

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

IAS PART 12

- - - - - x

CHARNETTE FERRIL, ALEXIA AGNANT and
ALAIN AGNANT,

Plaintiffs,

- against -

ADRIEN LIGONDE, CLAUTILDE LIGONDE,
KEVIN WITTER, EDGAR ROSA, BUDGET RENT-
A-CAR SYSTEM, INC. and ALFREDO RAMIREZ
GARCIA,

Defendants.

- - - - - x

Index No.: 21/06

Motion Date: 9/20/06

Motion No.: 18

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Motion No. 1

By notice of motion, defendant, Kevin Witter (Witter), seeks an order of the Court, pursuant to CPLR §3212, granting him summary judgment and dismissing the complaint as to him.

Defendant, Edgar Rosa (Rosa), submits an opposition and defendant Witter replies.

Motion No. 2

By notice of cross-motion, plaintiff (defendant on the counter-claim) seeks an order of the Court, pursuant to CPLR §3212, granting her summary judgment as defendant on the counter-claim and dismissing the counter-claim and any and all cross-claims as to her. Defendant Rosa files an affirmation in opposition. Defendants Ligonde file an affirmation in opposition incorporating and adopting the arguments set forth in the opposition of defendant Rosa.

Plaintiff Ferril (defendant on the counter-claim) files a reply.

Motion No. 3

By notice of cross-motion, defendants Ligonde, seek an order of the Court pursuant to CPLR §3212, granting them summary judgment and dismissing plaintiffs' complaint and all cross-claims as to them.

Plaintiffs file an affirmation in opposition incorporating by reference the arguments presented in defendant Rosa's affirmation in opposition to defendants Ligonde's motion.

Motion No. 4

By notice of cross-motion, defendants Budget Rent-A-Car System (Budget) and Alfredo Ramirez Garcia (Garcia) seek an order of the Court, pursuant to CPLR §3212, granting them summary

judgment and dismissing the complaint and all cross-claims as to them. Plaintiffs file an affirmation in opposition. Defendant Rosa files an affirmation in opposition.

The underlying cause of action is a claim by plaintiffs for personal injuries alleged to have been sustained in a motor vehicle accident on July 17, 2004, southbound on the Van Wyck Expressway, at or near the Jewel Avenue exit.

On behalf of defendant Witter, counsel provides what can only be described as a digest of the EBT transcripts, without any narrative summary of the events in question. Such provision, while helpful to the practitioner, fails to inform the Court in any useful manner, what occurred on that date.

Apparently the vehicle operated by Clautilde Ligonde, in which Marie Shorter was a passenger, experienced a flat tire and became disabled while traveling in the left lane of the southbound Van Wyck Expressway. Ms. Ligonde pulled the vehicle (or the vehicle moved on its own), partially out of the left lane and onto the left shoulder. Plaintiff, Maria Shorter, exited the vehicle and stood between the vehicle and the guard rail.

Defendant Witter, the operator of the Dodge Neon van, was traveling behind the Ligonde vehicle. After the Ligonde vehicle became disabled and stalled or stopped, Witter maintains that he came to a stop without making contact with the Ligonde vehicle.

Plaintiff/defendant, on the counter-claim, Ferril, the operator of a 1993 Nissan Altima, saw the Ligonde and Witter vehicles ahead and came to a stop behind the Witter vehicle without making contact. Ferril maintains that she was stopped for approximately five seconds when she was impacted on the right side by the vehicle operated by Rosa and was thereby pushed onto the highway divider. Plaintiff, Alexis Agnant, was a passenger in the Ferril vehicle.

Defendant Rosa, who was operating a 1998 Dodge Stratus, was traveling in the left lane at about 55 mph, when he saw the three vehicles ahead. He attempted to avoid hitting the Ferril vehicle by moving into the middle lane, which caused contact between his vehicle and the Budget Rent A Car vehicle operated by defendant Garcia.

Defendant Garcia maintains that Rosa's vehicle moved suddenly into the middle lane, making contact with his vehicle. Garcia maintains that he could not have avoided contact with the Rosa vehicle as there was traffic coming up in the right lane,

preventing him from moving over.

As a result of this accident, plaintiff, Marie Shorter suffered a severe injury requiring the amputation of her leg. Ms. Shorter has no memory of the accident and urges this Court to take plaintiff's amnesia into account when considering these summary judgment motions (see, Schecter v. Klanfer, 28 NY2d 228 and PJI 1:61 "Noseworthy" charge).

Motion No. 1

Defendant Witter argues essentially, that he did nothing wrong. On the day in question, Witter was traveling at 40 to 50 mph in the left lane when he saw the Ligonde vehicle about 10 car lengths ahead of him, partly in and partly off the road. Witter says that he managed to come to a complete stop about five car lengths from the Ligonde vehicle. Thereafter, he felt his vehicle being struck two separate times.

In opposition, plaintiff essentially argues that the Court should allow a "disabled amnesiac" her day in Court and deny summary judgment. Neither Ms. Shorter, nor any one else for that matter, can say for sure who was responsible for striking her.

Defendant Rosa argues that Witter came to a "sudden" or "abrupt stop," thereby necessitating Ferril to do the same, which in turn, caused Rosa to react to an emergency situation, created by Witter. Witter retorts that all parties who saw his vehicle before the accident happened agreed that he was "stopped." Moreover, the vehicle directly behind him, the Ferril vehicle was able to come to a stop without making contact with his vehicle.

Motion No. 2

Plaintiff Ferril (defendant on the counter-claim) maintains that she should be granted summary judgment on the issue of liability in both Action No. 1 (Index No. 19875/04) where she is a named defendant and Action No. 2 (Index No. 021/06) where she is the plaintiff. Ms. Ferril maintains while traveling on the southbound Van Wyck Expressway, she saw the Witter vehicle stopped in front of her in the left hand lane. She maintains that she gradually brought her vehicle to a stop, approximately two feet from the Witter vehicle. Within approximately five seconds she felt the impact to the front and back passenger side of her vehicle, from what turned out to be the Rosa vehicle.

In opposition, defendant Rosa maintains that the Ligonde vehicle stopped "improperly" on a thru lane of the expressway;

that the Witter vehicle thereby was caused to stop abruptly; the Ferril vehicle likewise; and, that Rosa, therefore, was faced with an emergency. Mr. Rosa argues that Ms. Ferril, who was traveling at 50 mph was required to stop her vehicle in less than 80 feet. This Rosa argues, could not have been anything other than an abrupt stop.

Defendant Ferril responds to plaintiff Shorter's claim that she is entitled to a lower burden of proof pursuant to the "Noseworthy Doctrine," by pointing out that she failed to provide expert testimony in support of her claim of amnesia (Menekou v. Crean, 222 AD2d 418, 634 NYS2d 532 (2nd Dep't. 1995)). Moreover, defendant argues, even if plaintiff Shorter was granted such relief, she must still provide some evidence in response from which defendant Ferril's negligence can be inferred. Defendant Ferril maintains that plaintiff Shorter has failed to do so.

And in response to defendant Rosa, defendant Ferril maintains that the fact that she and Witter both brought their vehicles to a safe stop is a demonstration, uncontroverted, that Ferril and Witter were operating their vehicles in a safe, non-negligent manner under the circumstances. Any argument to the contrary, Ferril argues, is mere speculation and surmise, unsupported by admissible evidence.

Motion No. 3

Defendant Adrien Ligonde, was the owner of the vehicle operated by defendant, Clautilde Ligonde (hereinafter Ligonde) on the day of the accident. Defendant Ligonde argues that she was not negligent in the operation of the vehicle, but that even if she was, such negligence was not the proximate cause of plaintiff Shorter's injuries.

Defendant Ligonde argues that defendants Witter and Ferril managed to stop without hitting the Ligonde vehicle. It was Rosa combined with the actions of Garcia that caused the accident, she argues.

In response, defendant Rosa refers the Court to opposition and argument noted above. Plaintiff Shorter adopts the Rosa arguments.

Motion No. 4

Defendants Garcia and Budget, also argue for summary judgment and dismissal as to them, on the grounds that the actions of defendant Rosa, caused an emergency situation for

Garcia in which he had no time to react or take evasive action. By the time Rosa "darted" into the middle lane making contact with the Budget vehicle, Garcia maintains that the front end of his vehicle was lined up directly with the rear of the Witter vehicle. Thus, Garcia argues, it was Rosa's actions in driving too fast and then "darting" into his lane with insufficient room to make a pass that caused the accident.

In response, Rosa directs the Court to the arguments previously presented in his opposition to the Witter motion on Action No. 1, Index No. 19875/04.

In opposition to the motion, counsel for Ferril as plaintiff in Action No. 2, Index No. 021/06, cites certain portions of Garcia's own EBT as reasons for denying summary judgment.

Plaintiff Ferril points out that Garcia admits to seeing three stopped vehicles in the left hand lane when he was about 100 meters away. While he began to slow his vehicle by lifting his foot from the gas, he did not place his foot on the brake.

Then he noticed the Rosa vehicle in the left lane, when it passed him and realized Rosa had no where to go except into the middle lane. At that point he continued to drive "normal," not slowing down more to give Rosa space, nor speeding up to pass the three stopped vehicles. Neither did he sound his horn or use his flashers.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 [2nd Dep't. 2003]).

There is no question that defendant Witter brought his car to a safe stop without colliding with the Ligonde vehicle. It is undisputed that Witter's vehicle was stopped at the time of the accident.

"A rear-end collision with a stopped automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred" (Leal v. Wolff, 224 AD2d 392, 393 [2nd Dep't. 1996]).

Here, defendant Rosa offers a claim that the Witter vehicle came to a sudden, abrupt and immediate stop, and cites Tripp v.

Gelco, (260 AD2d 925, 926 (3rd Dep't. 1999)), as authority for denying defendant Witter's motion for summary judgment. In that case, plaintiff's stopped vehicle was rear ended by the vehicle operated by defendant. The trial Court denied plaintiff's motion for summary judgment on liability and the Appellate Division affirmed. The Court, in this two car collision and without further explanation, held that "[c]onstrained as we are to view the evidence in the light most favorable to defendants, we conclude that they have presented a sufficiently non-negligent explanation for the collision to overcome the inference of negligence..." Id. at 926.

In a case following Tripp however, the same Court affirmed the trial court's granting of summary judgment on liability to plaintiff in a rear-end collision where the defendant's "non-negligent" explanation was insufficient to warrant denial. In Barton v. Youman (13 AD3d 1151, 1152 (3rd Dep't. 2004) rev'd on other grounds, Barton v. Youman, 24 AD3d 1192 (3rd Dep't. 2005), the Court held that defendant's claim that plaintiff stopped abruptly, was insufficient. "Although evidence of an abrupt stop can be sufficient to raise an issue of fact (see Tripp v. Gelco Corp., supra.), here plaintiff had to stop abruptly to yield to an emergency vehicle" (citations omitted). Id. at 1152.

In this instance, defendants Witter and Ferril, claim they both came to a gradual safe stop. It is undisputed that each was traveling at approximately 50 mph when they saw the Ligonde vehicle ahead partially blocking the left lane in which they were traveling. Both were able to control their vehicle and come to a stop without colliding with one another, or the Ligonde vehicle. Such action, even if accepted as "abrupt stopping" as Rosa claims, is an insufficient non-negligent explanation for his failure to avoid colliding with the Ferril vehicle and the Budget vehicle, and is insufficient to overcome defendant Witter's motion for summary judgment. Defendants Witter and Ferril, like the plaintiff in Barton had to come to as swift and safe a stop as possible to avoid colliding with Ligonde's vehicle.

Plaintiff Shorter's claim that defendant Witter's motion for summary judgment should be denied to provide her with a "day in court" does not constitute a legal basis for denial.

Moreover, it has long been established that "[e]vidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by the one who brings the complaint (Sheehan v. City of New York, 40 NY2d 496, 501 (1976)).

In Gerrity v. Muthana (28 AD3d 1063, 814 NYS2d 440 (4th Dep't. 2006), aff'd 7 NY3d 834 (2006)), plaintiff (Gerrity), a bus driver, was injured when a vehicle (operated by Muthana) ran a red light and struck the bus operated by plaintiff, causing it to collide with another illegally parked bus owned by defendant (Leprechaun Liens, Inc).

Defendant owner (Leprechaun Lines, Inc.) of the illegally parked bus, moved for summary judgment and dismissal on the grounds their actions in parking the bus, even if negligent was not the proximate cause of plaintiff's injury. Id at 1064. The Court held "[d]efendant met its burden on the motion by establishing as a matter of law that the sole proximate cause of the accident was Muthana's failure to stop at the red light, and plaintiff's failed to raise an issue of fact. The location of defendant's bus "merely furnished the condition or occasion for the occurrence of the event and was not one of the causes." Id. at 1064.

In another multiple car collision, the Appellate Division, Second Department reversed the trial court's denial of summary judgment and dismissal to defendant, the lead car in a three car pile up (Calabrese v. Kennedy and Paoluccio, 28 AD3d 505 (2nd Dep't. 2006)). In that case, defendant Paoluccio had come to a stop; plaintiff Calabrese was able to come to a safe stop behind Paoluccio, when defendant Kennedy hit the plaintiff's car in the rear causing the plaintiff's vehicle to collide with defendant Paoluccio's vehicle. In analyzing the facts, the Court observed "[s]ince the plaintiff was able to safely bring her vehicle to a complete stop behind the Paoluccio vehicle prior to the accident, any purported negligence on the part of Paoluccio was not a proximate cause of the rear end collisions or the plaintiff's injuries." Id. at 506.

Both defendant Rosa and defendant Garcia (driving the van owned by Budget Rent A Car) maintain that their actions should be deemed not negligent since the actions of the other drivers created an emergency situation. This Court disagrees.

"An emergency situation arises when one is confronted with a sudden and unexpected event or combination of events not of one's own making that leaves little or no time for reflection or the exercise of deliberate judgment" (citations omitted) (Stewart v. Ellison, 28 AD3d 252, 254 (1st Dep't. 2006)).

While such a doctrine, taken alone, might seem to apply in these circumstances, the Court must not consider this accident and the obligations of motor vehicle operators in a vacuum.

It is a maxim of vehicle and traffic law in New York, as no doubt elsewhere, that motor vehicle operators are charged with the obligation "...to see that which [they] should have seen with the proper use of [their] senses" Mohammed v. Frische, 223 AD2d 628 [1st Dep't. 1996), "...and to use reasonable care to avoid an accident." Pattern Jury Instructions (PJI) 2:77.

Under all of the circumstances herein, including defendant Ferril's and Witter's actions in coming to a safe stop, and defendant Rosa's and Garcia's own testimony, that each of them saw the three stopped vehicles ahead of them, there remain triable issues of fact as to whether one or the both of them failed to act reasonably under the circumstances (Tossas v. Ponce, 24 AD3d 224, 225 (1st Dep't. 2005) (three car collision, triable issue of fact as to whether defendant could have avoided impact); Raposo v. Raposo, 250 AD2d 420 (1st Dep't. 1998) (questions of fact raising triable issues as to whether defendant was confronted with an emergency situation).

Defendants Ligonde maintain that none of Clautilde Ligonde's actions, under the circumstances, constituted negligence, but that even if she was negligent, her actions were not the proximate cause of plaintiff's injuries (Sheehan v. City of New York, 40 NY2d 496. As noted above, defendants Garcia and Rosa oppose Ligonde's motion for summary judgment on the grounds that they were presented with an emergency situation. The Court, for the reasons already cited, rejects defendants' claim. Moreover, as noted above, defendant Ligonde's vehicle "...merely furnished the condition or occasion for the occurrence of the event and not one of the causes" Gerrity at 1064.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendant Witter's motion for summary judgment is granted and the complaint and any and all cross-claims are hereby severed and dismissed as against defendant Witter, and the Clerk is directed to enter judgment in favor of said defendant; and, it is further

ORDERED, that defendant Ferril's motion for summary judgment as defendant on the counter-claim is granted and the counter-claim and any and all cross-claims are hereby severed and dismissed as against defendant Ferril and the Clerk is directed to enter judgment in favor of said defendant; and, it is further

ORDERED, that defendant Adrien and Clautilde Ligonde's motion for summary judgment is granted and the complaint and any and all cross-claims are hereby severed and dismissed as against

defendants Adrien and Clautilde Ligonde, and the Clerk is directed to enter judgment in favor of said defendants; and, it is further

ORDERED, that defendants Budget Rent-A-Car System's and Alfredo Ramirez Garcia's motion for summary judgment is denied; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
December 5, 2006

JOSEPH P. DORSA
J.S.C.