

**Leary v Reyes**

2020 NY Slip Op 33225(U)

October 1, 2020

Supreme Court, New York County

Docket Number: 153475/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

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DAHNIQUE LEARY,

Plaintiff,

- v -

ESTRELLA REYES and RAYSHAWN WELLS,  
Defendants.

INDEX NO. 153475/2019

MOTION DATE 8/17/2020

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 47, 48

were read on this motion to/for STRIKE.

Before the Court is defendant Rayshawn Wells’ motion for an Order pursuant to 22 NYCRR § 202.21(d), to strike the Note of issue in this matter; and further for an Order extending the time of the defendant to move for summary judgment. Plaintiff opposes the motion and cross-moves for or an Order, pursuant to CPLR §3212 to grant partial summary judgment in favor of plaintiff and against defendants Estrella Reyes and Rayshawn Wells, on the issue of liability; and to set the matter down for a trial on damages. The accident at issue occurred on August 25, 2018, on Park Avenue North of East 120<sup>th</sup> Street in the County City and State of New York, when plaintiff was a passenger in a motor vehicle owned and operated by defendant Rayshawn Wells that came into contact with a vehicle operated by defendant Estrella Reyes.

Defendant has failed to establish that the note of issue must be vacated. It is well settled that “[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced” (*Cuprill v*

*Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]; *see also Hickey v City of New York*, 159 AD3d 511, 511 [1st Dept 2018]).

The Note of Issue shall not be stricken. Defendant alleges that plaintiff has not provided material requested in defendant Rayshawn Wells' Demand for Discovery and Inspection dated May 26, 2020 and June 16, 2020. In the May 26, 2020 Demand for Discovery and Inspection defendant requested information related to "degenerative joint disease in the back" (Mot, Exh C). In the June 16, 2020 Demand for Discovery and Inspection defendant any records related to plaintiff's treatment with physicians during the COVID-19 lockdown or since the outbreak of COVID-19 (Mot, Exh D). In plaintiff's opposition papers, plaintiff denies having not fully responded to defendant's demands; rather, plaintiff claims to have fully complied with all outstanding discovery demands.

Plaintiff attaches plaintiff's responses to defendant Rayshawn Wells' Demand for Discovery and Inspection dated May 26, 2020 and June 16, 2020 (Aff in Op, Exh A). Plaintiff's July 13, 2020 responses address both of defendant's discovery demands. Plaintiff's response claims that plaintiff did not sustain any back injuries, has not treated for back pain, and has not treated with medical providers who diagnosed plaintiff with "degenerative joint disease" (*id.*). Further, plaintiff responded that plaintiff did not treat with any physicians during the COVID-19 lockdown or since the outbreak of COVID-19 (*id.*). The Court finds that plaintiff has fully responded to defendant's demands. The fact that a party is dissatisfied with discovery responses proffered by another party is insufficient basis upon which to conclude that the party wilfully and contumaciously failed to comply with a court order compelling disclosure (*Automatic Mall Service, Inc. v. Xerox Corp.*, 156 AD2d 623, 624 [2d Dept 1989]). As such the instant motion to strike the note of issue is denied.

Plaintiff's cross-motion for Order, pursuant to CPLR §3212 to grant partial summary judgment in favor of plaintiff and against defendants Estrella Reyes and Rayshawn Wells, on the issue of liability; and to set the matter down for a trial on damages is denied in part and granted in part solely as to finding plaintiff free from liability. Summary Judgment in favor of the plaintiff is warranted where the defendant's own conduct inculcates him (*Uragrizza v Schmieder*, 46 NY2d 471 [1979]). "It is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles" (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001] citing *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1990]).

Here, an issue of fact exists as to the occurrence of the accident barring summary judgment on the issue of liability as against defendants. In support of the motion plaintiff attaches the Police Accident report in which both defendants gave conflicting descriptions as to the happening of the accident (Cross-Mot, Exh A). Plaintiff testified that he "can't say who [was] right or who [was] wrong" for the happening of the accident and could not recall whether the intersection was controlled by a traffic device (Cross-Mot, Exh D at 24, ¶2-5). Defendant Reyes testified that the police report correctly memorializes his statement that he entered into the intersection with a green light when co-defendant Wells' vehicle went through a red light (Cross-Mot, Exh E at 38, ¶ 17-23). Defendant Reyes testified that co-defendant's vehicle impacted his vehicle and then struck a light pole (*id.* at 27, ¶ 2-3). Defendant Wells' testimony contradicts that of defendant Reyes.

Defendant Wells testified that he came to a stop for the light at the intersection of Park Avenue and East 120<sup>th</sup> Street and waited for the light to turn green (Cross Mot, Exh F at 38-39). Defendant Wells testified that at least half of his vehicle was in the intersection when his vehicle

was impacted on the front passenger side (*id.*, at 42-43, 46). Plaintiff’s cross-motion contains conflicting descriptions of the accident at issue. Thus, the branch of plaintiff’s cross-motion for summary judgment on the issue of liability as against defendants is denied and the branch of plaintiff’s cross-motion finding plaintiff free from liability for the underlying accident is granted.

Accordingly, it is

ORDERED that defendant’s motion to strike the note of issue is denied; and it is further

ORDERED that the branch of plaintiff’s motion cross-motion for summary judgment on the issue of liability as against defendants is denied; and it is further

ORDERED that the branch of plaintiff’s cross-motion finding plaintiff free from liability for the underlying accident is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court

10/1/2020  
DATE

HON. ADAM SILVERA JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE