

**Cruz v Figueroa**

2018 NY Slip Op 30751(U)

March 23, 2018

Supreme Court, Bronx County

Docket Number: 301274/2015

Judge: Jr., Kenneth L. Thompson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 X

KARLA R. CRUZ a/k/a KARLA RIBEIRO,

Plaintiff,

-against-

ORLANDO FIGUEROA, DON THOMAS BUSES,  
INC., T. STONE CORP. and JOH DOE,

Defendants.

Index No: 301274/2015

**DECISION AND ORDER**

**Present:**  
**HON. KENNETH L. THOMPSON, JR.**

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The following papers numbered 1 to 7 read on this motion for summary judgment/amend

No	On Calendar of <b>March 12, 2018</b>	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1, 4
	Answering Affidavit and Exhibits-----	2, 5
	Replying Affidavit and Exhibits-----	3, 7
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	6
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, Don Thomas Buses, Inc., (Bus), and Orlando Figueroa, (Figueroa), move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against them. Plaintiff, Karla R. Cruz a.k.a. Karla Ribeiro, (Cruz), moves pursuant to CPLR 305 and 3025(b) for permission to amend the summons and complaint to add a party in place of the John Doe, and change the time of the collision. The motions are hereby consolidated for decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff in a motor vehicle accident on January 6, 2014. Cruz testified that her vehicle was struck by a white van owned by co-defendant, T. Stone Corp., (T. Stone), at an intersection controlled by only one stop sign controlling the entrance of the T.

Stone vehicle to the intersection. Plaintiff testified that the T. Stone vehicle did not stop at the stop sign and it t-boned plaintiff's vehicle, spinning plaintiff's vehicle around and struck the bus operated by Figueroa. Cruz' vehicle had been traveling in the oncoming lane to the bus operated by Figueroa.

The attorneys for Cruz as plaintiff in this action, have not submitted opposition to the motion of Bus and Figueroa for summary judgment. However, the defense counsel for defendant, Cruz, in an action with the index number 303181/2014, which is joined for trial with the action herein, improperly submitted opposition to Bus and Figueroa's motion, and it shall not be considered. However, even if, *arguendo*, the papers were considered, the outcome of this decision would be the same.

A driver in his proper lane is not required to anticipate that an automobile going in the opposite direction will cross over into his lane of traffic (*Caban v Vega*, 226 AD2d 109, 111 [1996]). Such a crossover scenario presented Mark Williams with an emergency situation not of his own making (*see Williams v Econ*, 221 AD2d 429 [1995]). In cases where the crossover and collision occur almost instantaneously, the driver in the proper lane cannot be considered negligently responsible for any part of the accident (*see Gonzalez v City of New York*, 295 AD2d 122 [2002])... Summary judgment is appropriate in these circumstances (*Eichenwald v Chaudhry*, 17 AD3d 403 [2005]; *Lyons v Rumpler*, 254 AD2d 261 [1998]).

*Williams v. Simpson*, 36 A.D.3d 507, 508 [1<sup>st</sup> Dept 2007]).

Figueroa was in his proper lane, traveling slowly after having stopped to allow cross-traffic in front of him to pass, when the vehicle operated by Cruz crossed over into the lane of travel of the bus operated by Figueroa. There is no

evidence whatsoever of any negligence on the part of Figueroa.

The white van left the scene of the accident so the driver of the van was unknown. The commercial owner of the vehicle was T. Stone. Plaintiff seeks to relate back her claim against the driver of the vehicle to the owner of the vehicle and the driver's employer, T. Stone.

In *Mundell v New York Blood Ctr.--Greater N. Y. Blood Program* (80 NY2d 219, 226), the Court of Appeals adopted the three-pronged test enunciated in *Brock v Bua* (83 AD2d 61, 69) for determining when the relation-back doctrine would permit the addition of a new party to relate back to claims previously asserted against a codefendant. Thus, the relation-back requirement is satisfied where "(1) both claims ar[i]se 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 he 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." The third prong of the test has been recently modified so that only mistake on the part of the litigant seeking the benefit of the doctrine, rather than excusable mistake, need be shown. (*Buran v Coupal, supra*, 87 NY2d, at 176.)

*Vanderburg v. Brodman*, 231 A.D.2d 146, 147 [1<sup>st</sup> Dept 1997]).

In the case at bar, the claims arise out of the same vehicular collision. The proposed new party taking the place of John Doe is Derone Lenny Garcia, (Garcia), who testified that he operated the subject vehicle on the day of the collision herein, while in the employ of his employer, T. Stone. Garcia has participated in this litigation, including a deposition which provided evidence of Garcia being the driver. Since the driver of the white van did not stay at the scene

of the accident, the driver could not have been designated in the Summons and Complaint at the commencement of this action. T. Stone argues that Garcia could have been substituted for John Doe prior to the expiration of the statute of limitations, because he was identified in a response to plaintiff's notice for discovery and inspection in the action joined for trial. However, Garcia was identified as having operated the vehicle between January 5, 2014 and January 7, 2014. The subject collision occurred on January 6, 2014. Plaintiff argues that she sought a more definitive response through deposition testimony of Garcia. This motion to amend was served promptly after Garcia's deposition.

Accordingly, the motion of Don Thomas Buses, Inc. and Orlando Figueroa is granted and the complaint and all cross-claims are dismissed as against them. Plaintiff's motion to amend is granted

The foregoing constitutes the decision and order of the Court.

Dated: 3/23/2018

  
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KENNETH L. THOMPSON JR. J.S.C.