

**Mosca v Parisi**

2021 NY Slip Op 33839(U)

May 10, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617139/19

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT- STATE OF NEW YORK**

**Honorable James P. McCormack**

**Justice**

\_\_\_\_\_x

**ANTONIO MOSCA,**

**Plaintiff(s),**

**-against-**

**DAVID PARISI and AMY PARISI,**

**Defendant(s).**

\_\_\_\_\_x

**Trial IAS Part 12  
Nassau County**

**Index No.: 617139/19**

**Motion Seq. No.: 001 & 002  
Motion 001 Submitted: 3/16/21  
Motion 002 Submitted 4/30/21**

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX  
Affirmations in Opposition.....XX

Plaintiff, Antonio Mosca (Mosca), moves this court for an order, pursuant to CPLR §3212, granting him summary judgment on the issue of liability against Defendants, David Parisi (David) and Amy Parisi (Amy). Defendants oppose the motion. Defendants move separately for an order vacating the note of issue, and extending the deadline to file summary judgment motions to 120 days after the completion of discovery.

This action arises from a motor vehicle accident that occurred on November 21, 2019, on the westbound Long Island Expressway (LIE) in Suffolk County. Mosca commenced this action by service of a summons and complaint dated December 10, 2019. Issue was joined by service of an answer dated February 26, 2020. The case certified ready for trial on February 25, 2021, and a note of issue was filed on March 1, 2021.

**MOSCA'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 001)**

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should

only be granted when there are no triable issues of fact (see also *Andre v. Pomeroy*, 35 N2d 361 [1974]).

In support of the motion, Mosca submits only the pleadings and his own affidavit.

The entirety of the affidavit reads as follows:

I am over the age of 18 and the Plaintiff in the above captioned action. I make this Affidavit in support of the motion for summary judgment.

1. On November 21, 2019, I was the driver of a 2018 Chevrolet.
2. I was traveling on westbound on 495 - Long Island Expressway in the left lane at or near Route 454, County of Suffolk, State of New York.
3. As I was traveling on 495, I braked and stopped for traffic in front of me when, suddenly, and without any warning, the Defendants, DAVID PARISI and AMY PARISI' [sic] vehicle violently struck my vehicle in the rear.

The court finds that, based on the affidavit alone, Mosca has failed to establish entitlement to summary judgment as a matter of law. The affidavit is too threadbare to enable Mosca to meet his burden. However, even if the court found Mosca did meet his burden, the motion would still be denied. In opposition, Defendants offer Mosca's deposition testimony which contradicts the affidavit regarding whether or not Mosca was moving at the time of the accident. That would raise an issue of fact.

**DEFENDANTS' MOTION TO VACATE THE NOTE  
OF ISSUE (MOTION SEQ. 002)**

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating “that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the “time, place and nature of the consultation and the issues discussed...”, or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2<sup>nd</sup> Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2<sup>nd</sup> Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1<sup>st</sup> Dept. 2007]). While Defendants’ counsel filed an affirmation of good faith, it is inadequate. The entirety of the description of good faith efforts is as follows: “2. That good faith efforts have been made to resolve the issues raised herein at prior Court Conferences, and correspondences to Plaintiff’s counsel as documented in the exhibits to this motion.”

The affirmation of good faith contains none of the required information, nor is there any indication that any efforts, much less diligent efforts were made to resolve the motion. Further, there are no such “correspondences” annexed to the papers. Even if there were, this court regularly finds that letters alone do not satisfy the rule. Other courts

have found letters alone do not satisfy the good faith requirement. (*See Eaton v. Chahal*, 146 Misc.2d. 977, 983 [N.Y.Sup. 1990]; *Santiago v. Park Ambulance Serv., Inc.*, 53 Misc.3d 1201(A)[N.Y.Sup. 2016]; *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 [4<sup>th</sup> Dept. 2006](sending only letters “failed to demonstrate that they made a diligent effort to resolve this discovery dispute.”, quoting *Baez v. Sugrue*, 300 A.D.2d 519, 521 [2<sup>nd</sup> Dept. 2002]). As a result, the motion will be denied as defective.

The court notes that Mosca filed his note of issue soon after the certification conference, but then supplied responses to discovery nearly two months later, in opposition to this motion. Because this motion is being denied on technical grounds, Defendants will be granted leave to renew upon proper compliance with 22 NYCRR 202.27. However, because it appears that Mosca owed discovery at the time the note of issue was filed, this court would be much more inclined to grant an order of preclusion than to vacate the note of issue should the motion need to be brought a second time.

Accordingly, it is hereby

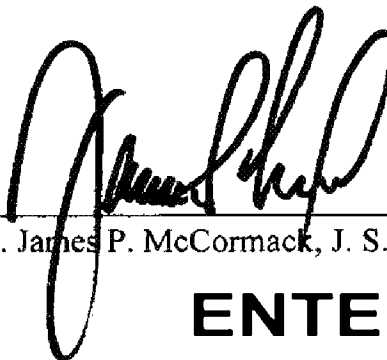
**ORDERED**, that the Mosca’s motion (Motion Seq. 001) for summary judgment on the issue of liability is DENIED; and it is further

**ORDERED**, that Defendants’ motion to vacate the note of issue will be denied, without prejudice, with leave to renew upon full compliance with 22 NYCRR 202.27; and it is further

**ORDERED**, that the deadline to file summary judgment motions is extended to July 9, 2021.

This constitutes the Decision and Order of the Court.

Dated: May 10, 2021  
Mineola, N.Y.



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Hon. James P. McCormack, J. S. C.

**ENTERED**

**May 14 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE