SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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Juana Reyes,

Plaintiff,

- against -

John Doe, an individual whose identity is currently unknown, A.B.C. Global Limo, and Lidia Urena,

Defendants.

----------X

Index No. 303093/2010

DECISION/ORDER

Present:
HON. LAURA G. DOUGLAS
J.S.C.

Plaintiff Juana Reyes' motion for an order: a) pursuant to CPLR 3126, striking defendant A.B.C. Global Limo's answer for willful failure to comply with the Preliminary Conference Order, dated October 18, 2010; b) pursuant to CPLR 3025, to amend the caption, summons and complaint in this matter to substitute "Keita Namfamady" for John Doe; and c) to set a date certain for the deposition of Keita Namfamady is decided as set forth below.

This is an action seeking monetary damages for personal injuries allegedly sustained by plaintiff, as a result of a motor vehicle accident, on or about July 4, 2008. According to the plaintiff's complaint, the motor vehicle accident occurred at or near 183rd Street and University Avenue, Bronx Count, at or about 9:30p.m.

In support of the plaintiff's motion for permission to amend the caption, summons and complaint in this matter to substitute "Keita Namfamady" for John Doe, moving counsel contends, in substance, that he first learned that proposed defendant "Keita Namfamady" was the driver of defendant A.B.C. Global Limo's ("A.B.C.") motor vehicle on or about May 22, 2012, at a pretrial conference. According to plaintiff's counsel, thereat, defendant A.B.C.'s counsel stated: a) that the driver of A.B.C.'s vehicle was finally located, and b) on or about May 18, 2012, that he had served plaintiff's counsel with a response to the prior combined demands and the directives of the Preliminary Conference Order, dated October 18, 2010. Prior to that time, moving counsel asserts he was "under the impression that defendant did not have the driver's name," based upon discovery. Hence, moving

counsel asserts that defendant's counsel willfully failed "to produce the name of their driver, who is a witness to the accident."

In contrast, defendant A.B.C.'s counsel argues, inter alia, that, though his "office could not stipulate to amend the [s]ummons and [c]omplaint to add Keita Namfamady since the Statute of Limitations had expired," because "the owner was a party and any recovery from this lawsuit would come from the owner's insurance policy, that there would be no prejudice" to plaintiff, if a non-party deposition of Keita Namfamady was held, without formally amending the pleadings.

In order for a claim asserted against a new defendant to relate-back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is untied in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought as well. Buran *v.* Coupal, 87 N.Y.2d 173, 178 (1995). The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the statute of limitations has expired. Cardamone *v.* Ricotta, 47 A.D.3d 659, 660 (2d Dept. 2008).

Turning to the merits of the motion, upon review of the record and applying these requirements to the facts of the case herein, this Court determines that the plaintiff has met his burden on all three prongs of the three-part test. The claims against the named defendant and the proposed defendant are based upon the same alleged motor vehicle accident. Further, for purposes of the Statute of Limitations, a defendant owner may be united in interest with a defendant driver. Rahi *v.* Sanelli, et al., 245 A.D.2d 13 (1st Dept. 1997); CPLR 203(b). Moreover, the proposed defendant driver of the motor vehicle would have had notice of the pending action, due to his relationship with defendant A.B.C. Global,

as he was its employee. Parenthetically, the Court notes that the police report lists, under the category for "driver" of the A.B.C. vehicle, that the person "left scene of accident." Therefore, under these circumstances, the policies under the Statute of Limitations and the relation-back doctrine do permit the plaintiff herein to commence an action against "Keita Namfamady." Therefore, the plaintiff's motion is granted to the extent of permitting him to serve an amended summons and complaint to substitute "Keita Namfamady" for John Doe, as a defendant, and to amend the caption accordingly, within thirty (30) days after service of copy of this order with notice of entry upon the defendants. The request for the deposition of the newly added defendant, namely "Keita Namfamady," shall take place at a mutually agreeable place, date and time, within sixty (60) days after service of the amended pleadings as indicated above. The answer of the defendant A.B.C. Global Limo is not stricken.

Accordingly, the motion is granted as stated herein.

This constitutes the decision and order of this Court.

DATED: 1-10-13

Bronx, New York

Hon. Laura G. Douglas, J.S.C.

JR

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

JUANA REYES,

Plaintiff,

-against-

JOHN DOE, an individual whose identity is currently unknown, A.B.C. GLOBAL LIMO, and LIDIA UREÑA,

Defendants.

----------X

NOTICE OF MOTION

INDEX NO. 303093/10

IA 27
8/13/12

MOTION BY: LAW OFFICES OF JESSE BARAB
Attorneys for Plaintiff
30 Park Circle
White Plains, New York 10603

PLACE, DATE & TIME: SUPREME COURT BRONX COUNTY
851 Grand Concourse
Bronx, New York 10451
Honorable Julia Rodriguez

Return Date: August 13, 2012 at 9:30 a.m.

RELIEF REQUESTED:

a) an Order, pursuant to CPLR §3126, striking Defendant A.B.C. Global Limo's answer for willful failure to comply with an order, or
b) an Order, pursuant to CPLR §3025 to amend the caption, summons and complaint to substitute "Keita Namfamady" for John Doe and
c) to schedule a certain date for Keita Namfamady's deposition
d) and for such other and further relief as this Court deems just and proper

SCA
CCDM

SUPPORTING PAPERS: Affirmation in Support of Law Offices of Jesse Barab and all papers and exhibits herein

ANSWERING AFFIDAVITS: Answering Affidavits, if any, are to be served no less than seven (7) days prior to the return date of this motion or any adjournments thereof.

Dated: New York, New York
July 4, 2012

Law Offices of Jesse Barab
Attorneys for the Plaintiff
JUANA REYES
30 Park Circle
White Plains, New York 10603
(212) 781-0633

To:
LAW OFFICES OF NANCY L. ISSERLIS
Attorney for Defendant
A.B.C. Global Limo Corp.
36-01 43rd Avenue
Long Island City, NY 11101
718-361-1514
Your File No.: B-22027

LAW OFFICES OF MICHAEL A. BARNETT
Attorneys for Defendant
Lidia Urena
Office and P.O. Address
1205 Franklin Avenue, Suite 335
Garden City, NY 11530
Tel. No.: (516) 294-6010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
JUANA REYES,

Plaintiff,

-against-

JOHN DOE, an individual whose identity is currently unknown, A.B.C. GLOBAL LIMO, and LIDIA UREÑA,

Defendants.
----------X

AFFIRMATION

INDEX NO. 303093/10

ALEXANDER PHENGSIAROUN, an attorney duly licensed to practice in the Courts of the State of New York hereby affirms the following under penalties of perjury:

1. That I am associated with the Law Offices of Jesse Barab, the attorneys of record for the Plaintiff, Juana Reyes in the above captioned action and as such am fully familiar with the facts and circumstamces of these cases.

2. I submit this Affirmation in support of the plaintiff's motion, pursuant to CPLR §3126 and §3025.

PROCEDURE HISTORY AND FACTS

3. The instant action was commenced by the filing of the Summons & Complaint at or about March 2010 and issue was joined at or about July 2010. See **Exhibit 1,** the Summons, Complaint, and Answers. Plaintiffs herein seeks to recover for personal injuries and damages stemming from an alleged July 4, 2008 automobile accident. According to the evidence presented to date, the incident took place at or near 183rd Street and University Avenue in Bronx, New York at or about 9:30 P.M.

4. The incident involved two automobiles; allegedy one motor vehicle owned by the defendant, Lidia Urena and the other vehicle owned by the defendant, A.B.C. Global Limo, Corp. and operated by the defendant, John Doe. Plaintiff, Juana Reyes was a passenger in the vehicle owned by the co-defendant, Lidia Urena. The vehicles were involved in an accident.

5. After the accident, it is alleged that A.B.C. Limo's driver got out of his car, took the other vehicles license plate that was on the ground as a result of the accident and left the scene. See **Exhibit 2**, Lidia Urena's deposition transcript, page 29.

6. Plaintiff responded to defendant's discovery demands at or about September 2010. In the responses, plaintiff also served her combined demands. Specifically, paragraph #7 stated **"[s]et forth the names and addresses of any witnesses to this occurrence."** See **Exhibit 3**.

7. A Preliminary Conference was held in this matter in the Supreme Court Bronx County on October 18, 2010. See **Exhibit 4**, the preliminary conference order. In pertinent part the order states that "all parties to exchange names and addresses of all witnesses, opposing parties' statements, and photographs....[i]f none, an affirmation to that effect shall be exchange." Id.

8. On or about December, 2010, plaintiff received responses from Law Offices of Nancy L. Isserlis, attorneys for A.B.C. Global Limo Corp, in response to the verified bill of particulars and combined demands. Another response was received at the same time responding to the preliminary conference order. See **Exhibit 5**, co-defendant's responses.

9. In both responses defendant stated under witnesses, "none other than those listed on the police report." Id. The police report does not list the driver or any other witness to this accident, it only contains the name of the A.B.C. Global Limo Corp. Under "driver," it states "left scene of accident." See **Exhibit 6**, the police report.

10. As a result of co-defendant's willful failure to produce the name of their driver, who is a witness to the accident, plaintiff was unable to hold a deposition of A.B.C. Global Limo's driver and a compliance conference was held on June 21, 2011. **Exhibit 4**, the compliance conference order.

11. Plaintiff under the impression that defendant did not have the driver's name pursuant to their prior response to plaintiff's bill of particulars and the preliminary conference order, filed the note of issue on November 29, 2011.

12. On or about April 11, 2012 and May 22, 2012 a pretrial conference was held in Bronx Supreme Court. During the latter date, counsel for A.B.C. Global Limo stated that the driver was finally located and that on or about May 18, 2012 they served plaintiff with it's response.

13. The response from co-defendant stated that **"[d]efendant is aware of the following witness who was the operator of the vehicle involved in the subject accident...KEITA NAMFAMADY, 1234 Boston Post Road, Apt. #5C, Bronx, NY 10456."** See **Exhibit 5**, co-defendant's responses.

14. During the same pre trial conference, the attorneys for all parties agreed to stipulate to have the driver substituted for the John Doe and to hold depositions on a certain date. We adjourned the matter to September to accommodate vacation schedules.

15. Soon thereafter, I sent the proposed stipulation to all parties substituting Mr. Namfamady for John Doe and setting a certain deposition date, however, after a conversation with Nancy L. Isserlis, Esq., she refused to sign same. A pretrial conference date is set for September 11, 2012.

WHETHER A.B.C. GLOBAL LIMO'S PLEADINGS SHOULD BE STRICKEN WHEN IT WILLFULLY, CONTUMACIOUSLY AND OBSTRUCTIVELY FAILED TO TIMELY RESPOND TO DISCOVERY DEMANDS

16. Pursuant to C.P.L.R. §3126, penalties for refusal to comply with order or to disclose:

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." Id.

17. In Arts4all v. Hancock, the Court of Appeals upheld an Appellate Division decision striking the pleadings where the parties offered no excuse for their repeated noncompliance with disclosure orders, and their conduct throughout litigation was evasive, obstructive, contumacious, dilatory, and such conduct was supported by the record. 12 N.Y.3d 846, 881 N.Y.S.2d 390, (Crt. App. 2009)

18. The Appellate Division has stated that willful and contumacious conduct can be inferred from repeated failures to comply with requests for document's and the court directives

to comply with request, over an extended period of time, together with contradictory and inconsistent excuses for it's failure to comply and upheld the trial court's order that strickened the appellant's answer pursuant to CPLR §3126. Pirro Group, LLC v. One Point St., 71 A.D.3d 654, 896 N.Y.S.2d 152, (2d Dept 2010), Bvam v. City of New York, 68 A.D.3d 798, 890 N.Y.S.2d 612, (2d Dept 2009), Maiorino v. City of New York, 39 A.D.3d 601, 834 N.Y.S.2d 272, (2d Dept 2007).

19. In other cases, the trial court has conditionally granted striking the pleadings. (See JOA v. Boulin, 2011 NY Slip Op 33303 (U), (Queens Sup. Crt. 2011), where defendant's answer shall be stricken unless defendant's appeared for depositions sixty days from the date of service of a copy of the order with notice of entry.)

20. Here, plaintiff demanded from defendant in combined demands to "[s]et forth the names and addresses of any witnesses to this occurrence," on September 2010. **Exhibit 3**. Defendant provided responses to the "combined demands" dated on December 2010 and stated under witnesses "none other than those listed on the police report."

21. A preliminary conference order was entered into on October 18, 2010 that ordered "[a]ll parties to exchange names and addresses of all witnesses, opposing parties' statements, and photographs...[i]f none, an affirmation to that effect shall be exchanged." **Exhibit 4**. On December 2010, a "response to the preliminary conference order" was received by plaintiff where again, defendant stated "none other than those listed on the police report" for witnesses. Exhibit 5.

22. Pursuant to court order, depositions of the parties, Juana Reyes and Lidia Urena were held on July 11, 2011. During the deposition of Lidia Urena:

Q. Your license plate fell off
A. Yes.

...

Q. He picked it up?
A. Yup
Q. Did he give it back to you?
A. No. He took it with him and then I had to go to the Motor Vehicle and get another one.
Mr. Barab: So, when you are taking to your client, you might want to get that thing back.
Mr. Pomerance: And give it to her? **Exhibit 2.**

23. Mr. Pomerance does not confirm that he does not know the identity of the driver, instead his immediate response is "[a]nd give it to her?" Id.

24. Plaintiff, being under the impression that defendant would answer the discovery responses in good faith and with the knowledge that the only party that was able to provide the driver information was in fact, the Law Offices of Nancy L. Isserlis, who had already told plaintiff in it's prior responses that there were none, filed it's note of issue on November 29, 2011.

25. On May 22, 2012, counsel for A.B.C. Global Limo stated to me during pre trial negotiations that they have just served our office with the driver information. **Exhibit 5**. By this time, however, the statute of limitations had already expired so we were unable to serve defendant driver and defendant A.B.C. Global Limo refused to stipulate the driver in.

26. Defendant's who represent A.B.C. Global Limo had in their exclusive possession driving records along with personnel and shift times. When our office requested witness information prior to the filing of the note of issue, we received "none...." **Exhibit 5**. Repeated requests to disclose the names of witnesses from the combined demands and preliminary conference order is evidence of Defendant's willfulness and contumacious behavior.

27. It is not incumbent on plaintiff to make a specific request for the name of the driver. A demand for "names and addresses of **any witnesses** to this occurrence" is sufficient;

the driver of the vehicle is a witness. Furthermore, the preliminary conference order is clear when it states that "[a]ll parties to exchange names and addresses of **all** witnesses...[i[f none, an affirmation to that effect shall be exchanged." **Exhibit 4.**

28. By defendant's own response, defendant acknowledges that the driver is a witness as the response states "[d]efendant is aware of the following **witness** who was the operator of the vehicle involved in the subject accident." **Exhibit 5.**

29. Importantly, defendant in bad faith, only provided this response after the statute of limitation had expired. Therefore, plaintiff is unable to serve defendant; defendant refuses to stipulate to substitute Keita Namfamady for the John Doe and is indicia that defendant is acting "obstructively" in this litigation.

30. Because defendant's conduct was evasive, obstructive and contumacious and defendant offers no excuse for the repeated non compliance with disclosure, which resulted in the production of the driver, after the statute of limitation had already expired, A.B.C. Global Limo's answer should be stricken. Arts4all v. Hancock, supra.

WHETHER THE RELATION BACK DOCTRINE IS PROPER WHEN THE CLAIM AROSE OUT OF THE SAME OCCURRENCE, THE PARTIES WERE UNITED IN INTEREST. AND THE NEW PARTY HAD NOTICE THAT HE WAS A NECESSARY PARTY IN THE LITIGATION

31. The Court of Appeals stated that "[t]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest' " Buran v. Coupal, 87 N.Y.2d 173, 638 N.Y.S.2d 405, (Crt. App 1995), C.P.L.R.§203. Poulard v. Papamihlopoulos, 254 A.D.2d 266, 678 N.Y.S.2d 383, (2d Dept 1998).

32. The three-part test in Brock v. Bua determines when the doctrine would permit the addition of a new party to relate back to an earlier pleading. 83 A.D.2d 61, 443 N.Y.S.2d 407, (2d Dept 1981).

33. Under this standard, in order for a claim against one defendant to relate back to claims asserted against another, the plaintiff must show that "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is `united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." Id.

34. In Poulard v. Papamihlopoulos, the plaintiff was struck by a vehicle owned by Adamandia Papmihlopoulos and operated by Stylianos Papas, who left the scene of the accident. 678 N.Y.S.2d 383, (2d Dept 1998). Action was commenced against the owner, and after the statute of limitations expired, the plaintiff moved to amend the summons and complaint to add the operator as a party defendant. Id. The Appellate Division reasoned that parties are united in interest when the "interest of the parties in the subject matter is such that they stand or fall together and that judgment against one will similarly affect the other." Id., see also Desiderio v. Rubin, 234 A.D.2d 581, 650 N.Y.S.2d 68, (2d Dept 1996).

35. The defendant's interests are united where one is vicariously liable for the acts of the others. Connel v. Hayden, 83 A.D.2d 30, 443 N.Y.S.2d 383, (2d Dept 1981). Pursuant to Vehicle and Traffic Law §388:

> "1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or

operating the same with the permission, express or implied, of such owner..." V.T.L §388

36. The Court of Appeals has stated that such liability "is derivative and is akin to that imposed on a master for the negligent acts of his servant under the doctrine of respondeat superior." Good Health Dairy Corp. v. Emery, 275 N.Y.14, (Crt. App. 1937).

37. As a result, the Appellate Division held that the owner and driver were united in interest; the Supreme Court properly granted the plaintiff's motion to amend the complaint to add the driver as a party defendant. Poulard v. Papamihlopoulos, 650 N.Y.S.2d 68, (2d Dept 1996).

38. The facts in Poulard, are almost identical to the subject litigation. In both cases, plaintiff initiated the lawsuit against the owner of the vehicle, the statute of limitations subsequently expired, and plaintiffs are now seeking to add the driver to the litigation. Therefore, here, Ms. Reyes must be allowed to substitute Keita Namfamady for the John Doe. Id., Buran v. Coupal, 638 N.Y.S.2d 405, (Crt. App 1995),

39. Taken in contrast with Davis v. Larhette, the Appellate Division applied the relation back doctrine to an employer employee situation and reversed the Supreme Court's decision. 39 A.D.3d 693, 834 N.Y.S.2d 280 (2d Dept 2007). Plaintiff sought leave to amend the complaint to include the defendant's employer after the statute of limitation had expired; the defendant was on a business trip when the accident occurred.

40. The Appellate Division reasoned that "[a]n employer is vicariously liable for its employees' torts under the theory of respondent superior if the acts were committed while the employee was acting with the scope of employment," and that defendant's business purpose alone launched the subject trip and was incidental to the furtherance of the employer's business

interest. Id. The Appellate Division reversed the Supreme Court's decision and plaintiff was granted motion for leave to serve a supplemental summons and amended complaint adding the employer as additional defendants by motion. Id.

41. Similarly, the claims against the owner of the vehicle A.B.C. Global Limo Corp. and the driver of the same vehicle Keita Namfamady arise out of the same conduct, transaction or occurrence. The parties to be joined are "united in interest," if either an employer employee relationship exists or if it does not. Supra. See Poulard v. Papamihlopoulos, 650 N.Y.S.2d 68, (2d Dept 1996), Davis v. Larhette, N.Y.S.2d 280 (2d Dept 2007). The driver was involved in the accident and left the accident scene. Therefore, plaintiff has satisfied the three prong test and Keita Nafamady must be substituted in for John Doe. Brock v. Bua. 443 N.Y.S.2d 407, (2d Dept 1981).

WHEREFORE, your affirmant respectfully request that this Court grant this motion in its entirety and issue an order striking co defendant A.B.C. Global Limo's answer or in the alternative amend the caption, summons and complaint to substitute KEITA NAMFAMADY for John Doe and setting a certain deposition date, with the new caption to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

JUANA REYES,

Plaintiff,

-against-

INDEX NO. 303093/10

KEITA NAMFAMADY, A.B.C. GLOBAL LIMO, and LIDIA UREÑA,

Defendants.

----------X

Together with relief as the court deems just and proper.

CERTIFICATION

July 5, 2012

JUANA REYES v. JOHN DOE, an individual whose identity is currently unknown,
A.B.C. GLOBAL LIMO, and LIDIA UREÑA
INDEX NO. 303093/10

The following documents are hereby certified:

PLAINTIFF'S MOTION TO STRIKE/AMEND CAPTION

LAW OFFICES OF JESSE BARAB
Attorney for Plaintiff
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