

<b>Denquah-Mensah v Shtogaj</b>
2013 NY Slip Op 33804(U)
July 1, 2013
Supreme Court, Bronx County
Docket Number: 305811-2010
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 24

-----X  
OLIVIA DENQUAH-MENSAH, Submission Date 1/28/13  
3/4/13

Plaintiff, **DECISION and ORDER**  
Present:

-against- **Hon. SHARON A.M. AARONS**

ANGJELIN SHTOGAJ, ARIEN SHTOGAJ Action No. 1  
and KWAME OPOKU, Index No. 305811-2010

Defendants.

-----X  
KWAME OPOKU, Action No. 2  
Plaintiff, Index No. 307079-2010

-against-

ANGJELIN SHTOGAJ and ARIEN SHTOGAJ,

Defendants.

-----X  
COMFORT DANSO, VIVIAN APPIAH, JOYCE  
ADUMENSAH, an infant under the age of 18 years,  
by her mother and natural guardian, IMELIA ADU-  
MENSAH, and IMELIA ADU-MENSAH, Individually,  
Plaintiffs, Action No. 3  
Index No. 350571-2010

-against-

ANGJELIN SHTOGAJ, ARIEN SHTOGAJ  
and KWAME OPOKU,

Defendants.

-----X  
COMFORT FORJOUR, Action No. 4  
Plaintiff, Index No. 17457-2010

-against-

ANGJELIN SHTOGAJ and ARIEN SHTOGAJ,

Defendants

-----X



complaints and all cross-claims in Action Nos. 1, 3, 5, 6 and 7 on the ground of collateral estoppel. Written opposition was submitted by defendants Angjelin Shtogaj and Arien Shtogaj ("the Shtogaj defendants"). No opposition was submitted by the plaintiffs in Actions 1, 3, 6 and 7. Charles Tafa, plaintiff in Action No. 5, has separately moved for partial summary judgment against defendants Arien Shtogaj and Kwame Opoku on the issue of liability. Written opposition was submitted by the Shtogaj defendants and Kwame Opoku. Frances Freeman, plaintiff in Action No. 6, has cross-moved for partial summary judgment against the Shtogaj defendants on the issue of liability. The plaintiffs in Action No. 3, Comfort Danso, Vivian Appiah, Joyce Adu-Mensah and Imelia Adu-Mensah, have also cross-moved for partial summary judgment against the Shtogaj defendants on the issue of liability. The motions and cross-motions are consolidated for purposes of disposition. The motion of Kwame Opoku is granted with respect to Actions Nos. 1, 3, 6 and 7 in its entirety and as to Action No. 5 as to the cross-claims only. The cross-motions of Frances Freeman and Comfort Danso, Vivian Appiah, Joyce Adu-Mensah and Imelia Adu-Mensah are granted. The motion of Charles Tafa is granted as to both Arien Shtogaj and denied as to Kwame Opoku.

In these seven actions consolidated for the purpose of a joint trial, the plaintiffs are seeking compensation for injuries sustained as a result of a motor vehicle accident which occurred on March 26, 2010. Kwame Opoku was the owner and operator of a van which was rear-ended by the vehicle owned by Angjelin Shtogaj and operated by Arien Shtogaj. The plaintiffs in Actions 1, 3, 4, 5, 6 and 7 were passengers in Opoku's van.

In support of his motion for summary judgment, Kwame Opoku has submitted a copy of the pleadings in Actions 1, 3, 4, 5, 6, and 7 (Opoku's Exhibits A - J), a copy of the police report prepared in this matter (Opoku's Exhibit K), Opoku's prior summary judgment motion filed with respect to Action No. 2 (Opoku's Exhibit L), a copy of this Court's decision dated April 5, 2012 granting Opoku's motion for partial summary judgment against the Shtogaj defendants on the issue of liability with respect to Action No. 2. (Opoku's Exhibit M).

Opoku asserts that based on the Court's prior decision granting him partial summary judgment on the issue of liability against the Shtogaj defendants, summary judgment should be awarded to him with respect to actions 1, 3, 5, 6, and 7 on the basis of collateral estoppel.

"Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *Alamo v. McDaniel*, 44 A.D.3d 149,153 (1<sup>st</sup> Dept. 2007). *See also Ryan v. New York Tel. Co.*, 62 N.Y.2d 494 (1984).

The Shtogaj defendants oppose the motion on two grounds. First, they argue the motion is premature as Kwame Opoku has not yet been deposed. In addition, they have submitted an affidavit of Arien Shtogaj dated December 10, 2011 (Shtogaj Opp., Exhibit A) in which he states that on the date of the accident, he was struck in the rear by another vehicle which caused him to lose consciousness and control of his vehicle, and that he did not speak to the police following the accident as stated in the police report.

The Shtogaj defendants maintain that the affidavit of Arien Shtogaj raises an issue of fact as to liability so as to warrant denial of the summary judgment motion.

Both of the arguments raised by the Shtogaj defendants with respect to the instant motions were previously rejected by the Court in its prior decision dated April 5, 2012. There is no requirement that all discovery be complete in order for a summary judgment motion to be resolved. *Rainford v. Hans*, 18 A.D.3d 638 (2d Dept. 2005). A summary judgment motion will be granted only if the movant establishes that there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In the prior decision, this Court found that Opoku's affidavit that he was traveling at a safe speed, within his lane of traffic when he was rear-ended by the Shtogaj vehicle, coupled with the fact that defendant/driver Arien Shtogaj was arrested at the scene for driving while intoxicated and later pleaded guilty to driving while impaired, was sufficient to meet Opoku's burden of demonstrating entitlement to summary judgment. In opposition to the prior motion, the Shtogaj defendants submitted an investigator's report stating that defendant Arien Shtogaj could not be found. In response to plaintiff's reply affirmation, the Shtogaj defendants submitted a further affirmation in opposition which included the same affidavit of Arien Shtogaj submitted in connection with the instant motion. The Court deemed this second affirmation in opposition to be a sur-reply which was not considered by the Court pursuant to the published court rules. As the Shtogaj defendants failed to provide a non-negligent explanation for the rear-end collision or an explanation for the driving while impaired conviction associated with this accident, the Court granted partial summary judgment to Kwame Opoku as to liability.

The Shtogaj defendants again attempt to have this Court consider the affidavit of Arien Shtogaj previously rejected by the Court in its prior decision. The Shtogaj defendants were granted a full and fair opportunity to litigate the issue of liability in the context of the prior summary judgment motion. The Shtogaj defendants did not provide the affidavit of Arien Shtogaj in a timely manner for it to properly be considered by the Court in connection with the prior summary judgment motion. There is no basis for the Court to consider it now. The Court notes that collateral estoppel may be applied even to default judgments “where the party against whom preclusion is sought appears in the prior action, yet wilfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so.” *Matter of Abady*, 22 A.D.3d 71, 84 (1<sup>st</sup> Dept. 2005). *See also Academic Health Professionals Ins. Assn. v. Lester*, 30 A.D.3d 328, 329 (1<sup>st</sup> Dept. 2006). While the prior motion was not decided on default, counsel for the Shtogaj defendants were unable to provide any opposition on the merits due to their inability to locate Arien Shtogaj. Through his absence or unwillingness to be found, Arien Shtogaj deliberately rendered himself unavailable to participate in the proceedings. Moreover, counsel for the Shtogaj defendants never moved to reargue/renew the Court’s prior decision granting summary judgment nor filed an appeal with respect to that decision. *See Windley v. City of New York*, 104 A.D.3d 597 (1<sup>st</sup> Dept. 2013). Accordingly, the Court finds that collateral estoppel applies to the motion of Kwame Opoku as to Action Nos. 1, 3, 6 and 7, the cross-claims in Action No. 5 and the cross-motions of Frances Freeman and Comfort

Danso, Vivian Appiah, Joyce Adu-Mensah and Imelia Adu-Mensah with respect to the issue of the liability of the Shtogaj defendants.

Plaintiff Charles Tafa moves for summary judgment against both Arien Shtogaj and Kwame Opoku in Action No. 5 and asserts that as an innocent passenger, he is entitled to summary judgment against both drivers without any restriction as to the potential issue of comparative negligence between the drivers.

Kwame Opoku opposes the motion and asserts that it is "internally inconsistent" as Tafa failed to file any opposition to Opoku's summary judgment motion with respect to liability as to Action No. 5. Opoku further argues that denial of the motion is mandated by collateral estoppel.

For the reasons previously set forth, collateral estoppel applies to Tafa's motion for partial summary judgment as to the liability of Arien Shtogaj.

However, collateral estoppel does not apply to Tafa's motion with respect to the issue of the potential liability of Kwame Opoku. Tafa was not a party to Action No. 2, the subject of the prior motion, and did not control the course of that litigation. In fact, Actions No. 5 - 7 were not joined with Action Nos. 1 - 4 until July 11, 2012, months after the Court's decision granting Opoku summary judgment as to liability with respect to Action No. 2.

This case is factually similar to *Augustine v. Sugrue*, 8 A.D.3d 517 (2d Dept. 2004) where the Court found collateral estoppel did not apply. Augustine was a passenger in Sugrue's vehicle which was involved in a three-car accident. Sugrue, the driver of the second car, cross-moved for summary judgment against the driver of the third vehicle. That motion was granted. Sugrue then moved for summary judgment

against his passenger, Augustine, asserting that collateral estoppel precluded Augustine from relitigating the issue of Sugrue's negligence. The trial court granted the motion which was then reversed on appeal. The Appellate Division, Second Department held that Augustine "did not have a full and fair opportunity to litigate the issue of Sugrue's negligence" as Augustine was not a party to the related action where summary judgment was granted and "did not have the opportunity to appeal the determination because he was not aggrieved by the court's order." *Id* at 518.

Accordingly, the court finds that Tafa did not have a full and fair opportunity to litigate Opoku's potential liability and, therefore, collateral estoppel may not be applied to him.

As a general rule, "the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence among the drivers." *Petty v. Dumont*, 77 A.D.3d 466, 467 (1<sup>st</sup> Dept. 2010). *See also Basabe v. Carrozza*, 106 A.D.3d 641 (1<sup>st</sup> Dept. 2013). However, here the issue of the comparative negligence of the two drivers has already been established in the context of the other related actions as well as with respect to Shtogaj's cross-claim against Opoku in the instant action based upon collateral estoppel. Under the unusual circumstances presented here, the Court finds that Tafa has failed to meet his burden of establishing entitlement to partial summary judgment as to liability against Kwame Opoku.

The summary judgment motion of Kwame Opoku with respect to Actions Nos. 1, 3, 6 and 7 is granted and the complaints and all cross-claims against Kwame Opoku in those actions are dismissed. With respect to Action No. 5, summary judgment is granted as to the cross-claims only.

The cross-motions of Frances Freeman and Comfort Danso, Vivian Appiah, Joyce Adu-Mensah and Imelia Adu-Mensah are granted to the extent that plaintiffs are entitled to partial summary judgment against the Shtogaj defendants for legal liability (fault only).

The motion of Charles Tafa for partial summary judgment as to legal liability (fault only) is granted as to Arien Shtogaj and denied as to Kwame Opoku. It is hereby,

**ORDERED** that the Complaint and all cross-claims against Kwame Opoku in Action Nos. 1, 3, 6 and 7 are dismissed and the cross-claims in Action No. 5 against Kwame Opoku are dismissed.

Dated: July / , 2013



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SHARON A.M. AARONS  
J.S.C.