

**De Abreu v Satz**

2020 NY Slip Op 35410(U)

July 29, 2020

Supreme Court, Kings County

Docket Number: Index No. 522343/2017

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 29<sup>th</sup> day of July 2020.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

-----X

MARIA ANTONIA ARIAS DE ABREU,

Plaintiff(s),

-against-

CORINNA LYNN SATZZ and JOHN DOE,  
Name fictitious and unknown to the plaintiff at  
this time.

Defendant(s).

-----X

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

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	28-39
Opposing Affidavits (Affirmations) _____	42
Reply Affidavits (Affirmations) _____	43

***Introduction***

Plaintiff, Maria Antonia Arias De Abreu, moves by notice of motion, sequence number two, for summary judgment, pursuant to CPLR § 3212, on the issue of liability, dismissing defendant’s affirmative defenses of comparative negligence and “emergency

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DECISION & ORDER

situation” and for such further and other relief as may be just and proper. Defendant, Corinna Lynn Satz opposes this motion.

### ***Background***

Plaintiff allegedly sustained personal injuries on February 1, 2016, in a rear end, hit and run collision. Plaintiff, Maria Antonia Arias De Abreu (De Abreu) was a passenger in the vehicle owned and operated by, Ruth Elida Peguero (Peguero). The De Abreu vehicle was stopped for a red light on East 60<sup>th</sup> Street. This vehicle was struck in the rear by the vehicle owned by defendant Corinna Lynn Satz (Satz) and operated by defendant John Doe (Doe).

De Abreu submitted her examination before trial (EBT) which she appeared for on February 20, 2019 (*see* NYSCEF Doc. #32, Exhibit B, De Abreu EBT), and provided an affidavit in support of her motion (*see* NYSCEF Doc. #31, Exhibit B, De Abreu Affidavit). De Abreu stated that she was a passenger in the back of Peguero’s vehicle on February 1, 2016 (*see* EBT at 14; *see also* Affidavit at ¶4). The vehicle was a bus and she sat in the last row (*see* EBT at 14; *see also* Affidavit at ¶4). The vehicle was stopped at a traffic control light for “two or three seconds” before the impact occurred (*see* EBT at 15; *see also* Affidavit at ¶5). De Abreu did not hear a horn or screeching tire before the impact occurred (*see* EBT at 15; *see also* Affidavit at ¶7). Plaintiff felt a heavy impact in the rear of the vehicle (*see* EBT at 15; *see also* Affidavit at ¶6). De Abreu was wearing a lap belt at the time of the accident (*see* EBT at 16; *see also* Affidavit at ¶8). She saw the driver get out of the vehicle that struck hers, inspect the damage and then get back into the vehicle and leave the scene of the accident (*see* EBT at 21; *see also*

Affidavit at ¶9). The traffic control light was still red when the driver of the Satz vehicle fled the scene (*see* EBT at 22).

This action was commenced by the filing of the summons and complaint on November 16, 2017. Issue was joined on April 19, 2018. A preliminary conference order dated November 14, 2018, directed defendants to respond to outstanding discovery demands within 45 days and to provide umbrella coverage information or an affidavit of an absence of such coverage by December 21, 2018 (*see* NYSCEF Doc. #19, PC order). On July 9, 2019, De Abreu filed a motion to strike, wherein the Hon. Lizette Colon ordered defendants to appear for an EBT on or before October 22, 2019 or be “precluded from testifying at the time of trial and offering supporting affidavits in support of dispositive motions, shall be adhered to w/o further motion or court intervention absent good cause” (*see* NYSCEF Doc. #25, 8/5/19 Order). On September 20, 2019, the Hon. Lizette Colon again ordered Satz and Doe to appear for EBTs on or before October 22, 2019 or be precluded (*see* NYSCEF Doc. #26, 9/20/19 Order). A Final Pre-Note order dated, October 23, 2019, extended defendants time to appear for their EBT and to provide plaintiff with the still outstanding discovery by November 26, 2019 (*see* NYSCEF Doc. #27, 10/23/19 Order).

## *Discussion*

### *Summary Judgment*

“[T]he 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 demonstrate the absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

### *Rear-End Collision*

“A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*Nsiah–Ababio v. Hunter*, 78 A.D.3d 672, 672, 913 N.Y.S.2d 659; *see Vehicle and Traffic Law* § 1129[a]; *Niyazov v. Hunter EMS, Inc.*, 154

A.D.3d 954, 63 N.Y.S.3d 457)” (*Batashvili v. Veliz-Palacios*, 170 A.D.3d 791, 96 N.Y.S.3d 146 [2 Dept., 2019]).

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision. A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause

(*Clements v. Giatas*, 178 A.D.3d 894, 112 N.Y.S.3d 539 [2 Dept., 2019] [internal citations omitted]; see *Xin Fang Xia v. Saft*, 177 A.D.3d 823, 113 N.Y.S.3d 249 [2 Dept., 2019]; see also *Ordonez v. Lee*, 177 A.D.3d 756, 110 N.Y.S.3d 339 [2 Dept., 2019]).

In support of her motion for summary judgment on the issue of liability, De Abreu submitted, *inter alia*, her deposition testimony and affidavit, which demonstrated that the operator of the Satz vehicle was negligent in the happening of the accident. It is undisputed that De Abreu’s vehicle was stopped at the time of the collision and the Satz vehicle struck the rear of the De Abreu vehicle (see *Clements v. Giatas*, 178 A.D.3d 894, supra). Further, it is undisputed that plaintiff was a passenger in the rear seat of the vehicle. Plaintiff demonstrated, prima facie, that she was an innocent passenger who did not contribute to the happening of the accident (see *Balladares v. City of New York*, 177 A.D.3d 942, 114 N.Y.S.3d 448 [2 Dept., 2019]). Therefore, De Abreu established, prima facie, negligence on the part the driver of the Satz vehicle.

In opposition, defendants request an extension of the time to produce their client for an EBT in their opposition papers.

Given the language of CPLR 2215, and the contexts in which it is applicable, the most reasonable interpretation of the statute is that a party seeking relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion, at least to have a right that the request be determined on the merits. Otherwise, a party who seeks relief by way of a notice of cross motion would be in a position less favorable than that of a party who merely makes the request without a notice of cross motion: the party who makes a formal cross motion would be required to comply with the notice and service requirements and deadlines imposed by the statute, but a party seeking relief merely by requesting it would enjoy greater flexibility.

(*Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 970 N.Y.S.2d 260 [2 Dept., 2013]).

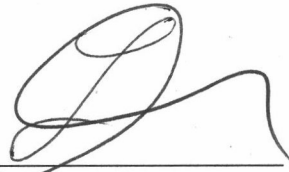
However, “courts ‘retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215’ (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2013]; see *Smulczeski v Smulczeski*, 128 AD3d 671, 672 [2015]).” (*Silvering v. Sunrise Family Med., P.C.*, 161 A.D.3d 1021, 78 N.Y.S.3d 143 [2 Dept., 2018]).

In this case at bar, Judge Colon issued numerous orders related to the production of the defendant for deposition. This Court does not find good cause to exercise its discretion in ruling upon the defendant’s application in the absence of a formal cross motion (*see id.*). As an initial matter, Judge Colon provided the defendant numerous opportunities to be produced, to no avail. Further, upon reading Judge Colon’s orders, they are self-executing the defendant is precluded. This Court will not act as the appellate court. Defendants failed to raise an issue of fact as to whether there was a non-negligent explanation for the happening of the accident.

**Conclusion**

Accordingly, plaintiff De Abreu's motion for summary judgment on the issue of liability, motion sequence two, dismissing the affirmative defenses of comparative negligence and "emergency situation" is granted.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

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