NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

ROSALUA FERNANDEZ,	Index No. 6907/12
Plaintiffs,	Motion Date March 19, 2014
- against-	
EAN HOLDINGS, LLC, ABEL E. CEBALLO, METROPOLITAN TRANSPORTATION AUTHORITY a/k/a MTA NEW YORK CITY TRANSIT and WILLIAM H. CASTRO,	Motion Cal. No. 41
Defendants.	Motion Seq. No. 5

The following papers numbered 1 to 18 read on this motion by defendants, Elrac, LLC F/K/A EAN Holdings LLC (Elrac) and Abel E. Ceballo, pursuant to CPLR 3211 (a) (7) to dismiss plaintiff's complaint and the cross claims of defendants, Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA), sued herein as Metropolitan Transportation Authority a/k/a MTA New York City Transit, and William H. Castro, in favor of defendant, Elrac, based upon the enactment of Federal Transportation Act, 49 USC § 30106, and pursuant to CPLR 3212 for summary judgment in favor of defendants, Elrac and Ceballo, dismissing plaintiff's complaint for failure to satisfy Insurance Law §§ 5102 (d) and 5104 (a), as she has not sustained a "serious injury" within the meaning of the Insurance Law, and on this cross motion by defendants, MTA and NYCTA, for summary judgment in favor of defendant, NYCTA, dismissing plaintiff's complaint on the ground that plaintiff has not sustained a "serious injury" as the term is defined in the New York Insurance Law § 5102 (d), and as such she does not have a cause of action under the New York Insurance Law § 5104 (a), and to dismiss the complaint and any cross claims against defendant, MTA, pursuant to Public Authorities Law § 1263, *et seq.*, as defendant, MTA, is not a proper party to this action.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-7
Affirmation in Opposition - Exhibits.....	8-12
Reply Affirmation.....	13-18

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

This action arises from a motor vehicle accident that occurred on August 1, 2011, at approximately 5:10 p.m., on eastbound Atlantic Avenue at or near its intersection with 100th Street, in Queens County, New York. Plaintiff was a passenger in a vehicle, operated by defendant, Ceballo, and owned by defendant, Elrac, which was in a collision with a bus owned by defendants, NYCTA, and operated by defendant, William H. Castro. Defendant, Ceballo, had leased the vehicle from defendant, Elrac, on July 30, 2011. This action was consolidated for joint trial with nine other actions arising from the same motor vehicle accident.

Defendants, Elrac and Ceballo, move to dismiss plaintiff's complaint and all cross claims against defendant, Elrac, for failure to state a cause of action pursuant to CPLR 3211 (a) (7), and for summary judgement in favor of defendants, Elrac and Ceballo, dismissing plaintiff's complaint and all cross claims against them on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. Defendants, MTA and NYCTA, cross-move for summary judgment in favor of defendant, NYCTA, dismissing plaintiff's complaint and all cross claims against defendant, NYCTA, on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, and to dismiss plaintiff's complaint and any cross claims against defendant, MTA, pursuant to Public Authorities Law § 1263, *et seq.*, since defendant, MTA, is not a proper party to this action.

Defendants, MTA and NYCTA, oppose the branch of the motion of defendants, Elrac and Ceballo, seeking to dismiss plaintiff's complaint and all cross claims against defendant, Elrac, and raise the issue of a potential conflict of interest with respect to the legal representation of defendants, Elrac and Ceballo, by the same attorney, Carman Callahan & Ingham, LLP. Plaintiff opposes the branch of the motion of defendants, Elrac and Ceballo, and the branch of the cross motion of defendants, NYCTA and MTA, seeking summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Defendants, Elrac and Ceballo, contend that plaintiff's complaint should be dismissed as against defendant, Elrac, for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), based on 49 USC § 30106 (the Graves Amendment).

The Graves Amendment is federal legislation that has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388 (*see Gluck v Nebgen*, 72 AD3d 1023 [2d Dept 2010]*; Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]). This section, entitled "Rented or leased motor vehicle safety and responsibility," states, in pertinent part:

> "(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--
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> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
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> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)."

Where there is a claim of independent negligence against the rental/leasing company, the Graves Amendment may be inapplicable (*see generally Li-Hui Chen v Jafri*, 2013 NY Slip Op 30852[U] [Sup Ct, Queens County 2013]).

In her complaint, plaintiff alleges in that defendants, Elrac and Ceballo, were, among other things, negligent in the ownership, operation, management, maintenance, supervision, use and control of the vehicle. Construing the pleadings liberally, presuming the facts alleged therein to be true, and according every favorable inference as the Court is required to do on a CPLR 3211 (a) (7) motion (*see Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475 [2009]; *see also Leon v Martinez*, 84 NY2d 83 [1994]; *Melnicke v Brecher*, 65 AD3d 1020 [2d Dept 2009]), this Court finds that the pleadings are sufficient to state a cause of action sounding in independent negligence against defendant, Elrac, which, if proven, would render the Graves Amendment inapplicable to this matter. In determining a motion to dismiss, "[w]hether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013] [internal quotation marks and citations omitted]).

Accordingly, that branch of the motion by defendants, Elrac and Ceballo, to dismiss plaintiff's complaint as against defendant, Elrac, pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, is denied.

With regard to the attorney disqualification argument raised by defendants, MTA and NYCTA, in their opposition papers, although once the Graves Amendment is determined to be inapplicable to a matter, or a particular action falls outside the ambit of the Graves Amendment, it is reasonable to conclude that the potential for a conflict of interest exists between the interests of the rental/leasing company and the driver of the vehicle, both of whom are defendants in the same negligence action with foreseeable cross claims against one another (*see*

Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a][1]), in the case at bar, there has been no such determination. Moreover, paragraph (b) of Rule 1.7 sets forth necessary conditions that allow an attorney to represent parties with differing interests. Specifically, Rule 1.7(b) of The Rules of Professional Conduct [22 NYCRR 1200.0] provides that "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing."

Consequently, this branch of the motion is premature. Defendant, NYCTA, and/or plaintiff may make future formal applications for disqualification of counsel of defendants, Elrac and Ceballo, on the ground of conflict of interest, upon proper proof.

In an Order dated May 13, 2014, Justice Jeremy S. Weinstein vacated the note of issue and restored this action to pre-note of issue status, noting that significant discovery remains outstanding. Thereafter, the parties entered into a "so-ordered" stipulation, dated June 27, 2014, with regard to outstanding discovery, which included medical discovery.

Since plaintiff's opposition papers indicate that there is medical discovery outstanding, that branch of the motion by defendants, Elrac and Ceballo, and the branch of the cross motion by defendant, NYCTA, both for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, are premature (*see* CPLR 3212 [f]).

Accordingly, the branch of the motion by defendants, Elrac and Ceballo, for summary judgment in their favor dismissing plaintiff's complaint and all cross claims against them and the branch of the cross motion by defendants, MTA and NYCTA, for summary judgment in defendant, NYCTA's favor dismissing plaintiff's complaint and all cross claims against defendant, NYCTA, are both denied, without prejudice to renew, upon completion of discovery

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[1]Rule 1.7(a)(1) of The Rules of Professional Conduct [22 NYCRR 1200.0] provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests."

and in accordance with the CPLR and Court Rules.

Finally, that branch of the defendants' cross motion of defendants, MTA and NYCTA, to dismiss plaintiff's complaint and all cross claims against defendant, MTA, pursuant to Public Authorities Law § 1263, et seq. is granted, without opposition, as defendant, MTA, is not a proper party to this action (*see Rampersaud v Metropolitan Transp. Auth. of the State of New York*, 73 AD3d 888 [2d Dept 2010]; *Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482 [1st Dept 2007]; *Soto v New York City Trans. Authority*, 19 AD3d 579 [2d Dept 2005]).

Dated: August 1, 2014

DARRELL L. GAVRIN, J.S.C.