

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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ALVARO VIERA, JANETH VIERA, and NICOLE COBO Index No. 22183/1999  
an infant, by her mother and natural Motion Date 03/29/05  
guardian, JANETH VIERA Motion Cal. No. 18  
Plaintiffs,  
- against -

LEXINGTON LEASING CO., THOMAS SETTEL, BOO  
BOO KITTY HACK CORP., SWARA HAZORRIA,  
MOHAMMED RAFIQZADAH and ZABEHULLAH KAKER,  
Defendants.

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The following papers numbered 1 to 14 read on this motion by  
defendants LEXINGTON LEASING CO., and THOMAS SETTEL for an order  
granting summary judgment to that defendant dismissing plaintiffs'  
complaint and dismissing the cross-claims against it based upon the  
defense of the emergency doctrine, and based upon the plaintiffs'  
failure to meet the "serious injury" threshold under Insurance Law  
§5102(d), and also move to strike the plaintiffs' note of issue and  
certificate of readiness for failure to produce one of the  
plaintiffs for an Independent Medical Examination.

	<u>Papers</u> <u>Numbered</u>
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Upon the foregoing papers it is **ORDERED** that the motion is  
determined as follows:

Facts

This personal injury action arose out of a three-car  
automobile accident that occurred on January 3, 1999, on the Grand

Central Parkway in Queens County. The plaintiffs were passengers in the second vehicle driven by defendant THOMAS SETTEL, (hereinafter "Settel"). Apparently, the first vehicle had spun into the guardrail, and its driver had gotten out of the vehicle, when defendant Settel lost control of his vehicle, operated in the same direction as vehicle one, struck the first vehicle, and was then in turn struck by the third vehicle. Defendants LEXINGTON LEASING CO., and THOMAS SETTEL, (collectively hereinafter known as "Settel"), move for summary judgment based upon the defense of the emergency doctrine, and based upon the plaintiffs' failure to meet the "serious injury" threshold under Insurance Law §5102(d), and also move to strike the plaintiffs' note of issue and certificate of readiness for failure to produce one of the plaintiffs for an Independent Medical Examination.

#### Standard for Summary Judgment

On a motion for summary judgment, parties must lay bare their proofs in non-hearsay form (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). It is axiomatic that "the party opposing the motion must submit sufficient evidence, in admissible form, to establish that there is a triable issue (*Zoldas v. Louise Cab Corp.*, 108 A.D.2d 378, 383 [1<sup>st</sup> Dept. 1985]) or to explain why a proper tender of proof is not being made (*Zuckerman v. City of New York*, *supra*.)

#### Emergency Doctrine

The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance not of his or her own making, which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be held negligent if the actions taken are reasonable and prudent in the emergency context, even if it later appears that the actor made a wrong decision, provided the actor has not created the emergency (see, *Caristo v. Sanzone*, 96 N.Y.2d 172, 174 [2001]; *Rivera v. New York City Tr. Auth.*, 77 N.Y.2d 322, 327 [1991]; see also, *Kuci v. Manhattan & Bronx Surface Tr. Operating Auth.*, 88 N.Y.2d 923 [1996]; *Pawlukiewicz v. Boisson*, 275 A.D.2d 446 [2d Dept. 2000]). The essence of the emergency doctrine is that, where a sudden and unexpected circumstance leaves a person without time to contemplate or weigh alternative courses of action, that person cannot reasonably be held to the standard of care required of one

who has had a full opportunity to reflect, and therefore should not be found negligent unless the course chosen was unreasonable or imprudent in light of the emergent circumstances (see, *Bello v. Transit Auth.*, 12 A.D.3d 58, 60 [2d Dept. 2004]; *Amaro v. City of New York*, 40 N.Y.2d 30, 36 [1976]). "This is not to say that an emergency automatically absolves one from liability for his conduct. The standard then still remains that of a reasonable man under the given circumstances, except that the circumstances have changed" (*Ferrer v. Harris*, 55 N.Y.2d 285, 293 [1982]).

Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact, (see, *Morgan v. Ski Roundtop*, 290 A.D.2d 618 [3d Dept. 2002]; *Cathey v. Gartner*, 15 A.D.3d 435 [2d Dept. 2005]; *Takle v. N.Y. City Transit Auth.*, 14 A.D.3d 608 [2d Dept. 2005]; *Tseytlina v. N.Y. City Transit Auth.*, 12 A.D.3d 590 [2d Dept. 2004]), they may, in appropriate circumstances, be determined as a matter of law.

Courts have summarily absolved defendants of liability within the context of an emergency situation, where, for example, a defendant attempted to avoid two vehicles which were spinning out of control, (see, *Wenz v. Shafer*, 293 A.D.2d 742 [2d Dept. 2002]), where an emergency stop was made by a bus operator only after distressed and panicking passengers urgently told the driver that a man had left a bomb on the bus, (see, *Bello v. Transit Auth.*, 12 A.D.3d 58 [2d Dept. 2004]), where a bus operator was forced to brake suddenly to avoid colliding with a vehicle that suddenly drove in front of the bus, (see, *Roviello v. Schoolman Transp. Sys.*, 10 A.D.3d 356 [2d Dept. 2004]; *Rivas v. Metropolitan Suburban Bus Auth.*, 203 A.D.2d 349 [2d Dept. 1994]), where a vehicle crashed into the wall of a highway, and suddenly came to rest blocking two traffic lanes, including the defendant's (see, *Garcia v. Prado*, 15 A.D.3d 347 [2d Dept. 2005]), or where another vehicle suddenly crosses over into the defendant's lane, (see, *Guevara v. Zaharakis*, 303 A.D.2d 555 [2d Dept. 2003]).

In addition, it is well settled that, under the emergency doctrine, "a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic" (*Huggins v. Figueroa*, 305 A.D.2d 460, 461 [2d Dept., 2003], citing *Bentley v. Moore*, 251 A.D.2d 612, 613 [1998]). Thus, there is a plethora of appellate authority for the

proposition that summary judgment lies in cases where the defendant reacts to avoid a car which suddenly crosses over into opposing traffic (see, e.g., *Lyons v. Rumpler*, 254 A.D.2d 261 [2d Dept. 1998]; *Huggins v. Figueroa*, 305 A.D.2d 460 [2d Dept. 2003]; *Eichenwald v. Chaudhry*, 2005 N.Y. App. Div. LEXIS 3888 [2d Dept. 2005]; *Foster v. Sanchez*, 792 N.Y.S.2d 579 [2d Dept. 2005]; *Pawlukiewicz v. Boisson, supra*; *Stoebe v. Norton*, 278 A.D.2d 484 [2d Dept. 2000]; *Coss v. Sunnydale Farms, Inc.*, 268 A.D.2d 499 [2d Dept. 2000]; *Turner v. Mongitore*, 274 A.D.2d 512 [2d Dept. 2000]).

By contrast, a situation in which the emergency is one of the defendant's own making, or caused by the defendant's own actions, will not be held to be a qualifying emergency for purposes of invoking the emergency doctrine. This occurs, for example, where the defendant fails to maintain a safe distance between his/her own vehicle and the vehicle ahead of him/her (see, V.T.L. §1129[a]; *Burke v. Kreger Truck Renting Co.*, 272 A.D.2d 494 [2d Dept. 2000]; *Pappas v. Opitz*, 262 A.D.2d 471 [2d Dept. 1999]; *Johnston v. El-Deiry*, 230 A.D.2d 715 [2d Dept. 1996]; *Dawkins v. Craig*, 216 A.D.2d 436 [2d Dept. 1995]), where the defendant fails to be aware of potential hazards presented by traffic conditions, including stoppages caused by accidents up ahead, (see, *Cascio v. Metz*, 305 A.D.2d 354, 355 [2d Dept. 2003]), or where the defendant simply strikes a completely-stopped vehicle in the rear (see, e.g., *Campanella v. Moore*, 266 A.D.2d 423, 424 [2d Dept. 1999]; *Bournazos v. Malfitano*, 275 A.D.2d 437 [2d Dept. 2000]).

Moreover, as a general proposition, weather and roadway conditions have been regarded as foreseeable and capable of being anticipated, and have, as a result, been held to be removed from the context of the emergency situation. The Court of Appeals, for example, has held that, when a defendant has an admitted knowledge of worsening weather conditions, where, at the time of the accident the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours, the presence of ice and slippery road conditions at the location of the accident cannot be deemed a sudden, unforeseen, and unexpected emergency (see, *Caristo v. Sanzone*, 96 N.Y.2d 172, 175 [2001][*Rosenblatt and Smith, JJ., dissenting*]).

Appellate tribunals in this department have followed suit, applying the holding in *Caristo v. Sanzone, supra*, in a myriad of cases, holding that "[a]n emergency instruction should not be

given where, as here, the defendant driver should reasonably have anticipated and been prepared to deal with the situation with which [he] was confronted" (*Muye v. Liben*, 282 A.D.2d 661 [2d Dept. 2001], citing *Pincus v. Cohen*, 198 A.D.2d 405, 406 [2d Dept. 1993]; see also, *Cascio v. Metz*, 305 A.D.2d 354 [2d Dept. 2003]; *Lamuraglia v. N.Y. City Transit Auth.*, 299 A.D.2d 321 [2d Dept. 2002]). Thus, wet, slippery, or icy roadway conditions have been held not to be emergencies, since they should be anticipated and dealt with by defendant driver, (see, *Marsicano v. Dealer Storage Corp.*, 8 A.D.3d 451 [2d Dept. 2004]; *Bellantone v. Toddy Taxi, Inc.*, 307 A.D.2d 979 [2d Dept. 2003]; *Gadon v. Oliva*, 294 A.D.2d 397 [2d Dept. 2002]; *Muye v. Liben*, 282 A.D.2d 661 [2d Dept. 2001]; *Pincus v. Cohen*, 198 A.D.2d 405 [2d Dept. 1993]).

Applying the above foundation principles of law to the facts at bar mandates the conclusion that the within situation was not a qualifying emergency within the context of the emergency doctrine. Defendant Settel was aware of the existing weather conditions. He was traveling around a curve on slippery, icy weather conditions. He struck a stopped vehicle which was disabled, and whose driver had already exited the vehicle. He first saw the disabled vehicle when it was approximately three (3) car-lengths away. Moreover, the police accident report, which is admissible (see, *Guevara v. Zaharakis, supra*), indicates that the defendant, by his own admission, "... lost control of [his] car and hit the taxi that was blocking part of my lane." Thus, defendant Settel has failed to establish, as a matter of law, through admissible evidence: (a) that the co-defendant's disabled vehicle suddenly spun into the path of his vehicle, leaving him little or no time to react (see, *Garcia v. Prado, supra*), (b) that the emergency was not of his making, because he was free from negligence as a matter of law by maintaining a safe distance and speed given the then existing roadway and weather conditions (see, *Caristo v. Sanzone, supra*; *Cascio v. Metz, supra*), and (c) that the weather and roadway conditions were unanticipated and unforeseeable. Even were this court to find that this scenario, as alleged, constitutes a qualifying emergency situation, there are issues of fact as to the reasonableness of defendant Settel's actions under the attendant circumstances which preclude an award of summary judgment.

Accordingly, that branch of Settel's motion seeking summary judgment as to liability based upon the defense of the emergency

doctrine is denied in all respects.

### "Serious Injury" Threshold

Likewise, the defendants failed to make a *prima facie* showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d); *see, Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Plaintiffs' Bill of Particulars alleges that plaintiff Alvaro Viera sustained injuries to the cervical and lumbosacral spine, head, right wrist and arm, plaintiff Janeth Viera allegedly sustained injuries to the cervical, thoracic, and lumbosacral spine and head, and plaintiff Nicole Cobo allegedly sustained injury to the cervical and lumbosacral spine. The defendants' single examining physician, neurologist Burton S. Diamond, M.D., concluded in his affirmed reports of his evaluation of plaintiffs Alvaro and Janeth Viera, dated May 25, 2004, that Alvaro had "cervical sprain, resolved," and that Janeth had "cervical and lumbar sprain, resolved," yet failed to set forth any objective tests which he conducted in order to justify those clinical findings (*see, Black v. Robinson*, 305 A.D.2d 438 [2d Dept. 2003]). Dr. Diamond also failed to set forth any findings with respect to the lumbar or cervical spine, head, or wrist (*see, Mendolia v. Harris*, 791 N.Y.S.2d 654 [2d Dept. 2005]; *Black v. Robinson, supra*; *Zavala v. DeSantis*, 1 A.D.3d 354 [2d Dept. 2003]; *Gamberg v. Romeo*, 289 A.D.2d 525 [2d Dept. 2001]), or to address all of the plaintiffs' alleged injuries with findings based upon objective testing. In addition, defendants' failed to provide any medical evaluation for plaintiff Nicole Cobo, and, thus, have likewise failed to make a *prima facie* showing that she did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Under these circumstances, the court need not consider the sufficiency or insufficiency of the plaintiff's opposition papers (*see, Barrett v. Jeannot*, 2005 N.Y. App. Div. LEXIS 5601 [2d Dept. 2005]; *Rich-Wing v. Baboolal*, 2005 N.Y. App. Div. LEXIS 5654 [2d Dept. 2005]).

### Striking Plaintiffs' Note of Issue

Defendant further moves for an order striking the plaintiffs' note of issue and certificate of readiness, solely premised upon the failure of plaintiff Nicole Cobo to appear for an Independent Medical Examination ("IME").

Plaintiffs filed their note of issue and certificate of readiness in this matter on or about October 28, 2004. At no time

from October 28, 2004 until the instant application was filed in January, 2005, (over two months), did counsel move to strike the plaintiffs' note of issue on the ground of outstanding discovery.

After the filing of a note of issue, there are two separate and distinct methods to obtain further disclosure (*see, Audiovox Corp. v. Benyamini*, 265 A.D.2d 135 [2d Dept. 2000]).

The first permits a court, in its discretion, to grant permission to conduct additional discovery after the filing of a note of issue and certificate of readiness, where the moving party demonstrates that "unusual or unanticipated circumstances" developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice. (22 N.Y.C.R.R. 202.21 [d]; *see, James v. N.Y. City Transit Auth.*, 294 A.D.2d 471 [2d Dept. 2002]; *Karakostas v. Avis Rent A Car Sys.*, 306 A.D.2d 381 [2d Dept. 2003]). In the instant application, counsel for Settel states that "[w]e have just come to learn that [Nicole Cobo] missed the IME" (affirmation of Lynne B. Prommersberger, Esq. at paragraph 45). This is belied by the copies of letters annexed to movants' motion papers, which indicate that, as early as May, 2004, defendants' counsel knew, or should have known, that the subject IME was not held and moved timely to compel the required disclosure. It is the responsibility of defendants' counsel, not that of plaintiffs' counsel or the court, to monitor the receipt of mandated disclosure. Thus, the court finds that the defendants have failed to establish that "unusual or unanticipated circumstances" developed subsequent to the filing of plaintiffs' note of issue to warrant the exercise of its discretion in this regard (*see, Jacques v. City of New York*, 7 A.D.3d 576 [2d Dept. 2003]; *Rodriguez v. Sau Wo Lau*, 298 A.D.2d 376 [2d Dept. 2002]).

The second, pursuant to 22 N.Y.C.R.R. §202.21(e), provides, in pertinent part: "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." Defendants' counsel failed to move timely to compel the outstanding disclosure, (*see, e.g., Costanza v. Skyline Towers 5*, 8 A.D.3d 524 [2d Dept. 2004]; *Lelekakis v. Kamamis*, 8 A.D.3d 629 [2d Dept. 2004]), and, for the aforementioned reasons, the court finds counsel's excuse unavailing, and contradicted by the evidence submitted.

Finally, it is well-settled that, before resorting to the use

of court intervention, it is incumbent upon the movant to undertake efforts between herself and the non-disclosing party to resolve the discovery dispute, and to submit an "affirmation of good faith" delineating her attempts to confer with counsel for the opposing party(see, 22 N.Y.C.R.R. §202.7 [a],[c]; *Romero v. Korn*, 236 A.D.2d 598 [2d Dept. 1997]; *Fanelli v. Fanelli*, 296 A.D.2d 373 [2d Dept. 2002]; *Diel v. Rosenfeld*, 784 N.Y.S.2d 379 [2d Dept. 2004]). Movants' counsel failed to submit the required affirmation, or to demonstrate that she ever actually conferred with the opposing party in a good faith effort to resolve the issues raised by the motion, or that any of the issues therein were actually discussed, as required by 22 N.Y.C.R.R. §202.7 [a],[c]. Indeed, the record indicates to the contrary, that had she timely requested the IME, it would have been agreed to by plaintiffs' counsel.

The drastic remedy of striking a pleading or dismissing the complaint pursuant to C.P.L.R. §3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith. Only where a party disobeys a court order and by their conduct frustrates disclosure, is dismissal within the sound discretion of the trial court (see, *Ave. C Constr. v. Gassner*, 306 A.D.2d 506 [2d Dept. 2003]; *Cronin v. Perry*, 269 AD2d 351 [2d Dept. 2000]). Defendants have not met their burden in this regard. Instead, the record indicates that, by their inaction, and failure to follow the procedures set forth above, they have caused the situation complained of, and waived their right to the disclosure they now belatedly seek.

### Conclusion

Accordingly, it is,

**ORDERED** that the motion by defendants LEXINGTON LEASING CO. and THOMAS SETTEL for an order granting the defendants summary judgment on liability and dismissing the plaintiffs' complaint and all cross-claims based upon the emergency doctrine is denied in all respects; and it is further,

**ORDERED** that the defendants' motion to dismiss based upon the plaintiffs' failure to meet the "serious injury" threshold under Insurance Law §5102(d) is similarly denied in all respects; and it is further

**ORDERED** that the defendants' motion to strike the plaintiffs' note of issue and certificate of readiness

or to compel further disclosure is denied in all respects; and it is further,

**ORDERED** that the defendants' motion is otherwise denied in all respects.

Dated: May 26, 2005

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***JANICE A. TAYLOR, J.S.C.***

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