SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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BRAULIO LAMBRECHT and GUISELLA LAMBRECHT,

Plaintiffs,

- against -

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

Defendants.

AFFIRMATION IN SUPPORT OF PLAINTIFFS' CROSS-MOTION AND OPPOSITION TO DEFENDANTS' MOTION

Index No. 602159/14

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FRANK C. PANETTA, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, and a Partner in the Law Firm of Massimo & Panetta. P. C., Attorneys for Plaintiffs herein, hereby affirms the following to be true under the laws of perjury:

1. I am a member of the law firm, MASSIMO & PANETTA, P.C., attorneys for the Plaintiff, GUISELLA LAMBRECHT, in the above entitled matter, and am fully familiar with the facts and circumstances herein.

2. I submit this Affirmation in support of Plaintiff GUISELLA LABRECHT's within Cross-Motion for Summary Judgment on the issue of liability, as there is no issue of fact on liability, Plaintiff can prove the matter is entirely the fault of the Defendant operator MICHAEL THOMPSON and in Opposition to Defendants' Motion for an Order relief pursuant to CLPR § 3025(b) to amend their Answer to add a Counterclaim against Defendant BRAULIO LAMBRECHT thereto, as (a) they simply do not meet the statutory requirement to amend their pleading, nor do they even attempt to do so. Their motion is a complete waste of resources and the only relief that should be granted is Plaintiffs' instant Cross Motion for summary judgment against the Defendants.

3. Plaintiff GUISELLA LAMBRECHT demands and is entitled to summary judgment relief because the overwhelming evidence requires it. Any delay in amending the pleadings would be error on the part of the Court and a waste of time. ***All three (3) of the Witnesses listed on the MV-104A (Exhibit "A")[1] prepared by the officer in this matter have provided Affidavits as to both the clear liability and fault of MICHAEL THOMPSON, as well as admissions made at the scene. All three witnesses were offended and shocked that Defendants in light of their clear negligence and prior admissions, had the temerity, had the audacity to even think of setting forth a defense or suing*** any Plaintiff (See Exhibits "B" ("The Santelli Affidavit"), "C" ("The Alyssa Thompson Affidavit") , and "D" ("The Schreck Affidavit").

4. The Defendant driver, MICHAEL THOMPSON, spun his tires (Exhibit "B", Paragraph "6") as he pulled out of a strip mall onto Jericho Turnpike, lost control of the powerful sports car he was driving (Exhibit "B", "The Santelli Affidavit" Paragraphs "6", "7"), a Morgan, and shot across two lanes and over a double-yellow line on the opposite side of the street and nearly killed Plaintiffs, ramming their Cadillac Escalade, flipping it backwards two complete revolutions.

5. Plaintiffs were lawfully and appropriately in their own motor vehicle driving on Jericho Turnpike within the speed limit and all proper norms of vehicular travel. Then, *out of the blue*, Defendants' vehicle, operated by Defendant MICHAEL THOMPSON, "fully depressed the accelerator" (Exhibit "B", Paragraph "5") "had no control as [he] "fishtailed" (Exhibit "B" Paragraph "7"), then when his wheels gained traction, shooting across two lanes "like a bullet" (Exhibit "B", Paragraph "9") struck Plaintiffs' vehicle *head-on or front to front (Exhibit "B" Paragraph "9") or the front left of the Morgan hit the Escalade's front.*

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[1] A certified copy of the police report was not available at the time of this motion, however, that's irrelevant, because Plaintiff doesn't rely on it and therefore, it doesn't have to be in admissible form, it is provided so that the Court can see the three (3) witnesses on it. All three (3) of whom have provided affidavit.

6. **It is apparent from the fact that Defense counsel for MICHAEL THOMPSON and DANCEY AUTO GROUP, LLC made a frivolous and meritless motion, that he never even spoke to his client**, ***MICHAEL THOMPSON*** nor did he speak to his own investigators from Zurich (who are extremely unscrupulous from past dealings, but that's not for this discussion), the carrier counsel represents, who interviewed Alyssa Thompson, an eyewitness on the accident report (Exhibit "A"). If he had done either, he would have discovered that the witnesses are strong (one can review Exhibits "B" and "C" and know that) and that all evidence makes it clear that MICHAEL THOMPSON is entirely at fault and that even THOMPSON himself had admitted to all at the scene, that the accident was entirely his fault (see Exhibits "B"," C"," D").

7. MICHAEL THOMPSON told everyone who would listen at the accident scene that his foot slipped off the brake and onto the gas (Exhibit "B", Paragraph 13, Exhibit "C", paragraph 9, Exhibit "D", Paragraph "10") It is extremely noticeably that affidavit by the Defendant operator of the Motor Vehicle, MICHAEL THOMPSON has been annexed to the motion. Where is it? The Defendant's silence is deafening. Without it, in the flimsy three page motion to amend the pleadings, the issue as to liability is closed and the motion to amend the pleadings fails. Defendants needed an affidavit from THOMPSON to hypothesize or at least conujure up some semblance of a theory as to why BRAULIO LAMBRECHT should be a defendant. It's dubious whether they can get an affidavit from MICHEAL THOMPSON anyway, no only because he admitted fault, but because no defense exists.

8. MICHAEL THOMPSON was negligent as per the witnesses (all three on the accident report, which is remarkable), admitted he was 100% liable. What's left is the assessment of the value of the Plaintiffs injuries. Summary judgment is ripe for the Plaintiffs' taking. How is it possible that the Defendants cross claim when they have no business doing so? The flimsy three

page motion and cross-claim is completely frivolous in nature and counsel puts himself in a precarious position.

9. This negligence by MICHAEL THOMPSON and the owner of the Morgan, DANCY AUTO GROUP, caused Plaintiffs severe and permanent injuries, Defendants have no defenses to assert to Plaintiffs' causes of action in the Complaint. Moreover, as there exists no genuine issue of material fact between the parties for resolution at trial, Plaintiffs should be granted the instant motion for summary judgment as to the liability issue. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974).

10. Similarly, in addressing Defendants' present motion, brought pursuant to CPLR § 3025(b), as Defendants have utterly failed to articulate *any theory of liability* attributable to Plaintiff BRAULIO LAMBRECHT while he was operating his vehicle during the accident (again, given that Plaintiff was operating his vehicle safely and lawfully at the time that Defendants' car, operated by Defendant MICHAEL THOMPSON, struck Plaintiffs' vehicle head-on), Defendants have failed to establish the necessary factual and legal predicate to warrant the application of CLPR § 3025(b) to this matter.

11. In their moving papers, Defendants have done nothing more than point out that the granting of their motion would not be prejudicial to Plaintiffs. Perhaps so, perhaps not. However, in their moving papers, Defendants have failed to demonstrate *any factual predicate or legal justification* for the relief they request from this Court. This is because Defendants cannot provide any basis in the Record or to articulate any reason to support their capricious effort to attribute an utterly superfluous counterclaim against Plaintiff BRAULIO LAMBRECHT.

12. On March 25, 2014, Plaintiffs were driving in their car, a Cadillac, on Jericho Turnpike near Woodbury Road in Woodbury, New York. Plaintiff BRAULIO LAMBRECHT was driving, and his wife GUISELLA LAMBRECHT was a passenger in the car, when

suddenly, a Morgan car driven by Defendant MICHAEL THOMPSON at a high rate of speed, struck their Cadillac head-on, causing both Plaintiffs serious and severe permanent injury.

13. More than one eye-witness passing by witnessed the automobile accident. They have reported seeing the Morgan's wheels spinning in place, causing the car to lurch forward, and continue accelerating, apparently losing control of the car, crossing the double yellow line in the middle of Jericho Turnpike, entering onto the lane of on-coming traffic, and striking Plaintiffs' on-coming Cadillac head-on with great force. At the time, the Cadillac was moving forward at a reasonable rate of speed.

14. After the accident, passersby reported that Defendant MICHAEL THOMPSON made statements to them. Said Defendant told them that the reason the accident occurred was because while driving the Morgan, he had unintentionally pressed the car's accelerator when intending to apply the car's brakes. For more complete statements of what the passersby witnessed, the Affidavits of the passerby witnesses. Exhibits "B", "C" and "D" are attached hereto.

AS AND FOR GRANTING PLAINTIFFS SUMMARY JUDGMENT

15. It is submitted that the present state of the Record – as set forth in Paragraphs 6, 7 and 8, *supra* – will not be materially altered by the discovery process. No new information will be discovered that would alter the circumstances of the underlying fact pattern, to wit, that the negligent operation of Defendants' automobile caused Plaintiffs' injuries. This being the case, it follows that, *pace* Paragraph 3, *supra*, as there *exists no genuine triable issue of material fact in dispute between the parties to be resolved at trial*, Plaintiffs should be granted the instant motion for summary judgment as to the liability issue. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974), *supra.*

16. In deciding a motion for summary judgment, the Court must decide whether there is an issue of fact in dispute and whether that issue is genuine and substantial or is a mere allegation or speculation. *Richard v. Credit Suisse,* 242 NY 346 (1926). A motion for a

summary judgment cannot be defeated by mere conjecture, suspicion or bald conclusory allegations. *Sosa v. Joyce Beverages, Inc.,* 159 AD2d 335 (1st Dept. 1990); *Richard v. Credit Suisse, supra;* see also, *McGaghge v. Kennedy,* 48 NY2d 832 (1979).

17. In a negligence case, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of damages suffered by the injured plaintiff. Restatement, Torts 2d., Section 281; *Becker v. Schwartz,* 46 NY2d 401 (1978); *Gordon v. Muchnick,* 180 AD2d 15 (2nd Dept. 1992). In order for a plaintiff to meet his burden of proving a prima facie case, he or she must show that the defendant's negligence was a substantial cause of the events which produced the injury. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980); *Boltax v. Joy Day Camp*, 67 N.Y.2d 617 (1986).

18. Summary Judgment is properly utilized to eliminate unnecessary expense to named litigants where no issue of material fact is presented to justify a trial as against them. *Ayelrod v. Armistead,* 36 A.D.2d 592 (1st Dept., 1971). With respect to the determination of whether or not such factual issues exist, the Court in *Manufacturers and Traders Trust Co. v. Barry Warehouses Inc.,* 49 AD2d 320 (4th Dept., 1975) stated (49 AD2d at pp. 321-322):

> The Court of Appeals has consistently held that the "test on a motion for Summary judgment is whether there are issues of fact properly to be resolved by a jury." *Hartford Accident Indemnity Co. v. Vesolowski,* 33 NY2d 169 (1973). The shadowy semblance of an issue is not sufficient, however, to defeat a motion for summary judgment. *Koppers Company Inc. v. Empire Bituminous Products, Inc.,* 35 AD 2d 906 (4th Dept. 1970), *aff'd* 30 NY2d 609 (1972)

The Court, in citing *Hartford Accident Indemnity Co. v. Vesolowski,* and *Koppers Company Inc. v. Empire Bituminous Products, Inc.,* held that the *shadowy semblance of an issue* is insufficient to defeat a motion for summary judgment. Here on summary judgment, Defendants cannot even demonstrate that they have so much as a *shadowy semblance of an issue* on their side of the argument.

19. Indeed, *Kaye v. Hickman,* 38 AD2d 754 (2d Dept. 1972) clearly states that where the automobile in which plaintiff-movant was a passenger had been standing still – motionless -- just prior to the multi-vehicular collision that caused his injuries, denial of his motion for summary judgment was error in the absence of a showing that he was negligent. Plaintiff-movant's motion for summary judgment motion was thereupon granted by the Appellate Division. Here, the circumstance that our Plaintiffs' car was in motion at the time of the head-on collision does not distinguish this case from *Kaye v. Hickman.* In each case the plaintiff-movant vehicle – whether moving or at rest – was free of any taint of negligence at the time the car was struck by a clearly out-of-control vehicle.

20. The *Kaye v. Hickman* decision cites a Third Department case, *Donlon v. Puglisi*, 27 AD2d 786 (3d Dept., 1967), with a holding that would be helpful in reaching the correct resolution of Plaintiffs' present summary judgment motion.

21. The fact pattern in *Donlon* differs somewhat from this matter. Appellant Denton was driving a car that was struck head-on (actually three-quarters-on) by a vehicle driven by Defendant Puglisi travelling in the opposite direction. Respondent Donlon was a passenger in the Puglisi car and was injured in the accident; he brought suit against both drivers. Donlon's driver Puglisi effectively acknowledged his negligence, in accordance with the holding by the Court of Appeals in *Pfaffenbach v. White Plains Express Corp.*, 17 NY2d 132 (1966).

22. Appellant Denton unsuccessfully moved for summary judgment in the *nisi prius* Court. He then appealed to the Appellate Division. The Third Department found the Record in the case did not contain any direct proof of negligence on Denton's part and granted his summary judgment motion. The Court stated as follows (27 AD2d at p. 787):

> ...it seems the unquestionable duty of [the Court below] and appellate Judges to utilize [summary judgment] in cases as clear as this, rather than *strain to find issues, however nebulous,* which may *preserve an unfounded claim* for *litigation* or *negotiation.* [Emphases supplied]

After noting that the lower Court had insufficiently taken the Court of Appeals holding in the *Pfaffenbach* case into consideration in deciding Denton's summary judgment motion, the Appellate Division concluded its opinion as follows [Ibid]:

> ...but upon this motion, involving the sole issue of appellant's [Denton's] negligence, the *proof was factual, adequate and uncontradicted.* Indeed, in the more difficult case of a plaintiff's motion, we have *awarded summary judgment upon a factual showing no more compelling* than the evidence in the case before us. *Hood v. Murray*, 25 AD2d 163 (3d Dept., 1966), *appeal denied* 17 NY2d 911. [Emphses supplied].

23. Likewise, in this matter, the proof is factual, adequate and uncontradicted that each of the present Plaintiffs, whether driver or passenger, was free from any negligence. The weight of the legal authority cited above, when applied to the facts and evidence in the case as already known, not only stands unrebutted as a matter of law in the present state of the record, but is of a nature that will stand unrebutted, even through any upcoming discovery process. Defendants will be unable to present any proof that may make justifiable or even excusable Defendant Michael Thompson's loss of control of Defendants' Morgan vehicle on Jericho Turnpike and Woodbury Road on March 25, 2014.

24. Accordingly, there is no triable issue of fact in this case and therefore, summary judgment should be granted to Plaintiffs on the issue of liability.

AS AND FOR DENIAL OF DEFENDANTS' MOTION UNDER CPLR §3025(b)

25. Defendants, doubtless well aware of the hopelessness of their defense, have (1) frantically scrambled to dream up dubious procedural maneuvers and (2) meaninglessly *strain*[ed] *to find issues, however nebulous,* to *preserve unfounded claims* for ... *negotiation.* *Pace*: *Donlon v. Puglisi*, 27 AD2d 786 at 787 (3d Dept., 1967).

26. Defendants' *dubious procedural maneuver* here, is to utilize the very liberal amendment provisions of CPLR §3025, specifically its subdivision (b). This subdivision reads as follows:

> (b) *Amendments and supplemental pleadings by leave.* A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court of by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplemental pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

27. Having selected CPLR §3025 subdivision (b) as his *dubious procedural maneuver*, all Defendants now needed to do was to *meaningless*[ly] *strain to find an issue* – any issue – to articulate a claim against Plaintiffs, collectively or singly – even an unfounded claim -- as per *Donlon v. Puglisi*. Yet, Defendants have been utterly unable to find an issue – by *strain* or otherwise – to place into his *dubious procedural maneuver* to provide a reason to grant Defendants the relief requested.

28. Defendants appear undeterred by the failure of an articulable reason to grant them the relief they have requested. They shamelessly claim entitlement to the very liberal amendment provisions of CPLR §3025(b), without setting forth any reason to be entitled to such "very liberal" treatment. Defendants request this Court to grant them leave to bring a baseless counter-claim against Plaintiff BRAULIO LAMBRECHT, contending that he, as the driver of the stricken Cadillac was somehow negligent in his operation of his vehicle, without explaining how said Plaintiff might have been negligent in the operation of his car within the context of the present fact pattern. Even given the "liberality of amendment" inherent (and rightly so) in CPLR §3025(b), Defendants must be able to give *some* basis, some facts, some legal theory – even an incorrect one -- to support the amendment of their pleadings to include the proposed amended counterclaim against said Plaintiff.

29. Defendants' silence, or more correctly, their inability to articulate just how said Plaintiff might have been negligent in this case, establishes that Defendants are not entitled to receive this relief. Indeed, in examining the underlying facts in the instant fact pattern, so far as they are known, Defendants' silence and/or inability to articulate the specifications for their proposed counterclaim is not surprising. After all, said Plaintiff was in routine operation of his Cadillac on an ordinary New York State highway, when all of a sudden, another car crossed the median double yellow line. Before said Plaintiff could react, the other car struck him head-on. How said Plaintiff may be said in any truthful manner to be negligent under the circumstances present is a question that answers itself. No known "legal fiction" can be manipulated into providing Defendants with any **arguable basis to support Defendants' proposed counterclaim.

30. Exhibit C to Defendants' motion papers contains the proposed counterclaim at the conclusion of Defendants' Verified Answer and Demands, just before the "Wherefore" clause. Plaintiff BRAULIO LAMBRECHT is warned that if Defendants are found liable to Plaintiffs in the case, "in view of the existing factual disparity," said Plaintiff or even "Plaintiffs" both "will be liable, *etc.* ...) to Defendants. Under such circumstances, due process considerations imposed a requirement upon Defendants to explain precisely of just what the "existing factual disparity" consists? Absent such an explanation, such "existing factual disparity" does not amount to anything of substance, not even

(1) mere allegation or speculation (*Richard v. Credit Suisse, supra*),

(2) mere conjecture, suspicion or bald conclusory allegation (*Sosa v. Joyce Beverages, Inc., supra*, and *McGaghge v. Kennedy, supra*),

(3) any existence of a duty running from Plaintiffs to Defendants (Restatement, Torts 2d, *supra*; *Becker v. Schwartz, supra*; *Gordon v. Muchnick, supra.*),

(4) a showing that any negligence supposedly attributable to Plaintiffs was a substantial cause of the damages supposedly sustained by Defendants in this accident (*Derdiarian v. Felix Contracting Corp., supra*),

(5) the existence of a *shadowy semblance* of an issue (*Manufacturers and Traders Trust Co. v. Barry Warehouses Inc, supra, Hartford Accident Indemnity Co. v. Vesolowski,* and *Koppers Company Inc. v. Empire Bituminous Products, Inc.,*

31. It cannot be denied by Defendants that if they genuinely wished to amend their pleadings with a counterclaim, it was incumbent upon them to articulate facts that would have given rise to an actual cause of action, as if they were creating a Complaint and framing a cause or causes of action in that Complaint. The gobildigook Defendants set forth in their proposed Amenment fars far short of amounting to a viable counterclaim. On this basis alone, Defendants' application for relief under CPLR §3025(b) must be denied. *Seneca v. Novarro,* 80 AD2d 909 (2d Dept., 1981); *AtlanticGulf & West Indies Steamship Lines v. City of New York,* 271 App.Div. 1008, *appeal den.* 272 App.Div. 273.

32. Given the lack of substance of Defendants' proposed counterclaim, their motion brought under CPLR §3025, must not only be denied, but must be deemed frivolous, with all accompanying sanctions to Defendants' Counsel. Applying the holdings of the cases cited in the previous section -- *Kaye v. Hickman, supra, Donlon v. Puglisi, supra* and their guiding Court of Appeals case, *Pfaffenbach v. White Plains Express Corp.*, 17 NY2d 132 (1966), *supra* -- without a doubt lead to such a conclusion.

33. *Pfaffenbach, Kaye* and *Donlon* all stand for the proposition that on summary judgment, Courts are not obligated to *strain to find issues, however nebulous,* which may *preserve an unfounded claim* for *litigation* or *negotiation.* 27 AD2d at p. 787. Indeed, it seems that the three cases were promulgated with the fact pattern of this case in mind.

34. This Court should also note Defendants' very late attempt at interposition of a proposed counterclaim Defendants' Counsel could have interposed their proposed counterclaim at the outset of this action in their Verified Answer. Nearly two years have passed since the Complaint was filed. No excuse was proffered by Defendants' Counsel for this delay. (*Manufacturers and Traders Trust Co. v. Barry Warehouses Inc., supra,* 49 A *Hartford Accident Indemnity Co. v. Vesolowski,* and *Koppers Company Inc. v. Empire Bituminous Products, Inc.,* hel

35. Defendant's motion should be dismissed in its entirety, as Defendant's have failed to offer a reasonable excuse for the delay. In accordance with CPLR §3025(b), the court should consider how long the amending party was aware of the facts upon which the motion was predicated as well as whether a reasonable excuse for the delay was offered. The facts upon which Defendant's based the motion for leave to amend were known to them when they initially answered the complaint and defendant has provided no explanation for his failure to plead such issue in his answer. Furthermore, the courts have found that where a proposed amendment to a pleading is palpably insufficient as a matter of law or totally devoid of merit, leave to amend should be denied. Brooks v. Robinson, 56 A.D.3d 406 (N.Y.A.D. 2 Dept.,2008).

BACKGROUND

36. The action against the Defendant was commenced by the filing and service of a Summons and Verified Complaint on May 13, 2014. *See, Defendant's Notice of Motion at Exhibit A.* Issue was joined on July 28, 2014, wherein defendant served a Verified Answer. *See, Defendant's Notice of Motion at Exhibit B.* Defendant served a Proposed Amended Answer with Demands on Defendant on January 4, 2016. *See, Defendant's Notice of Motion at Exhibit C.* Furthermore, a police report taken on March 25, 2014 documented BRAULIO LAMBRECHT as the driver of the motor vehicle in which plaintiff, GUISELLA LAMBRECHT was a passenger (*See, Defendant's Notice of Motion at Exhibit D.)*

37. Deposition of the Plaintiff(s) and Defendant(s) was taken on October 27, 2014 at 10:00 a.m., and is annexed hereto respectively. *See, Defendant's Notice of Motion at Exhibit D.*

THE PLEADINGS ARE ANNEXED TO THE DEFENDANTS' MOTION

38. Plaintiff will rely on the copy of the pleadings annexed to the Defendants' motion to amend the pleadings and did not annex a ***second set*** to this motion as the full set has already been submitted to the court for review.

39. It should be noted that the copy of the Defendants' accident report (Defendants' "D" and our Exhibit "A") is accurate and not in dispute. A certified copy is not necessary, as it is inferior to the witnesses affidavits (Exhibits "B", "C", "D") and has limited utility other than to verify the names of the eyewitnesses, all of which have participated in this motion.

WHEREFORE, Plaintiff respectfully requests that this Court deny the Defendants' motion to amend the Pleadings as it is legally insufficient and based on the instant Affirmation, the Exhibits herein, including the Affidavits, to grant Plaintiff GUISELLA LAMBRECHT's motion for summary judgment in its entirety, as no issue of fact exists and grant such other and further relief as this Court deems just and proper.

Dated: Mineola, New York
February 26, 2016

Yours, etc.

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