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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, PUTNAM COUNTY

Present: HON. ANDREW P. O'ROURKE
Supreme Court Justice

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MARY ELIZABETH STIMSON, as Administratrix
of the Estate of RICHARD E.F. STIMSON,

Plaintiff,

MOTION DATE: 3/18/05
INDEX NO. 486/04

-against-

CHRISTIAN J. VENTURINI, JOHN VENTURINI
and JOAN VENTURINI,

Defendants.

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The following papers numbered 1 to 8 were read on this motion by plaintiffs for an Order compelling discovery pursuant to CPLR 3124, and on this cross-motion for renewed summary judgment relief dismissing the complaint against defendant Joan Venturini.

Papers Numbered

- Notice of Motion - Affirmation (Hayes) - Exhs. (A-F) 1 - 3
- Notice of Cross-Motion - Affirmation (Corde) - Exh. 4 - 6
- Answering/Replying Affirmation (Philp) - Exhs. (A-B) 7 - 8

Upon the foregoing papers, it is Ordered that these motions are disposed of as follows:

Addressing the cross-motion first, same is hereby denied once again with leave to renew upon proper papers.

Firstly, the Court observes that defendants' request for relief is improper to the extent same was served without a proper notice of cross-motion, see CPLR 2215, and this omission has been objected to by plaintiff.

Secondly, the cross-motion is not properly supported by an affidavit from a "person having knowledge of the facts," as required by CPLR 3212, subdivision (b). Counsel's affirmation, not based upon personal knowledge, is of course without probative value as to the facts asserted therein. See eg. Schwartz by Schwartz v. Licht, 173 A.D.2d 458 (2nd Dept. 1991); Chand v. City of New York, 6 Misc.3d 1025(A), (Sup. Ct. Qu. Co. 2005). While an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment, i.e., title and registration documents, any assertions unsupported by any factual proof are of no probative value, and therefore, fail to raise a triable issue of fact. See Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st Dept. 2004); Ramnarine v. Memorial Center for Cancer and Allied Diseases, 281 A.D.2d 218 (1st Dept. 2001).

Moreover, here, unfortunately, in contradiction to certain other statements set forth in defense counsel's affirmation

that defendant John Venturini is the sole owner of the offending vehicle, counsel states, presumably inadvertently, that "The documentary proof therein together with the testimony of the parties clearly establishes that JOAN VENTURINI was the one and only owner of the vehicle. (Emphasis added)."

Lastly, and most notably, Justice Shapiro previously had determined that defendants would not be entitled to judgment dismissing the complaint against defendant Joan Venturini if the insurance policy on the subject vehicle reflects that she has an ownership interest in same; he had directed that discovery proceed on the issue of Joan Venturini's interest in the vehicle. Notwithstanding this specific ruling, defendants still have failed to proffer in support of their renewed motion any insurance documents conclusively demonstrating Joan Venturini's lack of interest in the subject automobile.

Based upon the foregoing, the motion for summary judgment dismissing the complaint as against defendant Joan Venturini must be and hereby is again denied.

With regard to plaintiffs' motion pursuant to CPLR 3102, subd. (a), 3113 and 3124 to compel defendants to appear for further depositions to answer questions which their counsel had objected to and refused to permit them to answer, the Court is constrained to observe that it is unfortunate Court intervention is necessary

to resolve counsels' dispute over the propriety of deposition questions. In addressing this always troublesome issue, the Court starts with the premise that there shall be liberal discovery of information "material and necessary to the prosecution or defense of an action," see CPLR 3101, subd. (a), but that a witness need not answer questions that are so improper that to answer them would cause substantial prejudice or which are palpably or grossly irrelevant or burdensome, or violate their constitutional rights. See Ferraro v. New York Telephone Co., 94 A.D.2d 784, 785 (2nd Dept. 1983). What constitutes "material and necessary" is left to the Court's discretion. See Andon ex rel Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740 (2000). The Court notes that there is no authority in the CPLR for an attorney to direct his client not to answer a question. Rather, the appropriate response would have been for defendants' counsel to have voiced his objection and sought a protective Order. See CPLR 3113, subd. (b). A party successfully challenging a question as grossly improper, burdensome or palpably irrelevant must meet a substantial burden. See Andersen v. Cornell University, 225 A.D.2d 946 (3rd Dept. 1996).

Here, it cannot escape the Court's attention that defense counsel, throughout each defendant's examination, repeatedly interrupted plaintiffs' counsel's questioning with her objections, directing defendants not to answer. This behavior continued even

after one telephone call to Chambers resulted in the Court's directive that the witness be allowed to answer the question, subject only to the parties' stipulation that all objections save as to form shall be reserved for trial determination. Defendants impediment to the discovery process shall not be tolerated.

Substantively addressing plaintiff's instant motion to compel further examinations before trial testimony, the Court grants same to the extent that defendants shall appear on or before May 17, 2005, at 10:00 a.m., at plaintiffs' counsel's office, for further examinations limited to those inquiries, and further limited questions naturally arising from the answers given thereto, that defendants failed to answer at their initial depositions, except as hereinafter proscribed. Defendants must answer questions regarding ownership of the vehicle involved in the subject accident, ownership of other vehicles, questions relating to the insurance documents and the procurement of insurance, the method and means of payment for the subject vehicle and how defendants themselves characterize ownership of said vehicle. The Court finds that these inquiries may bare upon the crucial issue of whether Joan Venturini has an ownership interest in the subject vehicle notwithstanding that her name does not appear on the title and registration. Also proper are inquiries directed at testing the credibility of responding law enforcement, particularly since this

line of inquiry was pursued by defense counsel during her examination of plaintiff which had preceded defendants' examination.

Further, defendant Christian properly may be asked questions designed to jog his memory of the accident details, notwithstanding his testimony that he does not recall the events of the accident date or the accident itself and the events immediately following. Defense counsel must also let defendant testify as to whether photographs accurately represent the condition of his vehicle post-accident and if he knows why depicted in the photograph is a document relating to a drug and alcohol abuse program.

The Court finds that, while Christian Venturini may also properly be asked whether he previously has been convicted of failing to wear a seat belt, he may not properly be asked whether he has been involved in prior accidents and, further, that questions relating to defendant Christian's physical or mental health, other than concerning his asserted amnesia relating to the events surrounding this accident, are all improper. He is not countersuing for damages and his health has not been placed into issue by any asserted defense. Cf. Gaglia v. Wells, 112 A.D.2d 138 (2nd Dept. 1985); Estabrook & Co. v. Masiello, 75 Misc.2d 784 (Sup. Ct. West. Co. 1973).

The parties are reminded that this action is scheduled for a final compliance conference at 9:30 a.m. on June 8, 2005. All discovery must be completed by that date. Any discovery not completed may be deemed waived and/or sanctions imposed. This date may not be adjourned without the Court's consent. Any party's failure to appear may result in the imposition of costs and/or sanctions. It is expected that at said conference plaintiffs shall be directed to file their note of issue and a trial date will be set.

Dated: March 23, 2005
Carmel, New York



ANDREW P. O'ROURKE
J.S.C.

Daniels and Porco, LLP
Attys. For Pltfs.
517 Route 22
P.O. Box 668
Pawling, New York 12564-0668

Boeggeman, George, Hodges & Corde, P.C.
Attys. For Defts.
11 Martine Avenue
White Plains, New York 10606