SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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CHRISTI STEVENS,

Plaintiff,

- v -

VIA TRANSPORTATION, INC.,CARLOS MERA

Defendant.

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INDEX NO. 158823/2017

MOTION DATE 01/30/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff 's motion to strike defendants' answers and for summary judgment on the issue of liability, pursuant to CPLR 3212, is denied.

Here, plaintiff seeks to strike defendants' answers for their alleged failure to produce discovery. Preliminarily, the Court notes that plaintiff alleges that defendants failed to respond to discovery "despite multiple court orders, to produce discovery". Berger Affirmation, ¶ 1. (2). However, a review of the Court file reveals that only a case scheduling order and a status conference order were issued by the Court, on October 27, 2017 and October 3, 2018 respectively, which relate to the discovery defendants allegedly failed to respond to. Moreover, it is undisputed that defendants responded to such discovery, albeit with objections. The Appellate Division, First Department has consistently held that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1st Dep't

2002)(internal citations omitted). Plaintiff has wholly failed to establish that defendants' alleged failure to comply with discovery was both deliberate and contumacious. In opposition, defendant Via Transportation, Inc. proffers its responses to discovery demands. Similarly, defendant Carlos Mera's opposition also proffers his discovery responses. Thus, the discovery requested has been provided, and plaintiff has failed to establish that the harsh remedy of striking defendants' answers is necessary herein. As such, plaintiff's instant motion seeking to strike defendants' answers is denied.

As to the portion of plaintiff's motion for summary judgment, the Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853. As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). Furthermore, it is well settled that "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990).

Plaintiff moves for summary judgment on the issue of liability against both defendants arguing that no issues of fact exist. In support of her motion, plaintiff proffers, *inter alia*, her

own deposition transcript and the deposition transcripts of defendant Mera and defendant Via. Plaintiff states that, at the time of the accident, she was a passenger in the vehicle, an SUV with a row of middle seats, owned by defendant Mera. Plaintiff obtained a ride in defendant Mera's vehicle through defendant Via's application on her cellular phone. Plaintiff was seated on the middle row of seats in defendant Mera's vehicle when such vehicle came to a stop to pick up another passenger who entered the row of seats on which plaintiff was seated. Plaintiff states that she attempted to slide over to the right to make room for the passenger entering the vehicle. However, according to plaintiff, the seat to her right, in the middle row, was missing causing her to fall to the floor and sustain injuries. Plaintiff testified that she did not remember any lights inside the vehicle when defendant Mera stopped to pick up another passenger. Thus, plaintiff argues that defendant Mera is liable for her injuries, and defendant Via, as the employer of defendant Mera, is vicariously liable.

In opposition, defendant Via argues that defendant Mera is not its employee such that it is not liable to plaintiff. Preliminarily, the Court notes that plaintiff has failed to establish as a matter of law that defendant Mera was employed by defendant Via. Thus, an issue of fact exists precluding summary judgment. Moreover, plaintiff's own motion proffers the deposition transcript of defendant Mera who testified that there was no missing seat in his vehicle and that the light inside his vehicle was operational. Thus, there is a conflict in the evidence proffered by plaintiff such that plaintiff has failed to eliminate all material issues of fact. As issues of fact exists as to how the accident occurred, plaintiff's motion is denied as to summary judgment on the issue of liability.

Accordingly, it is

ORDERED that plaintiff's motion to strike defendants Via Transportation, Inc. and Carlos Mera's answers are denied; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that all parties or counsel shall appear on May 3, 2019 in room 103 of 80 Centre Street, New York, New York, for a previously scheduled status conference; and it is further

ORDERED that within 30 days of entry, defendant Via Transportation, Inc. shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

3/19/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE