

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----X
BRAULIO LAMBRECHT and GUISELLA LAMBRECHT,

Plaintiffs,

-against-

MICHAEL THOMPSON and DANCY AUTO GROUP LLC,
and DANCY AUTO GROUP OF GREAT NECK LLC,

Defendants.
-----X

TRIAL/IAS PART 15
Index No.: 602159/14
Submission Date: 05/31/16
Motion Sequence: 001, 002

DECISION & ORDER

Papers Numbered

<i>Sequence #001</i>	
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Reply Affirmation for Motion to Amend Answer	2
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Upon the foregoing papers, defendants' motion for an Order pursuant to CPLR §3025(b) for leave to amend the Answer to add a counterclaim against plaintiff BRAULIO LAMBRECHT is determined as set forth below.

Plaintiff GUISELLA LAMBRECHT's cross-motion for an Order pursuant to CPLR §3212 granting summary judgment on the issue of liability and seeking sanctions pursuant to 22 NYCRR §130.1-1 is determined as set forth below.

This action seeks to recover for personal injuries allegedly sustained in a motor vehicle accident that occurred on March 25, 2014, between a vehicle operated by plaintiff BRAULIO

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LAMBRECHT, in which plaintiff GUISELLA LAMBRECHT was a passenger, and a vehicle operated by defendant MICHAEL THOMPSON and owned by defendant DANCY AUTO GROUP LLC.

Motion to Amend the Answer [Seq. 001]

Defendants move to amend the answer to add a counterclaim against BRAULIO LAMBRECHT, based upon the fact that he operated one of the two vehicles involved in the accident. Defendants argue that leave should be freely given insofar as there is no demonstrable prejudice to the plaintiff. Plaintiff GUISELLA LAMBRECHT opposes the motion, on the ground that defendants have alleged no factual basis for a finding of negligence on the part of BRAULIO LAMBRECHT.

Generally, leave to amend pleadings should be freely given, and the decision is committed to the broad discretion of the court. *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 (1983); *McGowan v. RPC Realty Corp.*, 46 AD3d 771, 772 (2d Dept. 2007). Although the legal sufficiency of a proposed amendment is generally not examined on a motion to amend, "where a substantial question has been raised as to the meritoriousness of a proposed amendment to a pleading, the court should resolve the question at the threshold in order to obviate the possibility of needless time-consuming litigation." *Staines v Nassau Queens Med. Group*, 176 AD2d 718, 719 (2d Dept. 1991). Leave to amend should not be granted where the proposed amendment is "palpably insufficient as a matter of law or is totally devoid of merit." *Schwartz v. Sayah*, 83 AD3d 926 (2d Dept. 2011); *see also Lucido v Mancuso*, 49 AD3d 220 (2d Dept. 2008).

The Court notes that defendants offer no affidavit or evidentiary facts in support of their motion. Nor are they required to. *Lucido v Mancuso*, 49 AD3d at 229. Nonetheless, in opposition to the cross-motion, defendants submit the affidavit of defendant MICHAEL THOMPSON, in which he states:

"I was struck from behind by another motor vehicle which caused me to lose control of the vehicle I was driving. As a result of being struck from behind, my vehicle was forced across Jericho Turnpike and made contact with a black SUV. ... The sole cause of the accident was the vehicle that struck my vehicle from behind causing me to lose control." (*Aff. In Opp to Cross-Motion, Exh. A*, ¶¶ 4, 5, 9, [emphasis supplied]).

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This party admission, on its face, negates any claim for contribution based upon an apportionment of fault to plaintiff BRAULIO LAMBRECHT. *Norman v Ferrara*, 107 AD2d 739 [2d Dept. 1985] (admission that vehicle was registered in defendant's name rendered defendant's proposed amendment of answer to deny ownership of vehicle palpably insufficient as a matter of law); *Cf., Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-99. Further, except to the extent that MICHAEL THOMPSON denies admitting guilt at the scene of the accident, his version of the accident is consistent with the account given in sworn affidavits by two eyewitnesses: namely, that MICHAEL THOMPSON lost control of his vehicle, crossed over the double yellow line and two lanes of traffic, and crashed into plaintiff's vehicle traveling in the opposite direction (*Aff. Supp. Cross-Motion and Opp. Motion, Exhs. B & C*).

Based upon the record to date, the Court finds that an attempt to prove negligence on the part of BRAULIO LAMBRECHT would be unavailing. *See Norman v Ferrara*, 107 AD2d at 740. The insufficiency of the proposed amendment is, accordingly, "clear and free from doubt." *Lucido v Mancuso*, 49 AD3d at 226; *Norman v Ferrara*, 107 AD2d at 740. At minimum, a "substantial question" has been raised as to the merits of the proposed amendment. *See Staines*, 176 AD2d at 719. The Court, in the exercise of discretion, cannot authorize an amendment serving no purpose other than to promote further motion practice and delay.

Cross-Motion For Summary Judgment [Seq. 002]

Plaintiff GUISELLA LAMBRECHT's cross-motion for summary judgment is supported by the affidavits of three non-party witnesses, two of whom saw the accident as it took place, and all of whom were at the scene immediately thereafter. Plaintiff also submits a copy of the Police Accident Report, which, among other things, identifies the non-party witnesses (*Aff. Supp. Cross-Motion and Opp. Motion, Exh. A [uncertified]; Affirmation in Reply [Panetta], Exh. A [certified]*).

Witness Louis Santelli states that he was driving directly behind the plaintiffs' vehicle and had a direct view of the accident as it occurred. He states further:

I noticed that the Morgan's [defendants' vehicle] wheels were spinning much faster than the vehicle was moving suggesting that the Morgan driver lost control of his vehicle. The Morgan oversteered and had no control as it "fishtailed" back and forth. I could tell the Morgan driver lost control of his vehicle and so I completely stopped my vehicle in my lane on Jericho Turnpike. The Morgan driver crossed over from the eastbound lane he was

supposed to be traveling almost perpendicular to the Lanes [sic] for traffic into the westbound lane “like a bullet” and smashed into the front drivers side corner of the Cadillac [plaintiffs’ vehicle]. (Aff. Supp. Cross-Motion and Opp. Motion, Exh. B, ¶¶ 6-9 [paragraph numbering omitted]).

Mr. Santelli states that, as he was retrieving plaintiffs’ belongings that were thrown from the vehicle, he overheard defendant MICHAEL THOMPSON say “I meant to step on the brakes, but stepped on the gas.” (Aff. Supp. Cross-Motion and Opp. Motion, Exh. B, ¶ 13).

The affidavit of witness Alyssa Thomson is consistent, in all respects, with that of Mr. Santelli. In addition to describing the accident, Ms. Thomson states that, after the collision, MICHAEL THOMPSON got out of his car and said “It was my fault, it was completely my fault!” (Aff. Supp. Cross-Motion and Opp. Motion, Exh. C, ¶ 9).

Non-party Ryan Schreck did not see the accident, but he got out of his vehicle immediately thereafter to attend to defendant MICHAEL THOMPSON. Mr. Schreck states that, while they sat together on the ground, MICHAEL THOMPSON stated “My foot moved off the brake and onto the accelerator.” (Aff. Supp. Cross-Motion and Opp. Motion, Exh. D, ¶ 10).

The Court finds that the above evidence, demonstrating that defendant MICHAEL THOMPSON’s vehicle traveled “like a bullet” across a double yellow line into the opposing lane of traffic and struck plaintiff’s vehicle head-on, is sufficient to establish, *prima facie*, that MICHAEL THOMPSON’s negligence was the sole proximate cause of the accident. *Rodriguez v Gutierrez*, 138 AD3d 964 (2d Dept. 2016); see NY Vehicle & Traffic Law §1126(a). Particularly, MICHAEL THOMPSON’s admission that he stepped on the accelerator instead of the brake demonstrates, *prima facie*, a situation of his own making. *Rodriguez*, 138 AD3d 964 at *3. Further, the manner in which the accident occurred establishes, *prima facie*, the absence of negligence on the part of plaintiffs – plaintiffs were not required to anticipate that defendants’ vehicle would cross over into oncoming traffic. *Id.*; *Tsai v Zong-Ling Duh*, 79 AD3d 1020 (2d Dept. 2010).

In opposition, defense counsel argues that plaintiffs have not established that BRAULIO LAMBRECHT’s actions were not at least partially responsible for the accident, because they submit no affidavits from plaintiffs nor provide any information regarding the speed or manner in which BRAULIO LAMBRECHT was driving on the day of the accident. The Court finds that the defense’s opposition eliminates, rather than raises, an issue of fact. As discussed above, MICHAEL THOMPSON, in a sworn affidavit, states that an unidentified driver who presumably

fled the scene bears *sole* responsibility for the accident. The Court notes, further, that MICHAEL THOMPSON cites no conduct on the part of BRAULIO LAMBRECHT that could have contributed to the accident. Nor do any of the three non-party witnesses. Counsel's "mere speculation that [BRAULIO LAMBRECHT] may have failed to take some accident-avoidance measures or in some other way contributed to the occurrence of the accident is insufficient to defeat the motion for summary judgment." *Tsai*, 79 AD3d at 1022.

On the issue of MICHAEL THOMPSON's negligence, defendants contend that the affidavit of MICHAEL THOMPSON creates an issue of fact, insofar as it attributes sole responsibility for the accident to the actions of an unidentified driver whose vehicle struck MICHAEL THOMPSON's vehicle in the rear and propelled it across two lanes into oncoming traffic. Presumably, defendants are attempting to demonstrate that MICHAEL THOMPSON's cross-over was an emergency situation not of his own making. *Rodriguez*, 138 AD3d 964 at *3. In his affidavit, MICHAEL THOMPSON also denies the prior admission of fault, and claims that he told the responding police officer that his vehicle was struck from behind. (*Aff. In Opp to Cross-Motion, Exh. A*, ¶¶ 6, 10).

In general, matters of credibility are appropriately left to the trier of fact. *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338 (1974); *Fleming v. Graham*, 34 AD3d 525, 526 (2d Dept. 2006), *rev'd. on other grounds* 10 N.Y.3d 296 (2008). In certain circumstances, however, when a recent affidavit submitted on summary judgment contradicts the affiant's own prior admissions, its credibility may be examined to the extent of determining whether it presents a feigned issue of fact. *Ricci v Lo*, 95 AD3d 859 (2d Dept. 2012); *Bloch v RT Long Island Franchise, LLC*, 70 AD3d 993 (2d Dept. 2010); *Rosenblatt v Venizelos*, 49 AD3d 519 (2d Dept. 2008); *Nieves v JHH Transport, LLC*, 40 AD3d 1060 (2d Dept. 2007); *but see Knepka v Tallman*, 278 AD2d 811 (4th Dept. 2000).

Here, MICHAEL THOMPSON's affidavit, sworn to on May 6, 2016 (over two years after the accident), contradicts prior admissions made to three non-party witnesses immediately following the accident. It also contradicts the information contained, or not contained, in the Police Accident Report (*Aff. Supp. Cross-Motion and Opp. Motion, Exh. A [uncertified]; Affirmation in Reply [Panetta], Exh. A [certified]*). According to the Police Accident Report, the accident involved two vehicles. The report did not list a third, unidentified vehicle that fled the scene. Nor did it note MICHAEL THOMPSON's alleged report that he was struck by an unidentified third vehicle. The only damage noted on the Police Accident Report was damage to the front of MICHAEL THOMPSON's vehicle, not to the rear. Notably, none of the non-party witnesses mentioned seeing a third vehicle in proximity to defendants' vehicle prior to the accident, or fleeing the scene in the aftermath.

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The Court finds that the recent affidavit of MICHAEL THOMPSON constitutes “a belated attempt to avoid the consequences of his earlier admissions by raising a feigned issue of fact” which is insufficient to defeat summary judgment. *Ricci*, 95 AD3d at 860. His conclusory denial of the prior admissions, although distinguishing this matter from *Ricci*, is insufficient to add substance to his claim. The Court thus finds that plaintiffs have established their right to judgment as a matter of law on the issue of liability only.

Based upon the foregoing, it is

ORDERED, that defendants’ motion for an Order pursuant to CPLR §3025(b) for leave to amend the Answer to add a counterclaim against plaintiff BRAULIO LAMBRECHT is *denied*; and it is further

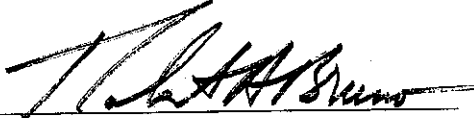
ORDERED, that plaintiff GUISELLA LAMBRECHT’s cross-motion, to the extent that it seeks an Order pursuant to CPLR §3212 granting summary judgment on the issue of liability only is *granted*; to the extent that the cross-motion seeks sanctions pursuant to 22 NYCRR §130.1-1, it is *denied*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: June 16, 2016
Mineola, New York

ENTER:


Hon. Robert A. Bruno, J.S.C.