient or clearly devoid of merit" (*see Higgins v. City of New York*, 144 A.D.3d 511, 516 [1st Dept. 2016], citing *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499 [1st Dept. 2010]; *see also Fairpoint Companies, LLC v. Vella*, 134 A.D.3d 645 [1st Dept. 2015]).

On a motion to dismiss pursuant to this section of the CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]).

Under CPLR 3211(a)(5), a party may move for dismissal as to one or more causes of action asserted against him on the ground that the cause of action is barred by the doctrine of res judicata. "'[O]nce a

claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions is barred, even if based upon different theories or if seeking a different remedy'" (*Schwartzreich v. E.P.C. Carting Co., Inc.*, 246 A.D.2d 439, 440-441 [1st Dept. 1998], quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 [1981]). "If the party against whom res judicata is invoked had a full and fair opportunity to litigate the claim in a prior proceeding based on the same transaction, but did not raise it therein, he will be barred from raising it in a subsequent proceeding" (*id.*, citing *Browning Avenue Realty Corp. v. Rubin*, 207 A.D.2d 263, 264-65 [1st Dept. 1994], *lv. denied*, 85 N.Y.2d 804 [1995]).

Applicable Law and Analysis

In this case, Defendants Eso and Velez have established entitlement to leave to amend their answers, as their proposed affirmative defenses on the grounds of res judicata have merit, and there is no indication that Plaintiffs would be prejudiced by the amendments (CPLR 3025[b]). Accordingly, the amended answer annexed to Eso and Velez's moving papers is deemed served as of the date of this decision (*see Jacobson v. McNeil Consumer & Speciality Pharmaceuticals*, 68 A.D.3d 652, 652-53 [1st Dept. 2009]). In addition, upon review of the papers, all Defendants have established that the July 2017 judgment, entered during the pendency of the subject action, bars Plaintiffs' claims, as it has been adjudged that the accident that this action arises from was staged (*see Atlantic Chiropractic, P.C. v. Utica Mutual Ins. Co.*, 62 Misc.3d 145[A][App. Term, 2nd 11th and 13th Jud. Distr. 2019]). The prior judgment is binding even though it was entered on default, as "[t]he doctrine of res judicata is applicable to a judgment taken by default which has not been vacated" (see *119 Rosset Corp. v. Blimpy of New York Corp.*, 65 A.D.2d 683 [1st Dept. 1978]).

In opposition, Plaintiffs fail to set forth any grounds for denial of the motion. Plaintiffs do not deny that the July 2017 judgment bars their claims. Plaintiffs only argue that the motion and cross-motion should be denied because they are untimely and unsupported by any affidavit showing a reasonable excuse for the delay. Plaintiffs further contend that they would be prejudiced because the note of issue was filed in March 2016 and pre-trial conferences took place in 2017. However, "'[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side..." (*Abdelnabi v. New York City Transit Authority*, 273 A.D.2d 114, 115 [1st Dept. 2000], quoting *Edenwald Constr. Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]). "The burden of establishing prejudice is on the party opposing the amendment" (*Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 [2014]) "Prejudice requires 'some indication that the [opposing party] has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Cherebin v. Empress Ambulance Service, Inc.*, 43 A.D.3d 364 [1st Dept. 2007], quoting *Loomis v. Civetta Corinno Const. Corp.*, 54 N.Y.2d 18, 23 [1981]). It is apparent here that Defendants have a reasonable excuse for the timing of their motion, as the

judgment in the related Declaratory Judgment Action was not entered until July 2017, and Defendants made this motion only months later. Furthermore, Plaintiffs do not specifically explain how the timing of the motion to amend hindered their preparation of their case or otherwise resulted in actual prejudice.

Accordingly, it is hereby

ORDERED, that Eso and Velez's motion for leave to amend their answer is granted, and the amended answer annexed to the moving papers is deemed served as of the date of this order, and it is further,

ORDERED, that Defendants' motion and cross-motion to dismiss pursuant to CPLR 3211(a)(5) on the grounds that Plaintiffs' action is barred by the doctrine of *res judicata* is granted, and Plaintiffs' complaint is dismissed, and it is further,

ORDERED, that the Clerk of this Court is directed to enter judgment accordingly, dismissing Plaintiffs' complaint and any and all claims against the defendants.

This constitutes the Decision and Order of this Court.

Dated: 5/17/19

Hon. Mary Ann Brigantti **J.S.C.**

Hon. Mary Ann Brigantti

1. CHECK ONE.....	☒ CASE DISPOSED IN ITS ENTIRETY	☐ CASE STILL ACTIVE
2. MOTION IS.....	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT