SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TROY MEISELBACH,

Plaintiff,

- against -

NEW ENGLAND MOTOR FREIGHT, INC. and FRANCISCO ESEIZA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.:3171/06
Motion Seq. No.: 04
Motion Date: 11/04/10

FRANCISCO J. ESEIZA and MARGARET ESEIZA,

Plaintiffs,

- against -

PHOENIX TRANSPORT CORP. d/b/a EMERGENCY AMBULANCE SERVICE INC. and TROY A. MEISELBACH,

Defendants.

Index No.: 15117/06
ACTION NO. 02

KATHRYN STADELMAN,

Plaintiff,

- against -

NEW ENGLAND MOTOR FREIGHT, INC. and FRANCISCO ESEIZA,

Defendants.

Index No.: 6246/09
ACTION NO. 03

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmations and Exhibits	1
Affirmation in Support	2
Affirmation in Opposition and Exhibits	3
Affirmation in Opposition	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

This motion by plaintiff Troy Meiselbach ("Meiselbach") for an order pursuant to CPLR § 3211(e) dismissing defendant New England Motor Freight, Inc.'s First, Third, Sixth and Eighth Affirmative Defenses and an order granting plaintiff Meiselbach summary judgment holding defendant New England Motor Freight, Inc. ninety percent (90%) liable is hereby denied.

Plaintiffs in the first and third actions, Meiselbach and Kathryn Stadelman ("Stadelman"), seek to recover damages for personal injuries allegedly sustained in a motor vehicle accident on December 1, 2005. Plaintiff Meiselbach seeks dismissal of defendant New England Motor Freight Inc.'s First Affirmative Defense sounding in comparative negligence, its Third Affirmative Defense sounding in the doctrine of sudden emergency, its Sixth Affirmative Defense pursuant to Insurance Law §§ 5102(d) and 5104(a) and its Eighth Affirmative Defense sounding in Intervening Cause. He also seeks summary judgment against defendant New England Motor Freight Inc., holding it ninety percent (90%) liable. He seeks to collaterally estop defendant New England Motor Freight Inc. from re-litigating the determination of its liability which was made in arbitration. Plaintiff Stadelman has joined in those requests.

Plaintiff Stadelman's request for relief is denied pursuant to CPLR §§ 2214 and 2215 as no motion has been made.

Contrary to defendant New England Motor Freight Inc.'s argument, standing alone,

plaintiff Meiselbach's failure to accurately cite the provision(s) of the CPLR applicable to the relief he seeks does not require denial of his motion. "It is undoubtedly 'better practice to specify the appropriate section or rule under which a motion is made and it may be necessary so that the other party is put on notice of the requirement applicable to one who opposes a motion for summary judgment that [it] bare and reveal [its] proofs.' " *Stone v. City of New York*, 16 Misc.3d 1134(A), 847 N.Y.S.2d 905 (Kings County Supreme Ct. 2007) *quoting Bernstein's Duck Farm v. Town of Brookhaven*, 21 Misc.2d 953, 71 N.Y.S.2d 311 (Suffolk County Supreme Ct. 1947), *citing Rubin v. Rubin*, 72 A.D.2d 536, 421 N.Y.S.2d 68 (1st Dept. 1979). "But where, as here, there is no misunderstanding or prejudice, 'a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides." *Stone City v. City of New York, supra, citing Frankel v. Stavsky*, 40 A.D.3d 918, 838 N.Y.S.2d 90 (2d Dept. 2007); *HCE Associates v. 3000 Watermill Lane Realty Corp.*, 173 A.D.2d 774, 570 N.Y.S.2d 642 (2^{d} Dept. 1991); *Pace v. Perk*, 81 A.D.2d 444, 440 N.Y.S.2d 710 (2d Dept. 1981). This is particularly so here since plaintiff Meiselbach included the phrase "and for such other and further relief as to this court seems just and proper" in its request for relief.

Plaintiff Meiselbach has moved pursuant to CPLR § 3211(e). Since an Answer has been filed, CPLR § 3211(e) does not apply here. However, relief pursuant to CPLR § 3211(a)(5) and (b) dismissing defendant New England Motor Freight Inc.'s Affirmative Defenses remains available.

As for plaintiff Meiselbach's request for summary judgment, this case was certified as trial ready by order dated December 6, 2007 and summary judgment motions were required to be made within sixty (60) days. CPLR § 3212(a) requires a party moving for summary judgment

outside the statutory or court-imposed time limit to show good cause for the delay. *See Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004). Plaintiff Meiselbach has not cited CPLR § 3212, nor has he cited CPLR §3211(c), which permits the court to treat a CPLR motion as one for summary judgment upon notice to the parties. Nevertheless, whether plaintiff Meiselbach's motion with regard to defendant New England Motor Freight Inc.'s liability is considered pursuant to CPLR § 3211(c) or CPLR § 3212, it is untimely. "To hold that CPLR 3211(c) motion may be made beyond the [set time limit] would defeat the purpose of CPLR 3212(a) and would undermine the Court of Appeals holding in *Brill v. City of New York*, [*supra*]." *Neil v. New York City Housing Authority*, 15 Misc.3d 1115(A), 839 N.Y.S.2d 434 (Kings County Supreme Ct. 2007), *aff'd* 48 A.D.3d 767, 853 N.Y.S.2d 567 (2d Dept. 2008). *See also* 166 Siegel's Practice Review 1, *Can Motion to Dismiss Under CPLR 3211 Circumvent the Time Limit of the Motion for Summary Judgment under CPLR 3212? (Oct. 2005).* Plaintiff Meiselbach's motion is untimely.

The arbitration awards on which plaintiff Meiselbach relies in seeking to collaterally estop defendant New England Motor Freight Inc. from advancing its First, Third, Sixth and Eighth Affirmative Defenses and from litigating its liability here were rendered on July 26, 2007. However, plaintiff Meiselbach has established good cause for his delay in seeking summary relief premised upon his recent discovery of the arbitration decision. Nevertheless, his application must be denied because he may not rely on the arbitration decisions to collaterally estop defendant New England Motor Freight, Inc..

Plaintiffs Meiselbach and Stadelman's employer, Empire State Association, went to arbitration pursuant to Section 5105 of the Insurance Law to determine defendant New England Motor Freight Inc.'s liability for their employees plaintiffs Meiselbach and Stadelman's

personal injury payments. The arbitrator found that Empire State sustained its burden of proving that defendant New England Motor Freight Inc. was ninety percent (90%) comparatively negligent. The arbitrator specifically found that there was no indication that the siren was an issue and that defendant New England Motor Freight Inc.'s driver turned left and failed to yield the right of way. As a consequence of these decisions, defendant New England Motor Freight Inc. paid Empire State Transportation, via checks dated September 20, 2007, $45,000.00 for plaintiff Meiselbach's personal injury payments and $5,421.93 for plaintiff Kathryn Stadelman's personal injury payments.

The underlying arbitration pursuant to Insurance Law § 5105 was mandatory and was held pursuant to Part 68 of 11 NYCRR before Arbitration Forums, Inc. The agreed upon arbitration rules provided "[o]ther than proceedings before [Arbitration Forums, Inc.] the decision of an arbitrator has no effect in other claims or suits arising out of the same accident or occurrence." "Although it is well settled that the doctrine of collateral estoppel applies to arbitration awards, it is also true that 'resolution of disputes by arbitration is grounded in agreement of the parties.' " *State Farm Ins. Co. v. Smith*, 277 A.D.2d 390, 717 N.Y.S.2d 210 (2d Dept. 2000), *citing Matter of American Ins. Co. v. Messenger*, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1977), *quoting Sullivan County v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 397 N.Y.S.2d 371 (1977). "Thus, the parties are free to limit the scope and effect of an arbitration agreement by formulating their own 'contractual restrictions on carry-over estoppel effect.' " *State Farm Ins. Co. v. Smith*, *supra* at 391, *quoting Matter of American Ins. Co. v. Messenger*, *supra* at 193-194. Accordingly, plaintiff Meiselbach's motion must be denied with regard to dismissal of the First, Third and Eighth Affirmative Defenses as well as declaring defendant New England Motor Freight Inc.'s liability. The parties to the arbitration clearly limited the applicability of

the decisions on which plaintiff Meiselbach relies. *See State Farm Insurance Company v. Smith, supra. See also Interboro Ins. Co. v. Reinzo*, 54 A.D.3d 675, 863 N.Y.S.2d 483 (2d Dept. 2008); *Kerins v. Prudential Property & Cas.*, 185 A.D.2d 403, 585 N.Y.S.2d 637 (3d Dept. 1992).

As for the Sixth Affirmative Defense, plaintiff Meiselbach has not established that he suffered a serious injury. The hospital report he submitted is not in admissible form.

Accordingly, plaintiff Meiselbach's motion is hereby denied in its entirety.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part at 100 Supreme Court Drive, Mineola, New York, on January 13, 2011 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
December 14, 2010