

Daly v Barrie
2020 NY Slip Op 31200(U)
March 23, 2020
Supreme Court, Kings County
Docket Number: 510126/2017
Judge: Devin P. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 510126/2017

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

TELLIANNE DALY,

Plaintiff,

against

IMOURANA BARRIE AND DONALD A. DUFFUS,

Defendants.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1, 2, 3</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>3, 4</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other	<u> </u>

Upon the foregoing papers, the “cross-motion” and motion for summary judgment by defendant Donald Duffus (Mot. Seq. 004) and (Mot. Seq. 005) and plaintiff Tellianne Daly’s cross-motion for summary judgment, for severance, to compel and for preclusion (Mot. Seq. 006), are decided as follows:

Factual and Procedural History

Ms. Daly commenced this action (the “Daly Action”) against defendants Imourana Barrie and Donald Duffus on May 22, 2017. In her complaint, Ms. Daly alleges that she was a passenger in a vehicle driven by Mr. Duffus on May 17, 2017, when it came into contact with the vehicle driven by Mr. Barrie. Ms. Daly alleges that she was injured as a result of the accident and asserts claims against Mr. Barrie and Mr. Duffus for negligence.

Subsequently, on November 1, 2017, Mr. Duffus commenced an action (the “Duffus Action”) in Bronx County Supreme Court against Mr. Barrie (Index No. 30369/2017) in which he asserts a claim for negligence against Mr. Barrie based on the same accident. Mr. Barrie moved in this action for joint trial of the two actions and by order, dated July 30, 2018, the court (Knipel, J.) granted the motion. Consequently, the Duffus Action was transferred to Kings

County and assigned Index No. 518200/2018. The order states that “each [action] shall retain its own index number, file a separate RJI, separate notes of issue, and file separate judgments”.

On November 30, 2018 Ms. Daly filed a note of issue and certificate of readiness for trial in the Daly Action. By motion, dated December 14, 2018, Mr. Duffus moved to strike that note of issue, to compel certain discovery and to extend the time for defendants to move for summary judgment. By order, dated March 14, 2019, the court (Colon, J.) set a schedule for additional discovery, but declined to strike the note of issue or to extend the summary judgment deadline. Instead, the court directed the parties seeking additional time to make any motion for summary judgment to include that application within the summary judgment motion, in accordance with *Brill v City of New York* (2 NY3d 648, 652 [2004]).

On March 20, 2019 Mr. Barrie moved for summary judgment in the Daly Action. On March 21, 2019, Mr. Duffus cross-moved for summary judgment and to strike Mr. Barrie’s third affirmative defense. Thereafter, on May 30, 2019 Mr. Duffus moved for summary judgment in the Daly Action as a “cross-motion” (Mot. Seq. 004). By letter, dated May 31, 2019, Ms. Daly rejected the cross-motion because there was no pending motion. However, on June 11, 2019, Ms. Daly opposed Mr. Duffus’s motion for summary judgment and cross-moved for summary judgment, for severance, to compel certain discovery, and to preclude (Mot. Seq. 006). Thereafter, on June 17, 2016, Mr. Duffus moved again for summary judgment (Mot. Seq. 005).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the

non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Additionally, pursuant to Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, the parties have 60 days from the date of the filing of the note of issue to move for summary judgment. The note of issue in this action was filed on November 30, 2018. Sixty days from that date was January 29, 2019. Thus, all pending motions for summary judgment are untimely. Furthermore, none of the parties even attempt to establish good cause for accepting their untimely motions pursuant to *Brill*.

Ms. Daly also requests that this court sever this action from the Duffus Action, which would effectively vacate Justice Knipel's previous order joining the two actions for trial. Ms. Daly contends that, by order, dated June 7, 2019, the court granted summary judgment to Mr. Barrie in the Duffus Action. The court record does not include any such order. Instead, there is a stipulation and order, dated June 13, 2019, adjourning all summary judgment motions in both actions to August 8, 2019. Ms. Daly also references a stipulation in which Mr. Barrie has allegedly agreed to be precluded as a witness in the Duffus Action. The court also does not have a copy of any such stipulation. Ms. Daly does not otherwise establish any basis for vacating the prior order joining the two cases for trial.

Plaintiff Daly also moves for an order compelling Mr. Duffus to produce certain photographs. Ms. Daly contends that she learned about the photographs when Mr. Duffus was deposed on June 19, 2018. Plaintiff provides a copy of her written request for these photos. The request is dated November 16, 2018, and includes no proof of service. In any event, only two weeks later, Ms. Daly filed the note of issue and certificate of readiness and, in the document, she

checked the box waiving any further discovery. Additionally, this case has been pending in JCP awaiting trial since September 6, 2019. Consequently, Ms. Daly cannot no longer request further discovery in this action.

In the body of her motion, Ms. Daly also asks this court to strike Mr. Barrie's answer because, she claims, Mr. Barrie failed to appear for three court-ordered depositions. Ms. Daly did not include this request for relief in her notice of motion. Also, Ms. Daly includes copies of only two orders that set deadlines for depositions, but they do not direct Mr. Barrie to be produced for deposition on a date certain. Ms. Daly provides no proof that Mr. Barrie was ever served with a notice of deposition. Moreover, Ms. Daly waived any further discovery in her note of issue.

Lastly, Ms. Daly requests preclusion of medical testimony of defendants' doctors, but makes no argument in support of that request in her moving papers.

Conclusion

Mr. Duffus's motions for summary judgment (Mot. Seq. 004 and 005) and Ms. Daly's motion for summary judgment and other relief (Mot. Seq. 006) are all denied.

This constitutes the decision and order of the court.

March 23, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court