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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOHN STAROPOLI, as the Executor of the Estate of ANTHONY STAROPOLI, deceased; and JACQUELINE STAROPOLI,

Plaintiffs,

-against-

AGRELOPO, L.L.C; JOSE LAMBARRIA, WESTBURY JEEP CHRYSLER DODGE, INC. d/b/a WESTBURY JEEP and MITCHELL A. LEWIS,

Defendants.

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MITCHELL LEWIS and LYNQUORIA PHILLIPS,

Plaintiffs,

-against-

JOSE LAMBARRIA, AGRELOPO, LLC., VEZANDIO CONGTRACTING CORP., and VEZANDIO CONSTRUCTION SERVICES, INC.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 1551/14
Motion Scq. Nos.: 01 - 05 & 07

DECISION AND ORDER

Index No.: ~~150428/14~~
Action 2 150429/14

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Motion pursuant to CPLR §3025(b) by plaintiffs for leave to amend the complaint (motion sequence no. 1) and other ancillary relief is ***granted*** as provided below.

Motion pursuant to CPLR §602(a) for an order of joint trial by defendant Mitchell A. Lewis (motion sequence No. 2) is ***granted*** as hereinafter provided.

Motion by defendant Westbury Jeep Chrysler Dodge, Inc. (Westbury Jeep) to disqualify the law firm of Sullivan Papain Block McGrath & Cannovo, P.C. from representing plaintiffs (motion sequence no. 3) is ***denied.***

Cross motion by plaintiffs pursuant to CPLR §3211(a)(1) to dismiss the counterclaim interposed by defendant Westbury Jcep against plaintiff/decedent Anthony Staropoli (motion sequence no. 4) is ***denied***.

Motion by defendant Mitchell A. Lewis pursuant to CPLR §3212 to dismiss the cross claim interposed by defendant Westbury Jeep and to strike the sixth and seventh affirmative defenses asserted by said defendant, and other ancillary relief (motion sequence no. 5), is ***denied***.

Cross motion by defendant Westbury Jeep pursuant to CPLR §3126 to compel defendant Mitchell A. Lewis to comply with the Notice to Admit dated May 22, 2014 (motion sequence no. 7) is ***denied***.

BACKGROUND

This instant action arises from a multi-vehicle automobile accident that occurred on December 5, 2013 at the intersection of President Street and Peninsula Boulevard, Hempstead, New York, when the vehicle operated by decedent, Anthony Staropoli[1], in which his wife, Jacqueline Staropoli, was a passenger, was stopped at a red light facing southbound on President Street and was struck by the

[1]Anthony Staropoli died on the same date as the accident. Jacqueline Staropoli died approximately three months later, on March 19, 2014.

vehicle owned by defendant Westbury Jeep and operated by defendant Mitchell Lewis which was traveling southwest on Peninsula Boulevard.

According to the proposed amended complaint, the accident occurred when a vehicle owned by defendant Agrelopo, L.L.C., and operated by defendant Jose Lambarria, without warning, made a left hand turn from Peninsula Blvd. toward President Street and collided with a motor vehicle operated by defendant Mitchell A. Lewis which was traveling on Peninsula Blvd. Thereafter, the Lewis vehicle allegedly crossed over a median located on President Street and struck the vehicle in which Jacqueline Staropoli was a passenger.

There are presently five motions before the court which are treated seriatim.

In motion sequence no. 1, plaintiffs seek leave, *inter alia*, to amend the complaint to add a cause of action for wrongful death (first cause of action) and property damage (fifth cause of action); to amend the caption to include the co-executors of the estate of now deceased Jacqueline Staropoli; to add additional parties Vezandio Construction Services, Inc., Vezandio Restoration Corp. and Vezandio Contracting Corp.; and to amend the caption to reflect the addition of said parties.

An application for leave to amend a pleading under CPLR §3025(b) should be freely granted absent prejudice, or surprise or unless the proposed amendment is palpably insufficient or devoid of merit (*Lui v Town of East Hampton*, 117 AD3d 689 2d Dept 2014]; *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 732 [2d Dept 2012]). The sufficiency or underlying merit of the proposed amendment is not to be examined any further (*Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]), unless such insufficiency or lack of merit is clear and free from doubt (*United Fairness In. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]). No showing of merit is required under CPLR §3025(b) (*Favia v Harley Davidson Motor Co., Inc.*, 119 AD3d 836 [2d Dept 2014] [citation and internal quotation marks omitted]). A determination whether to grant such leave lies within the

discretion of the court (*Finkelstein v Lincoln Natl. Corp.*, 107 AD3d 759, 761 [2d Dept 2013]).

Defendant Westbury Jeep opposes the motion, contending that, given the fact that Jacqueline Staropoli's death certificate, lists the immediate cause of death as cardiopulmonary arrest due to, or as a consequence of, metastatic colon cancer, the proposed amendment to add a cause of action for wrongful death is palpably insufficient. Defendant Westbury Jeep argues that nowhere on the death certificate is there any mention that Jacqueline Staropoli died as a result of a motor vehicle accident.

Notwithstanding the opposition offered by defendant Westbury Jeep, there is no showing that the proposed amendment would result in prejudice or surprise to any of the parties to the litigation. Nor is there any basis to conclude that the proposed amendment is palpably insufficient or devoid of merit. The first cause of action of the proposed amended complaint sufficiently alleges that defendants' negligence caused Jacqueline Staropoli to suffer injuries that ultimately resulted in her death within a relatively short period of time after the accident (*Lucido v Mancusco*, 49 AD3d 220, 232 [2d Dept 2008]). If Westbury Jeep wishes to test the merits of the proposed cause of action for wrongful death, it may later move for summary judgment on a proper showing (*Carroll v Motola*, 109 AD3d 629, 630 [2d Dept 2013]).

No opposition has been offered to the addition of Vezandio Construction Services, Inc.; Vezandio Restoration Corp., and Vezandio Contracting Corp., the alleged employer of defendant Jose Lambarria, as necessary defendants or to the addition of a cause of action for property damage.

Accordingly, motion sequence no. 1 is granted. The caption is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COURT OF NASSAU

----------X

JOHN STAROPOLI, as the Executor of the Estate of ANTHONY STAROPOLI, deceased; and JOHN

STAROPOLI and JACK MANGUM, as the Co-Executor
of the Estate of JACQUELINE STAROPOLI, deceased,

Plaintiffs,

- against -

AGRELOPO, L.L.C.; JOSE LAMBARRIA, WESTBURY
JEEP CHRYSLER DODGE, INC. d/b/a WESTBURY JEEP,
MITCHELL A LEWIS, VEZANDIO CONSTRUCTION
SERVICES, INC.; VEZANDIO RESTORATION, CORP.
and VEZANDIO CONTRACTING CORP.,

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

The proposed supplemental summons and amended complaint, annexed as Exhibit "A" to plaintiff's moving papers, shall be deemed filed and served *nuc pro tunc* upon those parties who have already appeared in the action.

Plaintiffs shall effectuate service upon the proposed additional defendants within 20 days of the date of the order hereon.

In motion sequence no. 2, Mitchell A. Lewis, defendant in action no. 1, seeks to remove action no. 2, bearing index no. 150429-14, presently pending in Supreme Court: New York County to Supreme Court: Nassau County and to join action no.1 and action no. 2 pursuant to CPLR §602(a) for the purpose of joint trial and discovery.

Action no. 2 was commenced by Mitchell A. Lewis, defendant in action no. 1, and his wife, Lynquoria Phillips, to recover for injuries allegedly sustained by them when the vehicle operated by defendant Jose Lambarria impacted the Lewis' vehicle.

CPLR §602(a) provides generally as follows;

> "When actions involving a common question of law are pending before a court, the court, upon motion, may order trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning

proceedings herein as may tend to avoid unnecessary costs or delay."

When two actions are pending in the Supreme Court in different counties, the motion to remove for the purpose of joint trial (discovery) may be made in either county. The court should designate in the order of joint trial (or consolidation) a venue for the place of trial (*Woods v County of Westchester*, 112 AD2d 1037 [2d Dept 1985]).

While it is often stated that, generally, the venue of a consolidated or joined action should be placed in the county where the first action was commenced (*Harrison v Harrison*, 16 AD3d 206 [1st Dept 2005]), the rule is not inflexible. The court, in its discretion, will consider a number of factors including the county where the cause of action arose and where the parties and witnesses are located (*Maciejko v Jarvis*, 99 AD2d 799 [2d Dept 1984]; *Perinton Assoc. v Heicklen Farms*, 67 AD2d 832 [4th Dept 1979]). It is only when the party opposing such an application demonstrates the likelihood of substantial prejudice that consolidation, or the uniting of separate actions, will be denied (*Mattia v Food Emporium*, 259 AD2d 527 [2d Dept 1999]). Where, as here, there are common questions of law and fact, consolidation or joint trial is favored by the courts in the interest of judicial economy, ease of decision making and uniform resolution (*Alizio v Feldman*, 97 AD3d 517 [2d Dept 2012]; *Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2d Dept 2006]; *Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]).

In opposing the motion, counsel for plaintiffs in action no. 2 fails to establish that a joint trial would prejudice a substantial right of any of the parties (*Mas Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 541 [2d Dept 2007]). The burden of demonstrating prejudice to a substantial right lies with the party opposing consolidation (*American Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006]). Notwithstanding the fact that action no. 1 does not have temporal priority, since action no. 2 was commenced three and one half weeks before action no. 1 was commeneed, venue should be placed

in Nassau County for the reasons set forth by movant which include the following:

> Actions 1 and 2 relate to the very same accident
> The accident occurred in Nassau County.
>
> All parties reside in Nassau County, other than Jose Lambarria, the driver of one of the vehicles involved
> in the accident.
>
> The police report lists two non-party witnesses, both with Nassau County phone numbers.
>
> Nassau County Police Department investigated the accident and likely will be a witness at trial.
>
> Each action is in its initial stages, without any significant discovery having taken place.
>
> All medical treatment was rendered in Nassau County.
>
> Actions 1 and 2 were commenced within one month of each other.

Accordingly, consolidation for the purpose of joint trial and discovery is hereby ordered with venue to be fixed in Nassau County.

Within 30 days from entry of this order, counsel for movant shall serve a certified copy of this order on the Clerk of Supreme Court: New York County who, upon receipt of the appropriate fee, shall transfer to the Clerk of Supreme Court, Nassau County, all of the papers on file in action no. 1 (Index no. 150429-14) captioned

Mitchell Lewis and Lynquoria Phillips
Plaintiffs,

v

Jose Lambarria, Agrelopo, LLC, Vezandio Contracting Corp.
and Vezandio Construction Services, Inc.
Defendants.

In motion sequence no. 3, defendant Westbury Jeep seeks to disqualify plaintiffs' counsel from

representing either Jacqueline Staropoli (now deceased) or the Estate of John Staropoli based on a purported inherent ethical conflict of interest in the joint representation of a driver of an automobile involved in an accident and his wife, who was a passenger in the automobile at the time of the accident (*Pessoni v Rabkin*, 220 AD2d 732 [2d Dept 1995]). Defendant Westbury Jeep notes that it has interposed a counterclaim against the Estate of Anthony Staropoli alleging that his actions, or inaction, contributed to the accident at issue herein. Further, defendant Westbury Jeep argues that the assertion of the counterclaim necessarily places the pecuniary interests of plaintiff Jacqueline Staropoli, now deceased, in conflict with those of the Estate of Anthony Staropoli.

Notwithstanding plaintiff's correct assertion that there is no categorical prohibition against duel representation of a passenger and driver in an automobile accident case where there is proper waiver and no viable cross claim or counterclaim asserted against the driver (*Matter of Ravitch*, 82 AD3d 126, 131 [1st Dept 2011]), Rule 1.7(a) 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."

The disqualification of an attorney is a matter which rests within the sound discretion of the court (*Mondello v Mondello*, 118 AD2d 549, 550 [2d Dept 1986]). The purpose of the Code of Professional Responsibility in situations involving adverse interest representation is to protect clients, ignorant and sophisticated, maintain the integrity of the legal system and prevent even honest attorneys from serving mutually antagonistic interests (*Bajd v Truet*, 287 AD2d 475, 476 [2d Dept 2001], *lv to appeal dismissed* 98 NY2d 961 [2002]).

The plaintiffs allege there is no viable cross claim or counterclaim against Anthony Staropoli as

the driver of the vehicle in which his wife, Jacqueline Staropoli was a passenger, and that the executors of the Estate of Anthony Staropoli, and the co-executors of the Estate of Jacqueline Staropoli executed waivers consenting to the simultaneous representation of both Estates in this action.

The court is mindful that disqualification of counsel during litigation implicates not only the ethics of the legal profession but alse the substantive rights of the litigants (*Homar v American Home Mtg. Acceptance, Inc.*, 119 AD3d 901 [2d Dept 2014]), and that a party's right to be represented by counsel of his or her own choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted (*Trimarco v Data Treasury Corp.*, 91 AD3d 756 [2d Dept 2012]). There has been no clear showing by the movants that disqualification is warranted. As such, the application to disqualify plaintiffs' counsel is denied.

In motion sequence no. 4, plaintiffs cross move pursuant to CPLR §3211(a)(1) to dismiss the counterclaim asserted in the Answer interposed by defendant Westbury Jeep against plaintiff John Staropoli as the Executor of the Estate of Anthony Staropoli based on the certified police report.

A motion to dismiss pursuant to CPLR §3211(a)(a) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the claim (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]; *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010] [internal quotation marks omitted]). In order for evidence submitted under CPLR §3211(a)(1) to qualify as documentary evidence, the evidence must be unambiguous, authentic and undeniable (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010]). Judicial records, as well as documents reflecting out of court transactions such as mortgages, deeds, contracts and any other papers, whose contents are essentially undeniable, would qualify as documentary evidence in the proper case (*Fontanetta v John Doe 1,supra* at p. 84-85).

A police accident report made by a police officer who was not an eyewitness to an accident,

which contains hearsay statements made by a motorists involved in the accident regarding the ultimate issues of fact, may not be admitted into evidence for the purpose of establishing the cause of the accident in question (*Figueroa v Luna*, 281 AD2d 204, 205 [1st Dept 2001] [quotation marks omitted]).

While, in certain limited circumstances, a police report may be admissible into evidence under the business records exception to the hearsay rule *(Bailey v Reid*, 82 AD3d 809, 810 [2d Dept 2011]), statements made by participants in an accident are not admissible under this rule where the participants are not under a business duty to make such statements (*King v King*, 99 AD3d 672, 673 [2d Dept 2012]).

Here, the police accident report (December 5, 2013) submitted by plaintiffs does not establish, as a matter of law, that the Staropoli vehicle was stopped at a red light at the time of the accident, and entirely blameless. Although a statement was allegedly initially made by defendant Mitchell A. Lewis that the Staropoli vehicle was stopped and waiting at a traffic light on President Street, a second police accident report signed by defendant Mitchell A. Lewis on December 12, 2013, makes no reference to the Staropoli vehicle.

Defendant Westbury Jeep has denied that there was an employment relationship between defendant Westbury Jeep and defendant Mitchell A. Lewis. As such, the alleged statement made by him cannot be construed as an exception to the hearsay rule as an admission against Westbury Jeep's own interest. There is, therefore, no basis to dismiss the counterclaim asserted against plaintiffs by defendant Westbury Jeep.

In motion sequence no. 5, defendant Mitchell A. Lewis seeks dismissal of the cross claim interposed by defendant Westbury Jeep for indemnification, and to strike the sixth and seventh affirmative defenses asserted in defendant Westbury Jeep's answer regarding permissive use of the

vehicle operated by said defendant.[2]

In support of his motion, defendant Mitchell A. Lewis contends that his wife Lynquoria Phillips, to whom the subject vehicle was allegedly lent, gave him permission to operate the "complimentary loaner car [owned by defendant Westbury Jeep and provided to his wife] on the date of the accident." In support of his position, defendant Mitchell A. Lewis relies on the provision of the Temporary Substitute Vehicle Agreement (loaner agreement) which states,

> "You, your spouse, and your immediate family members who would normally drive the new vehicle purchased or leased from our dealership are the only individuals entitled to drive a loaner vehicle. No one else may drive our loaner vehicle."

In response, defendant Westbury Jeep opposes the motion and cross moves to compel defendant Mitchell A. Lewis to comply with the Notice to Admit dated May 22, 2014. Although defendant Mitchell A. Lewis served a response to said Notice, he objected to requests that required him to admit the truth of certain allegations *vis-a-vis* the status of his driver's license and/or his permissive use of the loaner vehicle involved in the accident at issue.

Defendant Westbury Jeep contends that the argument advanced by defendant Mitchell A. Lewis as to his permissive use of the vehicle, flies in the face of the language of the loaner agreement which states that the customer expressly agrees that the vehicle would not be operated, *inter alia*:

> by anyone without first obtaining the dealer's written consent;
> by anyone who is not a qualified and licensed driver;

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[2]As and for a Sixth Affirmative Defense
The motor vehicle owned by tbis party was not being operated with the knowledge and consent of this party who bears no responsibility for the accident alleged herein.

As and for a Seventh Affirmative Defense
The motor vehicle owned by this answering defendant was not being operated with the knowledge and consent of this party who would, therefore, bear no responsibility for the ineident alleged herein.

> by anyone whose driver's license in any state has been revoked or suspended within the previous 3 years even if he or she now possesses a valid driver's license.

Moreover, defendant Mitchell A. Lewis' driving record indicates multiple license suspensions including February 1, 2012 and November 29, 2011 -- each within three years of the date of the loaner agreement (Deeember 5, 2013). As of November 22, 2012, his license is listed as for "ID-Only" (Exhibit "A":Cross Motion by Defendant Westbury Jeep).

Pursuant to Vehicle and Traffic Law § 388(1),[3] every owner of a vehicle is liable for injuries resulting from negligence

> "in the use or operation of such vehicle . . .by any person using or operating the same with the permission, express or implied, of such owner."

This section gives rise to a presumption that the vehicle is being operated with the owner's consent. The presumption, however, may be rebutted by substantial evidence to the contrary (*Tsadok v*

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[3]For purposes of completeness the court notes that a proposed amendment to § 388 of the Vehicle and Traffic Law adds subsection 5(a) which reads as follows:

5.(a) Notwithstanding any provision of this section, an owner of a motor vehicle that rents (including under a consumer motor vehicle rental program) or leases the vehicle to a person (or an affiliate of the owner) shall not be liable 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:

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles, or participates in a consumer motor vehicle rental program; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

(b) In this subdivision, the term "affiliate" means a person other than the owner who directly or indirectly controls, is eontrolled by, or is under common control with, the owner. In the preceding sentence, the term "control" means the power to direct the management and policies of a person whether through ownership of voting securities or otherwise.

Veneziano, 65 AD3d 1130, 1132 [2d Dept 2009]).

On August 10, 2005, Congress amended the Safe, Accountable, Flexible Efficient Transportation Act: A Legacy for Users to preempt the New York Vehicle and Traffic Law (the Graves Amendment [49 USC § 30106(c)]) to the extent that federal legislation prohibits imposition of liability on vehicle lessors for injuries resulting from the negligent use or operation of a leased vehicle (*Jones v Bill*, 10 NY3d 550, 553 [2008]).

The Vehicle at issue herein was a loaner vehicle.

As noted by defendant Westbury Jeep, the provision in the loaner agreement on which defendant Mitchell A. Lewis relies does not obviate the need for compliance with the terms of the entire agreement executed by Lynquoria Phillips including the requirement that a spouse, or immediate family member, have a valid New York State license, not a suspended or revoked license. Moreover, the loaner agreement contains a provision, initialed by Lynquoria Phillips, which specifically states that

> "only those who are named and those who present us
> with a license and insurance card may drive our vehicle."

Here, the plain language of the loaner agreement, signed and initialed by Lynquoria Phillips, flies in the face of the argument advanced by defendant Mitchell A. Lewis and precludes dismissal of either the cross claim asserted against him or the sixth and seventh affirmative defenses asserted in defendant Westbury Jeep's answer.

In motion sequence no. 7, defendant Westbury Jeep has cross moved to compel defendant Mitchell A. Lewis to comply with the Notice to Admit dated May 22, 2014.

The purpose of a Notice to Admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to be utilized to request admissions of material issues, or ultimate conclusions which can only be made after a full and complete trial (*HSBC Bank USA, N.A. v*

Halls, 98 AD3d 718, 721 [2d Dept 2012]). A Notiee to Admit may not be employed as a substitute for other disclosure devices, such as examinations before trial, deposition upon written questions or interrogatories (*Taylor v Blair,* 116 AD2d 204, 206 [1st Dept 1986]). Rather, the device is to be used to elicit a stipulation regarding specific matters eoncerning which there is general agreement (*Lewis v Hertz Corp.*, 193 AD2d 470 [1st Dept 1995] [citation and quotation marks omitted]).

A Notice to Admit should not contain allegations that would require that an opposing party concede any material facts. Here, defendant Westbury Jeep's notice improperly seeks the admission of a contested ultimate issue which goes to the heart of the controversy, i.e., that on the date of the accident herein defendant Mitchell A. Lewis did not possess a valid driver's license.

Defendant Mitchell A. Lewis has no obligation to respond to the allegations in the subject Notice to Admit (May 22, 2014) which seek admission of a contested material issue which is more properly procured by way of deposition or other disclosure devices (*Lolly v Brookdale Univ. Hosp. & Med. Ctr.*, 45 AD3d 537 [2d Dept 2007]). These include those that refer to the status of his license and his use of the loaner vehicle. It is hereby

ORDERED, that the parties are directed to appear for a preliminary conference on January 12, 2015 in DCM.

This constitutes the Decision and Order of the Court.

DATED: November 12, 2014
Mineola, N.Y. 11501

ENTER:

MICHELE M. WOODARD
J.S.C.

F:\DECISION - AMEND COMPLAINT\Staropoli v Agrelopo LLC 2 CAK.wpd