

Castillo v Depaso

2020 NY Slip Op 35122(U)

February 11, 2020

Supreme Court, Westchester County

Docket Number: Index No. 57712/2019

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

JOSE CASTILLO and LILLIAN CASTILLO,

Plaintiff(s),

- against -

DEBRA DEPASO, as Administratrix for the Estate of JONATHAN J. STEERE, and DEBRA A. DEPASO, Individually,

Defendant(s).

DECISION & ORDER

Index No.: 57712/2019

Motion Date: 11/22/19

DEBRA DEPASO, as Administratrix for the Estate of JONATHAN J. STEERE, and DEBRA A. DEPASO, Individually,

Third-Party Plaintiff(s),

-against-

SANTIAGO CASTILLO,

Third-Party Defendant(s).

Defendant/Third-Party Plaintiff DEBRA DEPASO, as Administratrix for the Estate of JONATHAN J. STEERE, and DEBRA A. DEPASO, Individually moves (Motion #1) for an order, consolidating the instant action (Action 1) with two other actions in Westchester County Supreme Court entitled *Santiago Castillo against DEBRA DEPASO, as Administratrix for the Estate of JONATHAN J. STEERE, and DEBRA A. DEPASO, Individually*, under Index Number 58470/2019 (Action 2) and *DEBRA A. DEPASO, Individually and as Administratrix for the Estate of JONATHAN J. STEERE against Santiago M. Castillo and Lincoln M. Escoto*, under Index Number 70887/2018 (Action 3).

Plaintiffs move (Motion #2) for summary judgment on the issue of liability.

Defendant/Third-Party Plaintiff DEBRA DEPASO, as Administratrix for the Estate of JONATHAN J. STEERE, and DEBRA A. DEPASO, Individually moves (Motion #3) for an order, compelling plaintiffs to accept the late answer of the moving defendants.

The following papers were read:

Notice of Motion (#1), Affirmation, and Exhibits (3)	1-5
Notice of Motion (#2), Affirmation, and Exhibits (12)	6-19
Notice of Cross-Motion (#3), Affirmation, and Exhibits (4)	20-25
Affirmation in Reply	26
Affirmation in Opposition and Exhibits (2)	27-29
Affirmation in Reply	30

By way of background, this action arises from a motor vehicle accident on July 12, 2017 during which a motor vehicle operated by defendant-decedent Jonathan J. Steere and owned by defendant/third-party defendant Debra Depaso collided with a motor vehicle operated by third-party defendant Santiago Castillo and owned by non-party Lincoln M. Escoto in whose motor vehicle plaintiff Jose Castillo was a passenger. The accident occurred on Noxon Road at or near the intersection with Firemens Way in the Town of LaGrange, New York. On May 14, 2019, plaintiffs commenced Action 1. On May 30, 2019, plaintiffs filed an affidavit of service, purportedly indicating that they had effectuated service of process on defendants on May 23, 2019. On July 1, 2019, defendants interposed an answer. On July 1, 2019, defendants filed a demand for a bill of particulars and other discovery demands. On July 12, 2019, defendants filed a third-party summons and complaint against third-party defendant Santiago Castillo. On July 18, 2019, defendants filed Motion #1 to consolidate Action 1, 2, and 3. On August 13, 2019, plaintiffs filed Motion #2 for leave to enter default judgment against defendants. On October 10, 2019, defendants filed Motion #3 to compel plaintiffs to accept their late answer. The Court initially addresses Motion #3.

In support of Motion #3, defendant Administratrix cross-moves for an order, compelling plaintiffs to accept the untimely interposed answer. Defendant Administratrix notes that the answer was filed on July 1, 2019, which was on 19 days after the answer was due. Defendant Administratrix contends that plaintiffs suffered no prejudice as a result of the lateness. Defendant Administratrix notes that she forwarded the summons and complaint to an attorney, who was representing her in one of the related actions and that there was some delay as the papers were routed to the insurance carrier.

In opposition, plaintiffs contend, among other things, that Motion #3 should be denied because defendant Administratrix has failed to demonstrate the existence of a potentially meritorious defense.

Under the foregoing circumstances, including that upon being served, defendant Administratrix sent the complaint to her personal attorney instead of her insurance

company, and upon receipt of the complaint, the insurance company served a verified answer less than 20 days after the time period in which to answer had expired, defendants have set forth a reasonable excuse for the delay in answering. In addition, there was no evidence of willful misconduct or an intent to abandon the action, and there was no prejudice to plaintiff (see *Yuxi Li v Caruso*, 161 AD3d 1132, 1134 [2d Dept 2018]). Accordingly, Motion #3 is granted and defendants' answer is deemed timely filed and served. Next, the Court considers Motion #2.

In support of Motion #2, plaintiffs move for summary judgment on the issue of liability. Plaintiffs proffer, among other things, the affidavit of plaintiff Jose Santiago, who avers that on July 12, 2017, he was the passenger in a motor vehicle traveling on Noxon Road in Lagrange, New York. Plaintiff Jose Santiago also avers that, at some point, an oncoming motor vehicle crossed the double yellow line and, notwithstanding the driver of his motor vehicle's efforts to avoid a collision, the oncoming motor vehicle collided with his motor vehicle.

Plaintiffs have made a *prima facie* showing of entitlement to judgment as a matter of law (see *Sullivan v Mandato*, 58 AD3d 714, 714 [2d Dept 2009]). As such, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In opposition, defendants contend that summary judgment would be premature at this juncture as no discovery has been completed. Defendants speculate that discovery may yield evidence to oppose Motion #2.

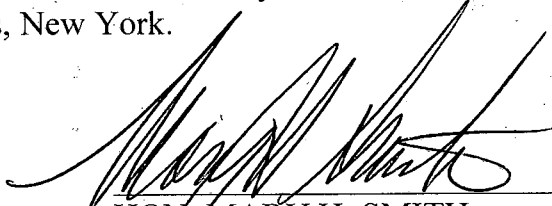
CPLR 3212 (f) empowers the Court to deny or order a continuance of a motion for summary judgment “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated” However, the party seeking the denial or continuance of the motion must demonstrate that the proposed “discovery might lead to relevant evidence, or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff” (see *Winzelberg v 1319 50th St. Realty Corp.*, 114 AD3d 674, 674 [2d Dept 2014]). Here, defendants have offered nothing more than speculation that evidence sufficient to defeat Motion #2 be uncovered during the discovery process, which is insufficient to deny the motion (see *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]). Accordingly, Motion #2 is granted. Next, the Court considers Motion #1.

In support of Motion #1, defendants note that Action 1, 2, and 3 all arise from the same motor vehicle accident. No party has opposed the motion. However, the Court notes that the parties to Action 3 have filed a stipulation of discontinuance. Accordingly, Motion #1 is granted to the extent that Action 1 and 2 are hereby consolidated. Defendants are

directed to submit a proposed order within 20 days hereof, setting forth, among other things the resulting caption.

This matter is scheduled for a Preliminary Conference on March 9, 2020 at 9:30 a.m. in Courtroom 800 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: February 11, 2020
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court