

SURPEME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
XXXXXXXXXXXX AND XXXXXXXXXXXXX,

Plaintiffs

-against-

XXXXXX and XXXXXXXX,
Defendants.

-----X

NOTICE OF
CROSS-MOTION

INDEX NO.
XXXXX/XX

Justice XXXXXXXXXXXX

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmation of JEENA R. BELIL, dated XXXXXXXX 4, XXXX, and upon all exhibits attached hereto, the undersigned will cross move this Court, before Honorable Justice XXXXXXXXXXXXXXX, at IAS Part 24, to be held at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 18th day of XXXXXXXX, XXXX, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order pursuant to Section 3025 of the C.P.L.R., amending the answer of the Defendants XXXXXXXXXXXXXXX and XXXXXXXXXXXXXXX to include a counterclaim against the Plaintiff, XXXXXXXXXXXX, and for such other and further relief as this Court may deem just and proper herein.

Dated: XXXXXXXXXXXXXXX, New York
XXXXXXX 4, XXXX

Yours, etc.,

XXXXXXXXXXXX
Attorney for Defendants
XXXXXXXXXXXX and XXXXXXXXXXXXXXX
Office and P.O. Address
XXXXXXXXXXXX
XXXXXXXXXXXX, NY XXXXX
(XXX) XXX-XXXX
File No.:

TO: XXXXXXXXXXXXXXX
Attorneys for Plaintiff
XXXXXXXXXXXX
on the Counterclaim
Office & P. O. Address
XXX XXXXXXXXXXX

P. O. Box XXX
XXXXXX, New York XXXXX

XXXXXXXXXX
Attorneys for Plaintiffs
XXXXXXX, Suite XXX
New York, New York XXXXX

XXXXXXXXXXXXXX
Attorney for Defendant
XXXXXXXXXXXX
XXX XXXXXX - Suite XXXX
New York, New York XXXXX

SURPEME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

XXXXXXXXXX AND XXXXXXXXXXXX,

Plaintiffs,

-against-

XXXXXXX, XXXXXXXXXXXXXXXX AND
XXXXXXXXXXXXXXXXXX,

Defendants.

-----X

AFFIRMATION IN OPPOSITION
TO MOTION AND IN SUPPORT
OF CROSS-MOTION

INDEX NO.
XXXX/XX

Justice XXXXXXXXXXXX

JEENA R. BELIL, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, alleges the following under penalty of perjury:

1. I am associated with the law firm of XXXXXXXXXXXXXXXX, attorneys for the Defendants, XXXXXXXX and XXXXXXXX, and as such submit this affirmation in support of the herein cross motion to amend the above stated Defendants' Answer to include a counterclaim and in opposition to the Plaintiff on the counterclaim attorney's motion to grant summary judgment by dismissing the co-defendant XXXXXXXX'S counterclaim and for such further and other relief as this Court deems just and proper under the circumstances.

2. I base my knowledge upon the contents of a file maintained by my office.

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

3. The Defendants herein join with the co-defendant in opposing the motion of Plaintiff on the counterclaim, XXXXXXXXXXXX

4. That based upon the affidavit of XXXXXXXX, (a copy of which is annexed hereto as Exhibit "A") there clearly is a triable issue of fact which requires a trial for factual resolution. That all of the arguments raised in XXXXXXXX affirmation are adopted by this affirment. Furthermore, there has not been necessary discovery completed.

5. Accordingly, the Defendants herein respectfully request that the motion for summary judgment of the Plaintiff on the counterclaim be denied in its entirety.

SUPPORT OF CROSS-MOTION ALLOWING ANSWER TO BE AMENDED TO ALLOW COUNTERCLAIM

6. That this office interposed an answer, cross-claim, demand for bill of particulars and various discovery dated May 29, XXXX on June 2, XXXX. Annexed hereto as Exhibit "B" is a copy of those documents.

7. A review of the police report (a copy of which is annexed hereto as Exhibit "C") indicated the Plaintiff-driver, XXXXXXXXXXXX, was standing still at a red light. There being no basis, even in good faith, for a counterclaim based on the police report, this office did not serve a counterclaim which could have been deemed frivolous.

8. That your affirmant, now upon recent notice of co-defendant, XXXXXXX's, version of the accident in his affidavit of merit, moves this Court to allow amendment of the Defendants, XXXXXXX and XXXXXXX, to include a counterclaim against the Plaintiff-operator, XXXXXXXXXXXX. That the rule in CPLR Section 3025(b) relating to amending pleadings "should be liberally construed to allow for the amendment, in the absence of laches, undue prejudice and unfair advantage". Leutloff v. Leutloff, 47 Misc.2d 458, 262 NYS2d 736 (4th Dept., 1965).

9. That there has been no laches in this matter, that, to the contrary, the herein Defendants have moved promptly upon notice of XXXXXXX's affidavit of merit which raised a factual issue regarding the Plaintiff's comparative negligence. That in a similar case where the Defendant-movant was moving for the same relief requested in the case at bar, the motion was denied based upon the Defendant's knowledge of the facts at the institution of suit and mailing the motion on the eve of trial three years after commencement of the action. L.B. Foster v. Terry Contracting, Inc., 25 A.D.2d 721, 268 NYS2d 618 (1st Dept. 1966). That the case at bar differs drastically in that the facts recently noticed in XXXXXXX's affidavit were not known at the inception of this action. Secondly, that to have instituted a counterclaim at that stage with the information available in the police report could have subjected such a counterclaim to a motion to dismiss based on frivolousness. Thirdly, that there is no prejudice to the Plaintiff who was already on notice as to the counterclaim instituted by the co-defendant.

10. That the herein Defendants annex hereto as Exhibit "D" a proposed counterclaim.

WHEREFORE, the Defendants, XXXXXXXXXXXX and XXXXXXXXXXXX, respectfully request this Honorable Court to grant an order pursuant to CPLR 3025(b) allowing the herein Defendants to amend their Answer to include a counterclaim against the Plaintiff-operator, XXXXXXXXXXXX, and to deny the Plaintiffs' motion for summary judgment dismissing the counterclaim brought by the Defendant, XXXXXXX, and for such other and further relief as this Court may deem just and proper under the circumstances.

Dated: XXXXXXXXXXXX, New York

XXXXXXXX 4, XXXX

JEENA R. BELIL, ESQ.