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| <b>Lee v Shah</b>                                                                                                                                                                                                                |
| 2012 NY Slip Op 32276(U)                                                                                                                                                                                                         |
| July 25, 2012                                                                                                                                                                                                                    |
| Sup Ct, Nassau County                                                                                                                                                                                                            |
| Docket Number: 16293/10                                                                                                                                                                                                          |
| Judge: Karen V. Murphy                                                                                                                                                                                                           |
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 11 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy  
Justice of the Supreme Court**

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**SAI I. LEE,**

**Plaintiff,**

**-against-**

**TAQIYYAH K. SHAH, JEANA R. GRIFFIN and  
"JOHN DOE," fictitious name, true name unknown,**

**Defendants.**

\_\_\_\_\_ x

**Index No. 16293/10**

**Motion Submitted: 6/1/12  
Motion Sequence: 001**

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X  
 Answering Papers.....X  
 Reply.....  
 Briefs: Plaintiff's/Petitioner's.....  
       Defendant's/Respondent's.....

Plaintiff moves this Court for an Order permitting plaintiff to amend the summons and complaint in this matter to name and include allegations against Earl Ray, as the operator of the motor vehicle alleged to have caused the motor vehicle accident giving rise to this action. Plaintiff also requests that, upon amending the summons and complaint to include Earl Ray, the Court grant summary judgment against the defendants on the issue of liability for the subject accident. Defendants Shah and Griffin oppose that branch of plaintiff's motion seeking summary judgment on the issue of liability.

The accident giving rise to this action occurred on February 3, 2010.

The parties failed to comply with this Court's Preliminary Conference Order issued on April 18, 2011, specifically with respect to the holding of depositions.

Defendants failed to comply with this Court's Compliance Conference Order dated August 16, 2011, which specifically directed that depositions be held on or before September 16, 2011. Plaintiff's deposition was held on September 16, 2011.

At a January 23, 2012 status conference, the Court was advised that defendant Shah was likely the driver of the vehicle that made contact with plaintiff's vehicle. At a February 14, 2012 status conference, the Court was advised that the deposition of the driver would be held on February 27, 2012. Ms. Shah's deposition was indeed held on February 27<sup>th</sup>, but she testified that she was not the driver of the vehicle.

This matter was certified for trial on March 5, 2012, and plaintiff filed a note of issue on May 30, 2012.

In support of this motion, plaintiff has provided, *inter alia*, his own deposition testimony, as well as that of defendant Shah.

Plaintiff's deposition testimony establishes that the driver of the vehicle that allegedly rear-ended him was a male.

At the deposition of defendant Shah held on February 27, 2012, Ms. Shah testified that she is the registrant of the vehicle that made contact with the rear of plaintiff's vehicle; she provided Earl Ray's name, address, and telephone number, and she further testified that she was not in the car at the time of the accident. Earl Ray was driving her car, with her permission. Ms. Shah also testified that Earl Ray had a male passenger in the car at the time of the accident, and she provided his first and last name. Thus, the evidence submitted sufficiently establishes that Earl Ray was the driver of the vehicle that made contact with the rear of plaintiff's vehicle.

Leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (*CPLR § 3025, Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 AD2d 310 [2d Dept., 2000]; *Sewkarran v. DeBellis*, 11 AD3d 44 [2d Dept 2004]), and unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit (*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 AD.d 809, 811 [2d Dept 2008] citing *Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

Plaintiff's application is granted as to the proposed amendment to add Earl Ray as a defendant in this action, and to include allegations against him as specified in the proposed supplemental summons and second amended verified complaint.

Accordingly, the caption of this action identified by Index No. 16293/2010 is amended as follows:

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**SAI I. LEE,**

**Plaintiff,**

**-against-**

**TAQIYYAH K. SHAH, JEANA R. GRIFFIN,  
"JOHN DOE," fictitious name, true name unknown,  
and EARL RAY,**

**Defendants.**

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Plaintiff shall serve the supplemental summons and second amended verified complaint upon defendant Earl Ray in accordance with CPLR § 308, and counsel for defendants Shah and Griffin, within 120 days of filing the supplemental summons and second amended verified complaint with the Nassau County Clerk, which filing shall be accomplished on or before August 31, 2012 (*CPLR §306-b*).<sup>1</sup>

The Court now turns to that branch of plaintiff's motion which seeks summary judgment against defendants.

Inasmuch as Earl Ray has just been added as a defendant in this matter, and there

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<sup>1</sup>The proposed second amended verified complaint contained in plaintiff's Exhibit I is not verified by either plaintiff or counsel. The second amended complaint to be served upon all defendants must be verified by plaintiff, as was the original complaint and Bill of Particulars. Plaintiff resides in Nassau County, New York, and counsel's office is also located in Nassau County.

has been no deposition of Earl Ray, the Court finds that this summary judgment motion is premature. The motion for summary judgment is denied without prejudice to renewal after the completion of discovery (*See Ross v. Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 506, [1993]; *Cirincione v. Atlantic Hylan Corp.*, 57 AD3d 707, [2d Dept 2008]; *Colombini v. Westchester county Healthcare Corp.*, 24 AD3d 712 [2d Dept 2005]; *OK Petroleum Distribution Corp. v. Nassau/Suffolk Fuel Oil Corp.*, 17 AD3d 551 [2d Dept 2005]; *Rosa v. Colonial Transit, Inc.*, 276 AD2d 781 [2d Dept 2000]).

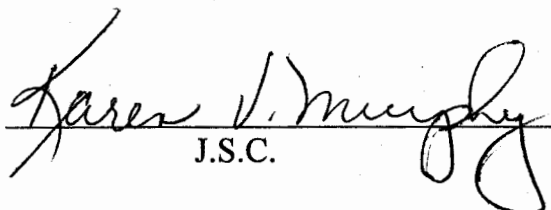
Accordingly, 22 NYCRR 202.21(e) provides that at any time, a court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect.

Based on the denial of plaintiff's summary judgment motion as premature, the Court finds that discovery proceedings are not complete in this matter. Thus, the Note of Issue and Certificate of Readiness are hereby vacated.

Counsel for all parties are directed to appear before the Court on September 19, 2012, at 9:30 a.m. for a status conference of this matter.

The foregoing constitutes the Order of this Court.

Dated: July 25, 2012  
Mineola, New York

  
J.S.C.

**ENTERED**  
AUG 02 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE