

**Cantwell v Jankowsky**

2024 NY Slip Op 34773(U)

July 5, 2024

Supreme Court, Queens County

Docket Number: Index No. 721159/2019

Judge: Maurice E. Muir

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR  
Justice

JASON CANTWELL,

Plaintiff,

-against-

TERENCE P. JANKOWSKY, ZHEN C. GOA,  
NTW INCORPORATED d/b/a NATIONAL  
TIRE BATTERY COMPANY and TBC  
CORPORATION,

Defendants.

TERENCE P. JANKOWSKY,

Third-Party Plaintiff,

-against-

NTW INCORPORATED d/b/a NATIONAL  
TIRE BATTERY COMPANY and TBC  
CORPORATION,

Third-Party Defendants.

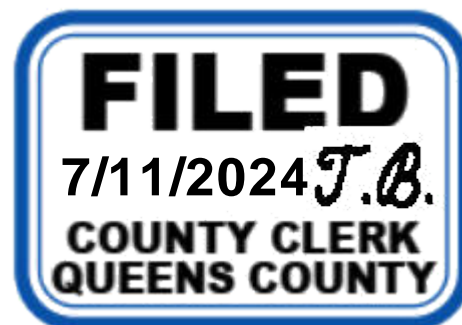
IAS Part - 42

Index No.: 721159/2019

Motion Date: 6/8/23

Motion Cal. No. 11

Motion Seq. No. 4



The following electronically filed (“EF”) documents read on this motion by Terence P. Jankowsky (“Mr. Jankowsky” or “Defendant/Third-Party Plaintiff”) for an order pursuant to CPLR § 3212 which grants summary judgment to Terence P. Jankowsky on the issue of liability as to any/all claims. Moreover, TBC Corporation (“TBC”), NTW Incorporated d/b/a National Tire and Battery Company (“NTB”) (collectively, “NTB” or “Defendant/Third-Party Defendants”) cross move for an order: a) pursuant to CPLR § 3212, for summary judgment dismissing Plaintiff Jason William Cantwell’s complaint and all cross/counter-claims on the

grounds that Plaintiff on William Cantwell did not sustain a “serious injury” within the meaning of New York Insurance Law § 5102(d); and b) granting such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 068 - 78
Cantwell Affirmation in Support.....	EF 088
Notice of Cross Motion-Affirmation-Exhibits-Service.....	EF 089 - 106
Jankowsky Affirmation in Support-Exhibits-Service.....	EF 126 -128
Affirmation in Opposition-Exhibits-Service.....	EF 129 -139
Reply Affirmation in Support-Exhibits-Service.....	EF 134 -137

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Jason William Cantwell’s (“Mr. Cantwell” or “Plaintiff”) allegedly sustained in a motor vehicle collision. In particular, on December 23, 2018, Zhen C. Gao (“Mr. Gao”) was operating his motor vehicle when he noticed that Mr. Jankowski’s dislodged tire travelling directly towards him. As a result, he brought his car to a stop and activated his flashing emergency lights; and Mr. Cantwell struck his vehicle in the rear (“subject accident”). As a result, on December 18, 2019, Mr. Cantwell commenced the instant action; and on May 14, 2020, issue was joined. Thereafter, on June 10, 2020, Mr. Jankowski commenced a third-party action against the Defendants/Third-Party Defendants. In particular, Mr. Jankowsky alleges that the sole proximate cause of the plaintiff’s injuries and the motor vehicle incident at issue, rests with the actions/inactions of the tire shop where he brought in his vehicle for tire service: On November 9, 2018, Mr. Jankowsky alleges that NTB installed 4 new tires on his Honda in York, Pennsylvania. Thereafter, on December 4, 2018, he returned back to that same York, Pennsylvania tire shop less than 1 month later complaining that the vehicle did not feel right. Thereafter, the NTB examined his vehicle and work was performed to the driver’s side rear tire as well as the passenger side front tire at that second visit. Before Mr. Jankowsky left the tire shop, NTB re-torqued all of his wheels to 95-foot pounds despite the manufacture’s recommendation that 80-foot pounds of torque be applied. Thereafter, 19 days after retorquing, Mr. Jankowsky’s front driver’s side wheel feel off while he was driving, which precipitated the subject accident. In support of the instant motion, Mr. Jankowsky provided an affidavit of C. Bruce Gambardella, P.E. (“Dr. Gambardella”), who opined to the following:

Failure mechanism of the wheel assembly detachment in Honda:

In the subject incident, based on the physical evidence, it appears that initially one wheel bolt was broken on the left front wheel hub very shortly after the 12/04/2018 service, assuming the NTB testimony. Discounting this testimony, the wheel bolt was broken and unrepaired when the CR-V left NTB after the November 9, 2018 service and only 4 lug nuts were holding the left front wheel assembly on the CR-V. The first wheel bolt failure in combination with the unrepaired damage to the wheel retention system led subsequent wheel assembly detachment. The first broken wheel bolt in and of itself would reduce the clamping force by 20 %. (This assumed that NTB would not allow the Honda to leave their facility with a broken wheel bolt. Clearly, if this was allowed by NTB, this would be a grossly unacceptable practice). When the pattern of wheel bolts was studied, it was clear that the wheel bolts that fatigued and failed were DIRECTLY opposite the initially broken wheel bolt which was heavily rusted. The two wheel bolts adjacent to the heavily rusted broken wheel bolt simply backed off and were lost. This detachment was a direct result of two rounds of improper maintenance by NTB. It was unknowable whether a re-inspection of the Honda 30-50 miles after the service on 12/04/2018 would have revealed any issues, as there were no reported issues with the Honda until just before the 12/23/2018 detachment.

Conclusion:

There was a pattern of repeated improper service work on the Jankowsky CR-V done by NTB on two sequential service visits. There was no history of wheel retention problems with the CR-V prior to the NTB service and no reported wheel retention problems with the CR-V after it was repaired by the body shop. The improper service work that led to the wheel detachment was the critical factor in the wheel strike to the Gao Lexus. *At this point in time, the subject wheel, wheel hub, rotor and wheel bolts are not available for inspection. Should they become available the writer requests a hands on inspection.*

In opposition, the Defendants/Third-Party Defendants argue that an NTB Tech, Timothy Weaver (“Mr. Weaver”) testified that with regard to Mr. Jankowsky’s vehicle, they made “absolutely sure” that NTB had three people torque the vehicle because the customer stated that the lug nuts came loose. Mr. Weaver also testified that twenty percent over-torquing would not have an effect on the integrity of the stud; and they probably did pull all of the wheels off to check and make sure the HUBs were clear of corrosion. Weaver testified that if there was a problem with the car from before, that they most likely would have removed all four tires to check for corrosion. Moreover, the Defendants/Third-Party Defendants provided an expert opinion from a Licensed Mechanical Engineer, Michael A. Stichter, Ph.D., P.E. (“Dr. Stichter”), who opined to the following:

When considering the increased stress and strain induced between 80 pound-feet to 95 pound-feet acting upon a wheel bolt, the material would not enter the plastic deformation region and therefore would not decrease the strength of the bolt in a significant or relevant manner. The torque value applied to the subject vehicle cannot be stated to a degree of engineering certainty as a contributive factor to the subject incident. Analysis of the torque applied does not support a failure mode in this way and there is no physical

evidence available for inspection to support a claim that plastic deformation occurred due to the torque applied (Ibid.)

It is well settled law that “[s]ummary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law” (*Reyes v. Arco Wenworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011], citing *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; see also *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show *prima facie* entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR § 3212(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1984]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant’s showing only by introducing “evidentiary proof in admissible form sufficient to require a trial of material questions” (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Furthermore, considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues” (*Ruiz v. Griffin*, 71 AD2d 1112, 1115 [2d Dept 2010] [internal quotations marks omitted]).

Here, the court finds that Mr. Jankowsky failed to establish his *prima facie* entitlement to judgment as a matter of law. (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Caldwell v. Town of Huntington*, 206 AD3d 875 [2d Dept 2022]; *Suchit v. Shaikh*, 207 AD3d 495 [2d Dept 2022]). Similar to the case at bar, in *Bicchett v. Atlantic Toyota*, 217 AD3d 743 [2d Dept 2023], on January 23, 2014, the defendants performed a multipoint inspection and tire rotation on the plaintiffs’ vehicle, which required the tires to be removed and reattached. Upon receipt of the vehicle after the service was completed, the plaintiff departed from the defendants’ property in the vehicle and drove along Sunrise Highway, at which point the right rear tire detached from the vehicle, causing the vehicle to crash into a snowbank. There, the Appellate Division, Second Department, held that “[f]or the doctrine of *res ipsa loquitur* to apply, a plaintiff must establish three conditions: “[f]irst, the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been

due to any voluntary action or contribution on the part of the plaintiff” (*Bicchett v. Atlantic Toyota, et al*, 217 AD3d 743 [2d Dept 2023] citing *Kambat v. St. Francis Hosp.*, 89 NY2d 489 [1997]; see *Berlich v. Maimonides Med. Ctr.*, 208 AD3d 1148 [2d Dept 2022]; *Marinaro v. Reynolds*, 512 AD3d 659 [2d Dept 2017]). Regarding the second element, exclusive control is not a rigid rule and has been applied in circumstances when “the accident occurred after the instrumentality left the defendant’s control, where it was shown that the defendant had exclusive control at the time of the alleged act of negligence” (*Dermatossian v. New York City Tr. Auth.*, 67 NY2d 219 [1986]; see *Marinaro v. Reynolds*, 512 AD3d at 659). The plaintiff does not need to eliminate all other causes, but, rather, must show that their likelihood is reduced so that the defendants’ conduct is more probably the cause (see *Dermatossian v. New York City Tr. Auth.*, 67 NY2d at 227; *Finocchio v. Crest Hollow Club at Woodbury*, 184 AD2d 491, 492 [2d Dept 1992]). The plaintiff must show that the defendant’s control was sufficiently exclusive to fairly rule out some other agency causing the purported defect (see *Bonventre v. Max*, 229 AD2d 557 [2d Dept 1996]; *Raimondi v. New York Racing Assn.*, 213 AD2d 708, 709 [2d Dept 1995]; see also *Matsur v. New York City Tr. Auth.*, 66 AD3d 848 [2d Dept 2009]). Once the plaintiff satisfies the burden of proof on these three elements, the doctrine of *res ipsa loquitur* permits the factfinder to infer negligence (see *Berlich v. Maimonides Med. Ctr.*, 208 AD3d 1149; *Smith v. Sommer*, 189 AD3d 906, 908 [2d Dept 2020]). Here, the court finds that Mr. Jankowsky neither satisfied the elements of *res ipsa loquitur* nor negligence. Furthermore, the court find that in light of the conflicting expert opinions, there exists a quintessential battle of the experts and such battle are best left for a jury’s resolution and not this Court on papers. “Where, as here, a nonmovant’s expert affidavit ‘squarely opposes’ the affirmation of the moving parties’ expert the result is ‘a classic battle of the experts that is properly left to a jury for resolution’” (*Mason v. Adhikary*, 159 AD3d 1438 [4<sup>th</sup> Dept 2018]; *Nowelle B. Hamilton Med., Inc.*, 177 AD3d 1256 [4<sup>th</sup> Dept 2019]). Thus, on this record and *assuming arguendo* that Mr. Jankowsky has met his prima facie burden establishing entitlement to summary judgment as a matter of law, the Defendants/Third-Party Defendants raised triable issues of fact in response. Thus, Mr. Jankowsky’s motion for summary judgment, on the issue of liability, must be denied.

Now, the court turns to the Defendants/Third-Party Defendants cross motion pursuant to CPLR § 3212, for summary judgment dismissing Mr. Cantwell complaint and all cross/counter-claims on the grounds that he did not sustain a “serious injury” within the meaning of New York Insurance Law § 5102(d). From the onset, the court finds that the instant cross motion is

improper: It is well settled that a cross-motion is an improper vehicle for seeking affirmative relief from a nonmoving party. (*Mango v. Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]; see CPLR § 2215; see also *Asiedu v. Lieberman*, 142 AD3d 858, 858 [1<sup>st</sup> Dept 2016]; *Sanchez v. Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v. Hospital for Special Surgery*, 114 AD3d 75, 88 [1<sup>st</sup> Dept 2013]; *Fuller v. Westchester County Health Care Corp.*, 32 AD3d 896 [2d Dept 2006]; *Terio v. Spodek*, 25 AD3d 781, 785 [2d Dept 2006]; *Gaines v. Shell-Mar Foods, Inc.*, 21AD3d 986, 987-988 [2d Dept 2005]). While courts have deemed this mislabeling a “technical” defect which will be disregarded, particularly where the nonmovant does not object and it results in no prejudice to the nonmoving party (see *Sheehan v. Marshall*, 9 AD3d 403 [2d Dept 2004]). Here, the court finds that there is prejudice because to the extent that the court deems the cross-movant’s motion a cross motion, the *Brill* rule is ignored. It is well settled law that courts are generally precluded from considering untimely summary judgment motions irrespective of the merits of the motions (*Brill v. City of New York*, 2 NY3d 648 [2004]). However, a well-established exception to this rule exists when the untimely cross motion is “nearly identical” to a timely summary judgment motion already before the court. (*Vitale v. Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016]; *Wernicki v. Knipper*, 119 AD3d 775 [2d Dept 2014]; *Homeland Ins. Co. of N.Y. v. National Grange Mut. Ins. Co.*, 84 AD3d 737 [2d Dept 2011]; *Whitehead v. City of New York*, 79 AD3d 858 [2d Dept 2010]). Here this exception does not apply to the case at bar.

Here, Mr. Cantwell correctly argues that “. . . defendants’ motion must be denied pursuant to CPLR 3212(a) as it is untimely.” Pursuant to CPLR § 3212(a), it requires motions for summary judgment be made no later than 120 days after the filing of the note of issue. This statutory deadline is strictly enforced and can only be extended upon a showing of good cause (*Brill v. City of New York*, 2 NY3d 648 [2004]; *Milano v. George*, 17 AD3d 644 [2d Dept 2005]; *Foo-Lu Co. v. Rojas*, 160 AD3d 932 [2d Dept 2018]). Whether good cause exists is a matter committed to the court’s discretion and requires a showing of a “satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy.” (*Id.* at 652; *Bargil Assoc., LLC v. Crites*, 173 AD3d 958 [2d Dept 2019] quoting *Bivona v. Bob’s Discount Furniture of NY, LLC*, 90 AD3d 796 [2d Dept 2011]). Here, on March 4, 2022, the plaintiff filed the Note of Issue and Certificate of Readiness for Trial (“Note of Issue”) with the clerk of the court. As such, the last day for any party to move for summary judgment in a timely fashion was on July 5, 2022. Notwithstanding the same, the Defendants/Third-Party Defendants’

served the instant cross-motion for summary judgment on September 8, 2022 -- more than two (2) months after the 120 day expiration. Furthermore, the Defendants/Third-Party Defendants failed to either move for leave to serve the untimely motion or to vacate the note of issue. Furthermore, the Defendants/Third-Party Defendants failed to offer a good cause explanation as to the delay. (*Bargil Assoc., LLC v. Crites*, 173 AD3d 958 [2d Dept 2019]; *Souffrant v. M&K Real Estate Associates, LLC*, 225 AD3d 914v [2d Dept 2024]).

Accordingly, it is hereby

ORDERED that Defendant/Third-Party Plaintiff's, Terence P. Jankowsky, motion for summary judgment, pursuant to CPLR § 3212, on the issue of liability, is denied in its entirety; and it is further,

ORDERED that Defendants/Third-Party Defendants' cross motion, pursuant to CPLR § 3212, for summary judgment dismissing Jason William Cantwell's complaint and all cross/counter-claims on the grounds that he did not sustain a "serious injury" within the meaning of New York Insurance Law § 5102(d), is denied, in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties on or before July 25, 2024.

The foregoing constitutes the decision and order of the court.

Dated: July 5, 2024  
Long Island City, NY

  
MAURICE E. MUIR, J.S.C.

