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| <b>Tucciarone v New York City Tr. Auth.</b>                                                                                                                                                                                    |
| 2022 NY Slip Op 32143(U)                                                                                                                                                                                                       |
| January 6, 2022                                                                                                                                                                                                                |
| Supreme Court, Richmond County                                                                                                                                                                                                 |
| Docket Number: Index No. 150300/2018                                                                                                                                                                                           |
| Judge: Thomas P. Aliotta                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: PART TR2-----X  
JOYCE TUCCIARONE,

HON. THOMAS P. ALIOTTA

*Plaintiff,***DECISION AND ORDER***-against-*

Index No.: 150300/2018

Motion No.: 002 and 003

THE NEW YORK CITY TRANSIT AUTHORITY,  
THOMAS JOSEPH MODICA, DANIEL M. CASTILLO  
and BRENDAN P. BULFIN,*Defendants.*  
-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through  
"9" were fully submitted on the 20<sup>th</sup> day of September 2021:

**Papers  
Numbered**Plaintiff's Notice of Motion, Affirmations,  
and Exhibits (MS\_002 - NYSCEF 57-69) .....1, 2Affirmation in Opposition by Defendants,  
NYCTA and MODICA (MS\_002 - NYSCEF 82).....3Notice of Cross-Motion, Affirmation, Statement of  
Material Facts and Exhibits by Defendants, NYCTA  
and MODICA (MS\_003 - NYSCEF 71-68) .....4, 5Affirmation in Opposition with Exhibit by Defendants,  
BULFIN and CASTILLO (MS\_003 - NYSCEF 79-81) .....6Defendants, NYCTA and MODICA Reply Affirmation  
to Defendants, BULFIN and CASTILLO dated  
September 14, 2021 (MS\_003 - NYSCEF 83) .....7Plaintiff's Counter Statement of Material  
Facts, Affirmation in Opposition and Exhibits  
(MS\_003 - NYSCEF 84-85) .....8Reply Affirmation by Defendants, NYCTA  
and MODICA dated September 16, 2021  
(MS\_003 - NYSCEF 86) .....9

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR Sections 3124 and 3126 against defendants, THE NEW YORK CITY TRANSIT AUTHORITY AND THOMAS JOSEPH MODICA (MS\_002) and the cross-motion by said defendants for an order, *inter alia*, pursuant to CPLR 3211 and 3212 dismissing this action (MS\_003) are decided as follows:

### **BACKGROUND**

This is an action for personal injuries sustained by plaintiff while a passenger on a bus owned by defendant, THE NEW YORK CITY TRANSIT AUTHORITY, and operated by its employee, THOMAS JOSEPH MODICA (hereinafter collectively referred to as "Transit"). It is alleged that the accident occurred on September 24, 2017 on Hylan Boulevard at or near its intersection with Jacques Avenue in Staten Island, New York. Plaintiff alleges that according to the investigation conducted by Transit, the accident occurred when the vehicle owned by defendant Castillo and operated by defendant Bulfin "moved left to right from the second traffic lane" and collided with Transit's bus. However, the police report states that, "Driver of VEH 2 [Bulfin] states he was traveling northbound on Hylan Boulevard and making a right turn from the right lane into the parking lot of 2424 Hyland [sic] Blvd when he was rear ended by Vehicle 1 [Modica]" (See NYSCEF 66).

Following Modica's deposition on April 23, 2021, plaintiff served on Transit a letter dated April 25, 2021 demanding a deposition of Surface Line Dispatcher William Rodriguez (NYSCEF 67). The basis of this demand was the fact that "Mr. Modica relied heavily on the findings of Surface Line Dispatcher, William Rodriguez at his deposition. The above notwithstanding, the witness could not verify the accuracy or consistency of William Rodriguez' investigation" (See NYSCEF 67). The defendants, Castillo and Bulfin have not testified in this

action in compliance with the Preliminary Conference Order or multiple compliance conference orders issued to date.

This demand was rejected by Transit and, therefore, on May 27, 2021, plaintiff was granted leave to serve a motion to compel compliance with the demand dated April 25, 2021 (NYSCEF 68). The order also granted leave to all parties to serve a motion with regard to the failure of Bulfin and Castillo to testify at an examination before trial. Plaintiff served the current motion on July 26, 2021 wherein she seeks an order pursuant to CPLR Sections 3124 and 3126 against Transit only. Thereafter, Transit served a cross-motion seeking an order a) pursuant to 3211 and 3212 to dismiss this action; b) precluding the co-defendants from testifying at trial; and c) compelling plaintiff to comply with Transit's post-deposition demand for discovery dated April 2, 2021 (NYSCEF 50).

### **FACTS**

Plaintiff has testified twice in connection with this action. Plaintiff initially testified at a pre-action statutory hearing on December 12, 2017. Plaintiff testified that she was sitting on the door side of the bus in a single seat (NYSCEF 74, 42:22-24).<sup>1</sup> However, she could neither recall what she was doing, nor the direction in which she was looking immediately prior to the incident (42:20-25; 43:1-3). When asked to describe the incident, plaintiff responded, "I was on the bus going to work and I felt the bus stop short" (44:17-23) because "a car cut the bus off, making a right" (46:5-7). The hearing examiner then inquired as to the basis of plaintiff's knowledge of the happening of the accident:

Q: Did you observe that or do you hear someone say that?

A: I heard and saw some. Like, I saw the car from like, and pull into the, after it was already in contacted with the bus.

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<sup>1</sup> The numbers refer to the page and line numbers in plaintiff's statutory hearing transcript.

Q: So another, and then did you observe another vehicle making contact with the bus or vice versa?

A: I don't understand what you you're saying.

Q: Did either the bus hit another vehicle or another vehicle hit the bus that you observed personally?

A: The bus, the car cut off the bus, the bus stopped short, and went into the car.

Plaintiff next testified at her examination before trial on July 9, 2019. Once again plaintiff testified that she was on the right side of the bus (NYSCEF 75, 32:19-20).<sup>2</sup> It was her testimony that immediately prior to the accident, the bus was travelling in the bus lane (34:9:12). However, on this occasion, plaintiff testified that she only saw the Bulfin and Castillo vehicle after the accident had occurred (35:16-22). Plaintiff only became aware of the accident when she felt the collision and the bus stop short (34:12-25). Plaintiff further testified that the first time she observed co-defendants' vehicle was after it pulled over following the accident (37:9:20) into the Shop Rite parking lot (41: 14-23). She did not observe "the bus and the other car actually come into contact with each other" (41:20-23) or recall whether she told the supervisor who responded to the scene of the accident that she observed the accident (41:4-25; 42:4-6).

On April 23, 2021, Modica testified that he reviewed his accident reports and all of Transit's reports to refresh his recollection prior to attending the deposition (NYSCEF 80, 9:16-23; 10:2-5). Modica was then requested to testify from memory (26:22-25; 26:1-3), whereupon he discarded said documents (69:14-25, 70:1-4). He recalled driving the S79 on the date of the accident (26:4-8). Once his attention was brought to the accident itself, he recalled it occurred on Sunday, September 24, 2017 at approximately 8:48 A.M. (31:6-19). He also recalled that he was travelling north on Hylan Boulevard in a commercial area (32:8-15) near the Shop Rite

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<sup>2</sup> The numbers refer to the page and line numbers in plaintiff's deposition transcript.

supermarket (33:6-9). The supermarket was on his right side (33:10-13). Prior to the impact, Modica was operating the bus in the right lane and travelling between 15 to 20 miles per hour (48:3-15). At the moment of impact, he was slowing down (49:9-13) when the Bulfin vehicle went from the middle lane into the shopping center (49:14-25; 50:1-2). The Bulfin vehicle was not in the right lane prior to the impact (Id.). Modica further testified that Bulfin was travelling faster than the bus as he came from either behind Modica or from his side (50:6-11). Modica had observed the Bulfin vehicle in his left side mirrors (55:10-14). The impact between the front side of the front bumper of the bus and the right side of Bulfin's vehicle towards the back occurred very quickly (57:21:25; 58:9-20). Modica further testified that he was driving straight in his lane when the other vehicle "came right in front of me" (65:9-15). After the impact, a portion of the Bulfin vehicle was in the Shop Rite parking lot and the right lane, perpendicular to the bus (65:16-25; 66:2-9).

Once Modica testified to the foregoing, he was shown a thirteen-page document which was marked as Plaintiff's Exhibit "2".<sup>3</sup> This document purportedly contained materials reviewed by Modica prior to testifying (69:14-25; 70:1-7). He was shown a document completed by the supervisor or dispatcher who arrived on scene (70:14-24). This document was referred to as the "dispatcher's brief" by plaintiff's attorney (Id.). Modica testified that he prepares his own brief and had not seen this particular document before testifying (70:25, 71:2-3). Modica did not recall providing to the dispatcher a statement that the "Right front corner of bus struck left side rear of auto" (71:8-13). Modica was then shown his "Operator Trip Sheet" (71:14-16). He testified that he completes his name and all information throughout the day (71:17-22). Modica completed information for this accident but did not mark the diagram with an "X" at the point of

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<sup>3</sup> These marked Exhibits were not annexed to the papers considered upon this motion.

the collision (72:24-25, 73:1-10). Modica further testified that he spoke to Bulfin who admitted to cutting him off (76:11-14), which was contrary to the statement Bulfin provided to the police (*Id.*, 15-17). Modica was also shown photographs of the Bulfin vehicle during the deposition (NYSCEF 62, pp.19-20). He testified that damage to the back bumper was not caused by the impact with the bus (NYSCEF 80, pp.87-88). Modica did not observe co-defendants' vehicle as it moved from the center lane into the right immediately prior to the impact (*Id.* at pp.104-107) because it happened in "a snap of the finger and he was there" (107:9-14).<sup>4</sup>

### **DISCUSSION**

A motion for sanctions pursuant to CPLR §3126 is a drastic remedy that is justified only when a party refuses to comply with a court order directing disclosure, or willfully and deliberately fails to disclose information which the Court finds ought to have been disclosed (*see* CPLR §3126; *Hoi Wah Lai*, 89 AD3d 990, 991 [2d Dept 2011] and *Thompson v. Dallas BBQ*, 84 AD3d 1221, 1221 [2d Dept 2011]). Such penalties are warranted when there is evidence of willful and contumacious conduct that is inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time (*see Roel v. Joe Hsu*, 185 AD3d 1077, 1078 [2d Dept 2020] and *Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2<sup>nd</sup> Dept. 2011]). However, "[T]he nature and degree of a penalty to be imposed on a motion pursuant to CPLR §3126 is a matter generally left to the discretion of the Supreme Court" (*Candela v. Kantor*, 154 AD3d 733, 733-734 [2d Dept 2017] and *Pesce v. Fernandez*, 144 AD3d 653, 654 [2d Dept. 2016]).

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<sup>4</sup> The marked photographs also were not annexed to the papers for consideration by the Court.

It is well settled that summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]). The proponent of any motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v. AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). It follows that speculation and hearsay are insufficient to defeat such a motion (*see generally, Gadon v. Oliva*, 294 AD2d 397, 398 [2d Dept. 2002]; and *Yassin v. Blackman*, 188 AD3d 62, 66-67 [2d Dept. 2020]).

The statements by parties to an action or non-parties contained in a police report are inadmissible to defeat summary judgment unless certain criteria are met because “[T]he use of a statement recorded in a police accident report involves two levels of hearsay, each of which must fit within a hearsay exception to render the statement contained within the report admissible” (*Id.* at p.65). At the first level, the police report must be certified and will be admissible if “it is based upon the officer’s personal observations and while carrying out police duties” (*Id.*). However, any statement recorded therein by the police officer must satisfy a hearsay exception or it may not be admitted for the truth of its content (*Yassin v. Blackman*, 188 AD3d 66). However, the statement may also be offered to establish that the statement was made only if the declarant is available to testify at the time of trial and subject to cross-examination to warrant the

denial of summary judgment (*Levbarg v. City of New York*, 282 AD2d 239, 241 [1<sup>st</sup> Dept. 2001]; *Maldonado v. Townsend Ave. Enterprises*, 294 AD2d 207, 208 [1<sup>st</sup> Dept. 2002]; and *A.B. Medical Services PLLC v. Allstate Ins. Co.*, 11 Misc.3d 135[A] [App. Term 2<sup>nd</sup> & 11<sup>th</sup> Jud. Dist., 2006]).

It is also well settled that the Court's role is solely to identify the existence of triable issues, not to determine the merits of any such issues upon a motion for summary judgment (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the credibility of the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v. Shop & Stop, Inc.*, 65 NY2d 625, 626 [1985]). The motion should be denied where the facts are in dispute, where different inferences may be drawn from the evidence or where the credibility of the witnesses is in question (see *Cameron v. City of Long Beach*, 297 AD2d 773, 748 [2d Dept. 2002]). If it is determined that material questions of fact exist, the motion must be denied.

In the context of a motion for summary judgment based upon the emergency doctrine, such a motion is not defeated with speculation that a driver failed to take evasive action (see generally, *Gadon v. Oliva*, 294 AD2d 397, 398 [2d Dept. 2002]). The emergency doctrine only relieves a driver of liability once it is demonstrated that the situation was not of their own making or that the accident was the "unavoidable result of circumstances which could not have been foreseen or prevented by the exercise of reasonable caution" (see *Marks v. Rieckhoff*, 172 AD3d 847, 849 [2d Dept. 2019]); *Penaranda v. Tesoriero*, 195 AD3d 633, 634 [2d Dept. 2021]; and see *Gadon v. Oliva*, *supra* [internal citations omitted]). This doctrine applies when a vehicle

“cuts in front” of another vehicle while making an unsafe lane change in violation of Vehicle and Traffic Law §1128(a) (*Marks v. Rieckhoff, supra* and *Leonard v. Pomarico*, 137 AD3d 1085, 1085-1086 [2d Dept. 2016]). The underlying rationale for the emergency doctrine is that “when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Penaranda v. Tesoriero*, 195 AD3d 634). However, summary judgment must be denied if there is a question of fact as to whether a driver meets its burden and establishes the elements of the defense (see *Marks v. Rieckhoff*, 172 AD3d 849).

#### **Motion Sequence 001**

Plaintiff’s motion for an order pursuant to CPLR§ 3126 is denied in its entirety. It is undisputed that approximately 32 days elapsed from the service of plaintiff’s letter dated April 25, 2021 until the compliance conference order issued on May 27, 2021 granting permission for plaintiff to serve a motion to resolve the dispute regarding Rodriguez’ deposition. Thus, there has not been a pattern of repeated failure by defendants to comply with court-ordered discovery over an *extended* period of time with respect to plaintiff’s request for a second deposition of Transit by William Rodriguez (*Roel v. Joe Hsu*, and *Rock City Sound, Inc. v. Bashian & Farber, LLP, supra*. [emphasis added]). As to that branch of the motion pursuant to CPLR §3124, plaintiff has also failed to demonstrate based upon the deposition testimony that Modica did not independently testify without the aid of documentary evidence. To the contrary, Modica was instructed not to refer to the documents while being questioned. At no time did he testify that he did not have independent recollection of the facts surrounding the happening of this accident.

While Rodriguez' testimony as a witness to Bulfin's and plaintiff's statements and admissions may be relevant at the time of trial, this argument was not raised by plaintiff in the moving papers. Moreover, the motion is denied as moot as the defendants' cross-motion is granted as set forth below.

**Motion Sequence 003**

Unlike the dispute with respect to Rodriguez' deposition, Castillo and Bulfin have repeatedly failed, over an extended period of time, to appear at the Court ordered depositions in this action without an adequate explanation (*Roel v. Joe Hsu, and Rock City Sound, Inc. v. Bashian & Farber, LLP, supra.*). Said defendants were ordered to appear at depositions on 12/21/2018, 7/23/2019, 10/23/2019, 11/15/2019, 1/30/2020, 2/13/2020, 11/16/2020, 12/15/2020, 1/20/2021, 3/31/2021 and 4/23/2021 (*see* NYSCEF DOC. 22, 28-33, 39-43 and 47).<sup>5</sup> The only explanation offered is that "Based upon discussions with Bulfin's and Castillo's families, it appears that Bulfin and Castillo recently moved to Mexico. Due to ongoing family issues, neither Bulfin nor Castillo has been in contact with their families, and both have moved [sic]" (NYSCEF 79, par. 20-21). This explanation is inadequate since it is not only based upon hearsay by unknown declarants, but it also fails to set forth the approximate date when defendants moved or the reason for their failure to appear and testify prior to moving out of the country. Additionally, defendants' counsel fails to set forth the outcome of their efforts to locate and apprise defendants of their required testimony commencing in 2018 after the first court order was issued but prior to the alleged move to Mexico. Based upon the foregoing, Bulfin and Castillo are precluded from testifying at the time of trial (CPLR §3126 [2]).

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<sup>5</sup> The Court notes that it has omitted from consideration the Court ordered depositions that were to take place during the period of time the State of New York was totally or partially shut down during the COVID-19 pandemic from March 2020 through the first week of November 2020.

Transit's motion for summary judgment is also granted. The Court first addresses the certified police report. This report, under the facts presented, is hearsay and insufficient to defeat summary judgment (*Yassin v. Blackman*, 188 AD3d 62). The statement to be offered was made by Bulfin, not Modica. Therefore, it is not an admission against interest as to Modica to raise an issue of his credibility for resolution by a jury. Next, even if the statement contained therein is offered as proof that the statement was made to rebut Modica's testimony and Transit's *prima facie* entitlement to summary judgment, Bulfin is precluded and unable to testify at trial subject to cross-examination (*Levbarg v. City of New York*, 282 AD2d 241; *Maldonado v. Townsend Ave. Enterprises*, 294 AD2d 208; and *A.B. Medical Services PLLC v. Allstate Ins. Co.*, 11 Misc.3d 135[A]). Therefore, the statement is not admissible for this Court's consideration in opposition to the cross-motion.

Finally, the only eye-witness testimony regarding the happening of the accident is from Modica. His testimony satisfies Transit's burden of proof that he was faced with an emergency situation not of his own making and that the accident was the unavoidable result of circumstances he could not have been foreseen or prevented by the exercise of reasonable caution (*Marks v. Rieckhoff*, 172 AD3d 849 and *Penaranda v. Tesoriero*, 195 AD3d 634). Modica's testimony establishes that the Bulfin vehicle cut in front of the bus suddenly and without warning in violation of Vehicle and Traffic Law §1128(a) (*Marks v. Rieckhoff, supra* and *Leonard v. Pomarico*, 137 AD3d 1085-1086), leaving little or no time for thought, deliberation or consideration, or the opportunity to weigh an alternative or evasive course of conduct (*Penaranda v. Tesoriero, supra* and *Gadon v. Oliva, supra.*). In opposition, the parties have not come forward with case law for the proposition that Modica was under an affirmative obligation to keep the any vehicle, including the Bulfin vehicle, in his sights *at all times*

(emphasis added). Modica, after “scanning his mirrors”, had the right to anticipate that the Bulfin vehicle would not change lanes without yielding the right of way (*Hurst v. Belomme*, 142 AD3d 642, 642 [2d Dept. 2016]; *Martin v. Ali*, 78 AD3d 1135, 1136 [2d Dept. 2010]; and *Moreno v. Gomez*, 58 AD3d 611, 612 (2d Dept. 2009)). Plaintiff’s cumulative testimony fails to raise an issue of fact as to the happening of this accident. As set forth above, neither plaintiff nor co-defendants submitted admissible evidence to rebut Transit’s *prima facie* entitlement to summary judgment. More importantly, plaintiff failed to submit such evidence to rebut her own testimony at the statutory hearing, *e.g.* that the Bulfin vehicle cut off the bus, or her deposition testimony that she did not see the impact (*DeMasi v. Radbro Realty*, 261 AD2d 354 [2d Dept. 1999]).

Transit’s motion for an order pursuant CPLR §3124 compelling plaintiff to comply with the Notice of Discovery and Inspection dated April 2, 2021 (NYSCEF 50) is denied as moot.

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for an order pursuant to CPLR §3124 and §3126 is denied in its entirety (MS\_002); and it is further

ORDERED, that the motion by defendants, NEW YORK CITY TRANSIT AUTHORITY and THOMAS JOSEPH MODICA, for an order precluding defendants, DANIEL M. CASTILLO and BRENDAN P. BULFIN, from testifying at the time of trial is granted; and it is further

ORDERED, that the motion by defendants, NEW YORK CITY TRANSIT AUTHORITY and THOMAS JOSEPH MODICA, for an order granting summary judgment pursuant to CPLR §3212 dismissing this action and all cross-claims against it is granted; and it is further

ORDERED, that this action is dismissed as against defendants, NEW YORK CITY TRANSIT AUTHORITY and THOMAS JOSEPH MODICA, only; and it is further

ORDERED, that the motion by defendants, NEW YORK CITY TRANSIT AUTHORITY and THOMAS JOSEPH MODICA, for an order pursuant CPLR §3124 compelling plaintiff to comply with the Notice of Discovery and Inspection dated April 2, 2021 is denied as moot; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 6, 2022

E N T E R:



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HON. THOMAS P. ALIOTTA, J.S.C.