

**Dermon v Aracena**

2023 NY Slip Op 34023(U)

September 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 501499/2023

Judge: Rupert V. Barry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 13

JACQUELYN DERMON,

Plaintiff,

against

DAMAR ARACENA, ENTERPRISE FM  
TRUST, PC RICHARD & SON LLC and  
P.C. RICHARD & SON LONG ISLAND  
CORPORATION,

Defendants.

Motion Seq. No.: 2  
Cal. No.: 8  
Index No.: 501499/2023

**DECISION & ORDER**

**Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Plaintiff's motion for summary judgment: NYSCEF Doc. Nos.: 27 – 40. Plaintiff's motion sought:**

- (a) an Order, pursuant to CPLR § 5015, granting the following: (1) vacatur of this Court's prior order dated July 19, 2023, wherein Plaintiff's Motion Seq. No.: 1 was denied due to Plaintiff's failure to appear (*see* NYSCEF Doc. No. 25);
- (b) an order, pursuant to CPLR § 3212, granting Plaintiff summary judgment on the issue of liability, and setting this matter down for an immediate trial on damages only;
- (c) an order, pursuant to CPLR § 3211(b), striking Defendants' affirmative defenses.

Upon the foregoing papers, this Court now finds as follows:

This action was commenced on January 16, 2023, with Plaintiff's filing of a summons and complaint and arises out of a motor vehicle accident which took place on April 19, 2022, at E/B Belt Parkway at or near its intersection with Pennsylvania Avenue in the County of Kings, State of New York. A vehicle operated by Defendant Damar Aracena struck in the rear the vehicle operated by Plaintiff.

This matter was discontinued without prejudice against Defendant ENTERPRISE FM TRUST by way of a stipulation filed on the NYSCEF system on September 12, 2023 (NYSCEF

Doc. No. 40). Accordingly, Plaintiff's motion is moot as it pertains to Defendant ENTERPRISE FM TRUST.

Plaintiff initially filed its similar motion on March 28, 2023 (Mot. Seq. No.: 1) seeking relief identical requested in items (b)-(c) above. On July 19, 2023, Plaintiff's counsel failed to appear for oral argument and, accordingly, the motion was denied (NYSCEF Doc. No. 25).

Defendants took no position with respect to Plaintiff's request that this Court vacate its prior July 19, 2023, denying Plaintiff's initial motion (Mot. Seq. 1) for Plaintiff's counsel's failure to appear for oral arguments pertaining to the same.

In opposition to that portion of Plaintiff's motion made pursuant to CPLR § 3211(b) seeking the striking of certain affirmative defenses, Defendants took no position with respect to Plaintiff's motion as it pertains to Defendants' seventh, eighth, ninth, eleventh, thirteenth, fourteenth, seventeenth, and nineteenth affirmative defenses; and conceded that Defendants' twelfth affirmative defense applies exclusively to Defendant Enterprise FM Trust.

#### **Plaintiff's Motion Pursuant to CPLR § 5015**

This Court must initially address Plaintiff's request that this Court vacate its prior Order dated July 19, 2023, which denied Plaintiff's March 28, 2023, motion (Mot. Seq. 1) which otherwise sought relief identical to that sought in the instant motion, for Plaintiff's counsel's failure to appear at the July 19, 2023, oral argument pertaining to the first motion.

Under CPLR § 5015(a), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of ... excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry

upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.” Confusion regarding the return date of a motion, mis-diarying of a motion, or a single isolated default in appearing should be excused because it is the public policy of this State to decide cases on the merits (*See, Ubaydov v. Kennedys Fleet*, 31 AD3d 536 [2d Dept. 2006]).

Here, this Court finds that Plaintiff’s counsel’s failure to appear on the underlying motion constituted excusable default, and, accordingly, this Court’s Order dated July 19, 2023 [NYSCEF Doc. No. 25] is hereby vacated.

#### **Plaintiff’s Motion Pursuant to CPLR 3212**

Pursuant to CPLR § 3212(b), a motion for summary judgment “...shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The proponent of a summary judgment 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 (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] [*internal citations omitted*]). Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of a material issue of fact requiring trial of the action. *Id.*

A rear-end collision with a vehicle creates a *prima facie* case of liability with regard to the operator of the moving vehicle, unless the operator of the moving vehicle proffers an adequate, non-negligent explanation for the accident (*Bustillo v. Matturro*, 292 AD2d 554 [2d Dept 2002] [*internal citations omitted*]).

Here, Plaintiff has submitted an affidavit of Plaintiff (NYSCEF Doc. No. 31) as well as a certified police accident report (NYSCEF Doc. No. 32) establishing that the accident occurred when the vehicle being operated by Plaintiff was struck in the rear by a vehicle operated by Defendant DAMAR ARACENA. In opposition, Defendants have not submitted any evidence to the contrary.

Additionally, under the doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee where that negligence occurs while the employee is acting within the scope of his employment (*Sauter v. New York Tribune*, 305 NY 442 [1953]; *see also* VTL § 388).

For the foregoing reasons, Plaintiff's motion pursuant to CPLR § 3212 for partial summary judgment on the issue of liability is **granted** as to Defendants DAMAR ARACENA, PC RICHARD & SON LLC, and P.C. RICHARD & SON LONG ISLAND CORPORATION.

**Plaintiff's Motion Pursuant to CPLR § 3211(b)**

Plaintiff also moves, pursuant to CPLR § 3211(b), to strike Defendants' First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Affirmative Defenses.

During oral argument held on September 13, 2023, Plaintiff agreed to withdraw her motion as it pertains to Defendants' Fourth Affirmative Defense, and Defendants agreed to withdraw their First, Second, Third, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Affirmative Defenses.

**Plaintiff's Motion for an Immediate Trial on the Issue of Damages**

Plaintiff's motion also seeks an immediate trial on the issue of damages. While Plaintiff has established entitlement to partial summary judgment on the issue of liability to the extent described above, this Court finds that Defendants are entitled to discovery on the issue of damages and, accordingly, that branch of Plaintiff's motion seeking an immediate trial on the issue of damages is **denied** and discovery is to proceed on the issue of damages. Accordingly, it is hereby

**ORDERED**, that Plaintiff's motion pursuant to CPLR § 5015 to vacate this Court's July 19, 2023 Order is **GRANTED**; and it is further

**ORDERED**, that Plaintiff's motion pursuant to CPLR § 3212 for summary judgment on the issue of liability as to Defendants DAMAR ARACENA, PC RICHARD & SON LLC, and P.C. RICHARD & SON LONG ISLAND CORPORATION is **GRANTED**; and it is further

**ORDERED**, that Plaintiff's motion pursuant to CPLR § 3212 as it pertains to Defendant ENTERPRISE FM TRUST is **DENIED as moot**; and it is further

**ORDERED**, that Plaintiff's motion pursuant to CPLR § 3211(b) as to Defendants' First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Affirmative Defenses is **GRANTED**; and it is further


**ORDERED**, that Plaintiff's motion for an immediate trial on the issue of damages is **DENIED**; and it is further

**ORDERED**, that the remaining parties herein are to proceed with discovery pertaining to the issue of damages.

The foregoing constitutes the decision and order of this Court.

\*All applications not specifically addressed herein are Denied.

Dated: September 13, 2023

  
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HON. RUPERT V. BARRY, A.J.S.C.  
HON. RUPERT BARRY

KINGS COUNTY CLERK  
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