

**Javier v Auld**

2024 NY Slip Op 32321(U)

June 18, 2024

Supreme Court, New York County

Docket Number: Index No. 150497/2020

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

INDEX NO. 150497/2020

RAUL JAVIER,

Plaintiff,

MOTION DATE 05/05/2022, 07/04/2022, 11/18/2022

- v -

MOTION SEQ. NO. 002 003 004

CHARLES H. AULD, JR., JONATHAN LOVERA, STEVEN J. MECIR, CRYSTAL G. LYLES, ELYSE PRICE, and JOHN DOE,

Defendants.

DECISION + ORDER ON MOTION

CHARLES H. AULD, JR.

Plaintiff,

Third-Party Index No. 595724/2021

-against-

STEVEN J. MECIR, CRYSTAL G. LYLES, and ELYSE PRICE,

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 129

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, motion sequences 002, 003, and 004 are consolidated for disposition and decided as follows. In motion sequence 002, plaintiff Raul Javier (Javier) moves for leave to renew the prior motion, and upon renewal, for an order vacating the April 7, 2022 decision and order that granted summary judgment dismissing all claims and cross-claims against

defendant/third-party defendant Elyse Price (Price) (NY St Cts Elec Filing [NYSCEF] Doc No. 67). In motion sequences 003 and 004, defendant/third-party plaintiff Charles H. Auld, Jr. (Auld) and defendant/third-party defendant Steven J. Mecir (Mecir) move, respectively, for summary judgment dismissing all claims and cross-claims against them (NYSCEF Doc Nos. 90 and 104). For the reasons set forth below, motion sequence 002 is granted and motion sequences 003 and 004 are denied.

### Background

In January 2020, Javier commenced the action against Auld, Jonathan Lovera (Lovera), and John Doe alleging that he sustained serious injuries as result of a November 2019 multi-vehicle accident (NYSCEF Doc No. 93, initial pleadings). Auld and Lovera separately answered and asserted cross-claims against each other. In August 2021, Auld commenced the third-party action against Mecir, Crystal G. Lyles (Lyles), and Price (NYSCEF Doc No. 94, third party pleadings). Javier then served an amended complaint to name the additional defendants (NYSCEF Doc No. 95, amended pleadings).<sup>1</sup> Auld answered, Price answered both complaints, and Mecir answered the third-party complaint. In these answers, defendants asserted cross-claims against each other for contribution and/or indemnification.

In motion sequence 001, Price sought summary judgment dismissing all claims against her (NYSCEF Doc No. 30). In support, she submitted, among other things, a statement of material facts, an affidavit providing her account of the accident, and an attorney affidavit (NYSCEF Doc Nos. 31, 32, and 33). Javier, Auld, and Lovera opposed the motion with affirmations from their respective attorneys (NYSCEF Doc Nos. 43, 45, and 46), but did not submit party affidavits setting forth their respective personal knowledge of the accident. Due to this omission, the court credited

---

<sup>1</sup> In August 2023, Lyles's attorney filed a stipulation of discontinuance in the initial action (NYSCEF Doc No. 125). The stipulation specifies that it is subject to the consummation of settlement.

Price's affidavit testimony. The decision and order, which provides a cogent summary of Price's testimony, states:

"Movant's submission...in which she avers that her vehicle was stopped at a red traffic signal for 30 seconds at the intersection of Cross Island Parkway and Bell Boulevard before the accident occurred; that she saw a car that was exiting the ...Parkway strike the guardrail which caused a traffic light to fall in front of her vehicle; that she saw a second car traveling behind the first car that was exiting the parkway then strike the car [of defendant/third-party defendant Mecir] that was stopped behind her vehicle...; that the vehicle of defendant/third-party plaintiff Auld was also exiting the...Parkway when the accident happened; that two of the three drivers...exiting the...Parkway left the scene...and that at no time while the accident was happening was her vehicle struck by or in contact with any other vehicle; that her vehicle remained stopped at the red traffic signal all times establishes movant is free from liability and entitled to summary judgment" (NYSCEF Doc No. 76 at 4-5).

### I. Parties' Arguments

#### Motion Sequence 002

Javier's motion to renew is based upon counsel's assertion that although a paralegal prepared an affidavit for Javier, counsel inadvertently omitted it from the opposition to Price's motion (NYSCEF Doc No. 67). Counsel argues that the court should excuse the omission and grant renewal to consider the affidavit. In the affidavit, Javier avers that he was a rear seat passenger in Lovera's vehicle and saw "several vehicles moving before colliding with each other" (NYSCEF Doc No. 72 at ¶ 4). Counsel contends that Javier's account of the accident contradicts Price's account, raising material issues of fact such as whether Price's vehicle was moving at the time of the accident and whether her conduct was a contributing factor. Counsel also provides a certified police accident report (NYSCEF Doc No. 73), and asserts that it identifies Price as a driver of a vehicle involved in the accident. Counsel stresses that the police report does not state that Price's vehicle was stopped. According to counsel, the report is admissible under the business

record exception to the hearsay rule. Additionally, according to counsel, each defendant must be deposed before a determination can be made regarding any defendant's liability.

Auld opposes the motion to the extent that it asserts that no defendant should be granted summary judgment at this juncture. Essentially, his position is that the other defendants should remain in this action unless his motion for summary judgment is granted. In partial support of Javier's motion, Auld provides his own affidavit and an attorney affirmation (NYSCEF Doc Nos. 84 and 85). Counsel explains that he believed that his prior submissions were sufficient to oppose Price's motion. He now argues that renewal is appropriate as Auld should not be prejudiced by his attorney's mistaken belief. In the affidavit, Auld avers that Price's vehicle "was almost struck by the utility pole" and that it "was located closer to the...erratic vehicles than [his] vehicle was and [she] was in a better position to observe the unknown individuals who fled the scene" (NYSCEF Doc No. 85 at ¶ 9). Therefore, counsel contends that Price "has knowledge about the occurrence in her exclusive possession that may reveal she was liable, [and] she should not be removed from the action[s] based on a non-descript and conclusory affidavit" (NYSCEF Doc No. 84 at ¶ 7).

In the affirmation opposing summary judgment in motion sequence 001, Auld's counsel pointed out that although the initial police accident report did not mention Price, the report was later amended to identify her as the driver of vehicle number five (NYSCEF Doc No. 46). Counsel also pointed out that the amended report reflects that vehicle number five was struck by another vehicle. According to counsel, the report contradicts Price's statements in her affidavit that no vehicle struck her own, and thus there are credibility issues that must be resolved at trial. Counsel specified that the triable issues of fact include whether Price's vehicle was stopped when the accident occurred and whether she was involved in the accident. Counsel further argued that summary judgment was premature because discovery is needed, for example, to depose Price

regarding the averments in her affidavit. In the current affirmation, counsel repeats that Price should be deposed as a defendant in the actions.

Price's attorney responds that renewal should be denied as neither party proffers a reasonable excuse or newly discovered evidence (NYSCEF Doc Nos. 77, 86). In support, counsel quotes *Chelsea Piers Mgt. v Forest Elec. Corp.* (281 AD2d 252, 252 [1st Dept 2001]) in which the First Department held that "[r]enewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation" (*see* NYSCEF Doc No. 77 at ¶ 10). If the court grants renewal, counsel argues that it should not vacate the prior decision and order as the new submissions do not defeat Price's prima facie showing of entitlement to summary judgment. For instance, counsel asserts that Javier's affidavit does not allege any negligence by Price as it contains Javier's admission that "he does not know how the accident occurred" (NYSCEF Doc No. 77 at ¶ 4). Counsel also asserts that Auld's affidavit does not allege negligence by Price as it merely relays the near miss between Price's vehicle and a utility pole and speculates about Price's view of the other drivers. Apart from this, counsel argues that Javier accepted Price's statement of undisputed material facts offered with the original summary judgment motion as he did not submit a counterstatement. Counsel similarly claims that the instant motion is improper and incomplete as not all documents from the prior motion are exhibits. As for the initial and amended police reports, counsel observed in his reply on motion sequence 001 that neither the initial or the amended copy of the police report was certified, and thus, argued that the reports were inadmissible evidence (NYSCEF Doc No. 59) In motion sequence 002, counsel advances several reasons why the amended certified police report is inadmissible, including that it does not contain a declaration against interest and it is not properly authenticated. Counsel further notes that Javier did not offer it in opposition to motion sequence 001.

In reply, Javier's attorney reiterates his arguments and disputes opposing counsel's characterization of Javier's statements (NYSCEF Doc No. 82). He interprets Javier's statements to mean that he saw the accident as a rear seat passenger with a different vantage point than drivers of the vehicles involved. As for the police report, counsel claims it contains Price's constructive declaration against interest, establishing her involvement in the accident, as she gave the police officer her license, registration, and insurance information.

Motion Sequence 003

In support of Auld's summary judgment motion, counsel argues that there is no evidence that Auld was negligent or contributed to the accident (NYSCEF Doc No. 92). Counsel refers to the certified police accident report which identifies Auld as one of the drivers involved in the accident. The report documents that Auld stated that his vehicle was hit when he was stopped for a red light. Counsel also refers to Auld's affidavit in which Auld states that "one vehicle traveling...around eighty miles an hour struck the side of [his] vehicle without warning and...[then struck] a traffic utility pole" (NYSCEF Doc No. 97 at ¶ 3). Auld continues that "[a]round the same time another vehicle traveling at a similar speed struck the other side of [his] vehicle and...[then struck] the guardrail causing the vehicle to go up into the air before landing on another vehicle that was stopped at the red light" (*id.* at ¶ 4). Based on this evidence, counsel claims that Auld is entitled to summary judgment.

Javier opposes and his counsel argues that Auld did not demonstrate prima facie entitlement to summary judgment (NYSCEF Doc No. 100). In his affidavit, Javier states that "[t]he...vehicle listed next to Auld's name [in the police report] was exiting the...Parkway and it did not come to a stop at the exit ramp...[it] drove into the intersection...fast and without stopping beforehand, and caused in part the multi vehicle accident" (NYSCEF Doc No. 102 at ¶ 5). As such,

counsel asserts that Auld is negligent as a matter of law (*see* Vehicle and Traffic Law §§ 1110, 1180, and 1212).

Lovera opposes, but only with an affirmation from an attorney who has no personal knowledge of the accident (NYSCEF Doc No. 98). Auld did not file a reply.

#### Motion Sequence 004

In support of Mecir's motion for summary judgment, counsel cites to Price's statement in motion sequence 001 that a vehicle was stopped behind hers when it was struck by another. Counsel contends that this stopped vehicle was Mecir's vehicle (NYSCEF Doc No. 106). Here, counsel points to Mecir's affidavit in which he states that his vehicle "remained stopped at all times...behind another vehicle when the two cars came speeding off the expressway, striking the light pole, guardrails and...[his] car" (NYSCEF Doc No. 112 at ¶ 7). Counsel, in turn, argues that Mecir - like Price - establishes prima facie entitlement to summary judgment as his vehicle was stopped at the time of the accident.

Lovera, Auld, and Javier separately oppose the motion, although Auld only partially opposes. Lovera again submits an attorney affirmation without the required affidavit (NYSCEF Doc No. 114). Auld relies upon his affidavit in support of Javier's motion and his counsel's affirmation, which also repeats the arguments opposing Price's motion for summary judgment (NYSCEF Doc Nos. 85 and 113, respectively). For instance, counsel contends that Mecir is in exclusive possession of relevant information and should be deposed as a defendant in the actions. Counsel contends that *if* Auld is denied summary judgment, then Mecir should be denied summary judgment and deposed. Javier's attorney argues that summary judgment is precluded as there are conflicting affidavits from Javier and Mecir concerning the facts of the accident (NYSCEF Doc



No. 116). Furthermore, counsel asserts that the police report is corroborative and admissible, and summary judgment is premature as the drivers, including Mecir, need to be deposed.

In reply, counsel revisits his original argument and asserts that the opposition to Mecir's summary judgment motion does not raise any triable issue of fact (NYSCEF Doc No. 121). Counsel also makes a *res judicata* argument for the first time in reply, and thus it is not properly before the court (*see Serrano v Brook Plaza, LLC*, 211 AD3d 549, 549 [1st Dept 2022]). Even if the argument had been properly raised, it is unavailing because it is based on the court's April 2022 decision, which is being relitigated under motion sequence 002.

## II. Legal Analysis

Initially, the court rejects Price's argument that motion sequence 002 is improper as it did not contain all the documents from motion sequence 001. Under CPLR § 2214 (c), "in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court."

The court now turns to the gravamen of the renewal motion. CPLR § 2221 (e) states that a renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "contain reasonable justification for the failure to present such facts on the prior motion." However, "this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant at the time the original motion was made" (*Global Liberty Ins. Co. v Laruenceau*, 187 AD3d 570, 571 [1st Dept 2020] [internal quotation marks and citation omitted]). Similarly, "[a]lthough a party seeking renewal should offer a reasonable justification for failing to present any new facts on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*Matter of Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015] [internal quotation

marks and citations omitted]). In *Allison v D'Agostino Supermarkets* (282 AD2d 219, 219-220 [1st Dept 2001]), the First Department permitted renewal where plaintiff submitted a newly prepared expert affidavit based on facts known to plaintiff when she initially opposed defendant's summary judgment motion. The court observed that "[t]here is no evidence that the failure [to include the affidavit with the initial opposition] was dilatory or strategic" and its inclusion "would have been sufficient to defeat defendant's summary judgment motion" (*id.*). Likewise, in *Joseph v Board of Educ. of the City of N.Y.* (91 AD3d 528, 529 [1st Dept 2012]), the First Department granted renewal based upon law office failure where an attorney "inadvertently failed to append the 'so ordered' version of the stipulation" as an exhibit. Considering the above authorities and the arguments made in this motion sequence, the court exercises its discretion and grants renewal.

The court notes that when Price moved for summary judgment in January 2022, she provided a statement of undisputed material facts in compliance with the version of Uniform Court Rule § 202.8-g that was in effect at that time. Although Javier did not submit a responsive counterstatement, the rule was amended in June 2022 to clearly make such statements optional unless the court directs otherwise (*see* 22 NYCRR §§ 202.8-g [a], [c]). Before the amendment, some courts exercised discretion when a party submitted opposition without a responsive counterstatement such that they did not deem the proffered material facts admitted (*e.g. Mackins v City of New York*, 2021 NY Slip Op 32440[U], \*6-7 [Sup Ct, NY County 2021]; *see also Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851-852 [3d Dept 2022] [explaining the rule's purpose and why courts could exercise discretion under the prior version of the rule]). In exercising this discretion, the court does not deem Price's proffered facts admitted.

To prevail on a summary judgment motion, the movant must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact” (*Aras v B-U Realty Corp.*, 221 AD3d 5, 11 [1st Dept 2023] [internal quotation marks and citation omitted]). If the movant makes this showing, then “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Lebedev v Blavatnik*, 193 AD3d 175, 182 [1st Dept 2021] [internal quotation marks and citation omitted]). “In deciding [each summary judgment] motion, the court must draw all reasonable inferences in favor of the [opposing parties] and deny summary judgment if there is any doubt as to the existence of a material issue of fact” (*Castro v Hatim*, 174 AD3d 464, 468 [1st Dept 2019]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations” (*Cresco Labs N.Y., LLC v Fiorello Pharms., Inc.*, 217 AD3d 539, 541 [1st Dept 2023] [internal quotation marks and citation omitted]). Here, because of the conflicting accounts in the parties’ affidavits regarding whether certain vehicles were stopped, whether certain vehicles were involved in the sequence of collisions, and whether certain individuals were a cause of the accident, the court denies summary judgment as to Price, Auld, and Mecir (*see Mason v Dupont Direct Fin. Holdings*, 302 AD2d 260, 262 [1st Dept 2003] [opining “that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits”]).

The court finds that the deposition issues raised in the motions are moot and academic except as to Price, as the note of issue filed during the pendency of the motions indicates that discovery is complete as of May 2, 2024 (*see* NYSCEF Doc No. 133). Appended to the note of issue is a so-ordered stipulation dated April 19, 2024, which states that Price was served with a subpoena for a deposition to be held on June 4, 2024. It is unknown at this time if the deposition

was conducted. As such, the court holds that prematurity is another ground for the denial of Price's summary judgment motion (*see* CPLR § 3212 [f]).

Further, the amended certified police report provides additional support for the denial of summary judgment to Price, as it contradicts Price's averment that her vehicle was not struck by or in contact with any other vehicle. Although at trial Price or another litigant may prove that the report is not properly certified and/or that the statements within are inadmissible hearsay, the court can consider the report as it not the sole evidence offered in opposition to Price's motion (*see Jung Ung Moon v Kumbee Ree P Some*, 189 AD3d 628, 629 [1st Dept 2020]). The court recognizes that an uncertified and incomplete copy of the amended report was proffered on motion sequence 001 with the certified amended report proffered on motion sequence 002, and notes that even if it had not considered the certified police report upon renewal, the decision's outcome would be the same as to Price.

As for Auld's reliance on the report in motion sequence 003, such reliance is misplaced. The report attributes a statement to Auld that he was stopped at a red light, but this is not definitive proof that Auld was in fact stopped.

The court has considered the parties' remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that the motion for leave to renew Price's summary judgment motion is granted (motion sequence 002); and it is further

ORDERED that, upon renewal, the court vacates its decision and order dated April 7, 2022, denies summary judgment, and reinstates all claims and cross-claims against Price; and it is further

ORDERED that Auld's motion for summary judgment (motion sequence 003) is denied; and it is further

ORDERED that Mecir's motion for summary judgment (motion sequence 004) is denied; and it is further

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

This constitutes the decision and order of the court.

6/18/2024  
DATE

*José A. Caputo*

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