Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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TZIPORA HAIMOV FUZAILOVA,

Plaintiff(s),

- against -

JACQUELINE RINCON, ARIEL NAMATIEV, ELLA NAMATIEV, DAVID BOROHOV, ROTSHEL BOROHOV, JONATHAN ALIAV and ARTHUR ALIAV,

Defendant(s).

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Index No.: 707751/18

Motion Date: 9/29/20

Motion Cal. No.: 9

Motion Seq. No.: 07

The following papers numbered 1 - 10 read on this motion by plaintiff, pursuant to CPLR 2221 (d) and (e), for leave to reargue and renew the prior motion by defendants Ariel Namatiev and Ella Namatiev ("the Namatiev defendants") for summary judgment dismissing the complaint and cross-claims as against them, and pursuant to CPLR 3124, to compel them to appear for depositions.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Partial Support-Service.....	5 - 6
Affirmation in Opposition-Service.....	7 - 8
Reply Affirmation-Service.....	9 - 10

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from a multi-vehicle automobile collision that allegedly occurred on February 8, 2018 at 10:56 p.m. in Nassau County. It is undisputed that on that night, plaintiff and her husband, defendant David Borohov, were part of a group which was traveling westbound on the Northern State Parkway, a highway with three lanes in both directions. The group rode in three vehicles, which were driven, respectively, by David Borohov, and defendants Ariel Namatiev and Jonathan Aliav. It is also undisputed that Ariel Namatiev's vehicle suffered a flat tire *en route*, after which he pulled over and stopped in the right lane, and the other two vehicles followed suit, forming a single file

with the Namatiev vehicle in the rear. Some of the occupants, including plaintiff, exited the vehicles to investigate. Shortly thereafter, a vehicle driven by defendant Jacqueline Rincon struck the Namatiev vehicle in the rear, propelling it forward into the other vehicles, striking and injuring plaintiff in the process.

The Namatiev defendants previously moved for summary judgment dismissing the complaint and cross-claims as against them, on the ground that Jacqueline Rincon's negligence was the sole cause of the accident because she struck their stopped vehicle from the rear. The motion relied on, *inter alia*, the personal affidavit of Mr. Namatiev, in which he averred that he had been "completely and safely stopped" in the right lane of the highway, with his hazard lights on, for approximately three to five minutes before the initial collision. Plaintiff and Jacqueline Rincon separately opposed the motion.

By order dated June 29, 2020, this court granted the Namatiev defendants' motion for summary judgment (sequence #4) dismissing the complaint and all cross-claims as against them, finding that the Rincon opposition was insufficient to raise a triable issue of fact, as it solely consisted of her attorney's affirmation, which is not proof in admissible form.

Plaintiff now moves for leave to renew and/or reargue the Namatiev defendants' prior motion for summary judgment, and upon granting leave, that this court deny the motion.[1] The court deals first with the branch of the motion seeking renewal. "A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and must contain reasonable justification for the failure to present such facts on the prior motion" (*JPMorgan Chase Bank, N.A. v Jeffrey Novis*, 157 AD3d 776, 777 [2d Dept 2018]; *see also* CPLR 2221 [e] [2] and [e] [3]). In support of renewal, plaintiff submits the transcripts of the deposition of Jonathan Aliav, asserting that his testimony raises triable issues of fact as to Mr. Namatiev's negligence. As Jonathan Aliav's deposition occurred after the prior motion had been fully briefed, which, arguably, may constitute a reasonable justification for failing to previously present his transcript. However, the copy of the transcript submitted by plaintiff on the instant motion is neither signed by Jonathan Aliav, nor certified by the court reporter (*see* CPLR 3116 [a] and [b]; *Celestin v 40 Empire Blvd., Inc.*, 168 AD3d 805, 808 [2d Dept 2019] [unsigned, but certified transcript may be used where its accuracy has not been challenged]). As such, the court cannot consider the Aliav transcript because it is not submitted in

[1]Ms. Rincon submits an affirmation supporting the motion, except to the extent that plaintiff attributes to her any negligence for causing the accident. The other defendants did not submit papers in response to this motion.

admissible form and this branch of plaintiff's motion seeking renewal is denied.

As to the branch of the motion seeking to reargue, CPLR 2221 (d) (2) provides, in pertinent part, that such a motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion ... ." Moreover,

> "[w]hile the determination to grant leave to reargue lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019] [internal quotation marks and citations omitted]).

On this motion, plaintiff argues that on the prior motion, the Namatiev defendants failed to satisfy their *prima facie* burden to eliminate all issues of fact as to whether Ariel Namatiev violated VTL §§ 1163 (e) or 1202 (a), and, thus, was negligent *per se*, and whether that caused or contributed to the accident. However, in her papers in opposition to the prior motion (sequence #4), plaintiff expressly argued that the Namatiev defendants had not made a sufficient *prima facie* showing. The court, thus, denies plaintiff leave to reargue.

Plaintiff also moves to compel defendants David Borohov and Ariel Namatiev to sit for their respective depositions. The court cannot entertain the merits of this branch of the motion because plaintiff failed to submit an adequate affirmation of good faith.

Section 202.7(a) of the Uniform Rules for Trial Courts requires that a motion relating to disclosure be accompanied by an affirmation of good faith from the moving party's attorney showing that he or she conferred with the opposing party's attorney in a good faith effort to resolve the issues raised by the motion (*see e.g. Murphy v County of Suffolk*, 115 AD3d 820, 820 [2d Dept 2014]; *Deutsch v Grunwald*, 110 AD3d 949, 950 [2d Dept 2013]; *Natoli v Milazzo*, 65 AD3d 1309, 1310-1311 [2d Dept 2009]). The affirmation must describe "the time, place and nature of the consultation and the issues discussed and any resolutions, or ... indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [c]).

Plaintiff's counsel's affirmation of good faith indicates only that the respective attorneys for David Borohov and Ariel Namatiev have requested adjournments before each of their previously scheduled deposition dates. She does not state whether she ever

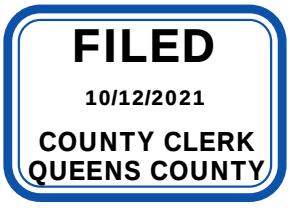
consulted with her adversaries in an effort to ascertain and resolve whatever issues exist regarding the holding of these depositions. Such a showing does not "evince [] diligent effort[s]" (*Deutsch*, 110 AD3d at 950), as contemplated by Uniform Rule § 202.7.

Accordingly, the above-referenced motion is denied in its entirety; and it is further

ORDERED, that, in the future, the parties shall make diligent efforts to attempt to resolve any disclosure issues by, *inter alia*, complying with the outstanding discovery which was noticed by each side without resort to further motion practice, upon penalty of dismissal pursuant to CPLR § 3126.

The foregoing shall constitute the decision and order of this court.

Dated: March 19, 2021



JANICE A. TAYLOR, J.S.C.

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