

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

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NINA CAMMARATA,

Plaintiff,

-against-

Index No.: 9857/02
Motion Date: 5/5/04
Calendar Number: 9

**BERNARD R. DREXEL, "JOHN DOE" said name
being fictitious and unknown and JAMAICA TOWING
INC.,**

Defendants.

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The following papers numbered 1 to 21 read on this motion by defendants for an order granting summary judgment in their favor and dismissing the complaint and any cross-claims as against them; and cross-motion by plaintiff for an order pursuant to CPLR 1024 amending the pleadings. .

| | PAPERS NUMBERED |
|--|--------------------|
| Notice of Motion-Affirmation-Exhibits..... | 1-4 |
| Memorandum of Law..... | 5 |
| Affidavit in Opposition-Exhibits..... | 6-8 |
| Notice of Cross-Motion-Affirmation-Exhibits..... | 9-12 |
| Affirmation in Reply-Exhibits..... | 13-15 |
| Affirmation in Opposition-Exhibits..... | 16-18 |
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Upon the foregoing papers it is ordered that defendants' motion for summary judgment in their favor and dismissing the complaint and any cross-claims as against it is denied, and the cross-motion by plaintiff for an order pursuant to CPLR 1024 amending the pleadings by the insertion of the name of Anthony McMillan, also known as Andy McMillan, as defendant herein, in place and stead of "John Doe", name fictitious, is granted, for the following reasons:

According to plaintiff's complaint, the action arises out of an automobile accident that occurred on April 12, 2001, on the east bound Brooklyn Queens Expressway 25 feet west of Northern Boulevard, Queens, County. Plaintiff was operating her motor vehicle when it came into contact with a metal object on the highway that fell from the motor vehicle owned and operated by the defendants. Plaintiff also alleges that defendants negligently, recklessly, and carelessly operated and maintained their vehicle by allowing this object to fall and become an obstruction to plaintiff's safe driving. She also alleges that defendants violated various provision of the New York State Vehicle and Traffic Laws. Plaintiff commenced the instant action to recover for personal injuries sustained as a result of this accident.

Defendants move for summary judgment. The basis for this motion is that they did not

breach a duty of care to plaintiff in the operation of their tow trucks, they did not create the condition in the roadway that plaintiff alleges contributed to her accident, and plaintiff cannot prove proximate causation. They have submitted, inter alia, plaintiff's and defendant Drexel's deposition transcripts.

At her deposition, Plaintiff stated that when she saw the large metal object in her lane she slowed her vehicle by slamming on her brakes, however she drove over the object and lost control and hit a concrete cement barrier. A few minutes later, a Fire Department vehicle arrived on the scene and firefighters informed plaintiff that they knew where the object in the roadway had come from. At that point, plaintiff noticed a tow truck that had pulled over into the right lane ahead of her vehicle and she was told that the metal object was a bumper or a hitch to a tow truck. Bernard Drexel stated at his deposition that he arrived on the scene of the accident in response to a dispatch that a collision had taken place. There, he saw the fire truck, a police car and the metal object in the left lane, it appeared to be about six feet long by ten inches wide and eight inches high. He explained that the firefighters had concluded that the metal belonged to his tow truck although he denied such. Another Jamaica Towing tow truck, operated by Andy MacMillan, arrived at the scene and he towed plaintiff's vehicle from the scene while Bernard Drexel towed the metal object back to the Jamaica Towing storage facility. Defendants have also submitted a copy of the decision of New York State Department of Motor Vehicles Administrative Judge Marc Berger, dated August 29, 2003. A.J. Berger found that Bernard Drexel had established his non-involvement in the instant accident. Finally, defendants refer to a police accident report that mentions that one of the tow truck operators stated that he "did not know that the object fell off the truck."

According to defendants, there is no admissible evidence that the metal object in the roadway was owned or had been in the exclusive control of defendants. They argue that plaintiff relies upon the speculations of the firefighters and police accident report and such are insufficient to establish a prima facie case of negligence. They also claim that the doctrine of res judicata applies and the finding by the Administrative Judge establishes plaintiff's responsibility for the accident. Defendants also argue that the plaintiff's testimony establishes that her own driving was the sole proximate cause of the accident. Plaintiff opposes this motion claiming the evidence raises issues of fact regarding defendants' negligence that need to be resolved at trial. She also claims that if her separate spoliation motion is granted, this motion must be denied.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to

determine whether such issues exist. *See, Barr v County of Albany*, 50 NY2d 247 (1980); *Miceli v Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.”

Initially, the Court, in a separate decision and order dated May 10, 2004, granted plaintiff’s motion for an order, inter alia, striking the answer of defendants as a sanction for their spoliation of critical evidence, i.e. their destruction of the metal object and maintenance records, to the extent that defendants are precluded from offering evidence on the issues of ownership of the metal object and the creation of the dangerous condition in the roadway. Consequently, the branches of the instant summary judgment motion based upon plaintiff’s inability to prove defendants’ ownership and creation of the dangerous condition are rendered moot. However, the court notes that plaintiff has submitted sufficient evidence, in the form of her deposition testimony, that one of the operators of defendants’ tow trucks admitted to her that the metal object fell from his truck. Thus, raising an issue of defendants’ ownership of the metal object and having created the dangerous condition. *See, Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246 (1st Dept 2002); *Rosario v Benmergui*, _ AD2d_, 2004 N.Y. App. Div. Lexis 4763 (1st Dept 2004.) Additionally, defendants’ claim that the Administrative Judge’s decision is dispositive of the liability issue is mistaken. Plaintiff was not present at the hearing and she was not given a fair opportunity to appear. Defendants had notice of plaintiff’s representation on this matter and failed to notify her through her attorney. Instead, they chose to send a notice to plaintiff’s address indicated on her motor vehicle license. A manner not calculated to ensure proper notice.

Left for the court to consider is defendants claim that plaintiff was the sole cause of this accident. Defendants claim that plaintiff, confronted with a metal object on the roadway should have been able to evade the object by doing more than slamming on her brakes. According to defendants, plaintiff had sufficient time to take evasive action and since there were no cars blocking her from doing so, her failure to do so was the proximate cause of her accident. Plaintiff opposes this motion and refers to deposition testimony that indicates there was very little time for her to take actions after seeing the metal object in the road. This conflicting testimony raises issues of facts as to whether plaintiff acted reasonably under the circumstances and could not avoid the dangerous condition allegedly created by defendants. *See generally, Pawlukiewicz v Boisson*, 275 AD2d 446 (2d Dept 2000.)

The cross-motion by for an order permitting plaintiff to amend the summons and complaint by adding an additional named defendant, Andrew McMillan, and amending the caption to so reflect is granted. It is well-settled that leave to amend pleadings is freely given

"absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983.)

However, such motion should be denied if the substance of the proposed pleading lacks merit. *See, Posillico v Laquila Construction, Inc.*, 265 AD2d 394, (2d Dept 1999.) In the instant case, plaintiff claims that it was not until the deposition of defendant Bernard Drexel that she became aware of the name of the person operating the other tow truck that was at the scene of the accident. Defendants oppose this motion claiming the plaintiff cannot add another party at this late date since they could have done so earlier and it will prejudice their summary judgment motion. Since the action already involves a named driver of defendant Jamaica Towing, the naming of the other defendant tow truck operator will be no additional burden to defendants defense.

Plaintiff shall serve and file with the court, the amended complaint and supplemental summons, with an amended caption in the form proposed in the moving papers within thirty days of the entry of this order. Service upon defendants shall be pursuant to Article 3 of the CPLR.

DATED: May 7, 2004

ORIN R. KITZES, J.S.C.