SHORT FORM ORDER

INDEX NO. 12410/2006

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

LIAM FAWCETT, INFANT BY HIS M/N/G PATRICIA HARREN, and PATRICIA HARREN INDIVIDUALLY,

Plaintiffs,

-against-

SUFFOLK TRANSPORTATION SERVICE, INC., SUFFOLK TRANSPORTATION SYSTEMS, INC., SUFFOLK TRANSPORTATION CORP., LONG ISLAND POWER AUTHORITY, KEVIN G. DONNELLY, and OBDULIA GONZALEZ,

Defendants,

ORIG. RETURN DATE: January 19, 2007
FINAL RETURN DATE: April 3, 2007
MTN. SEQ. #: 001-MotD, 002-MotD

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ATTORNEYS FOR SUFFOLK TRANSPORTATION SERVICE, INC., SUFFOLK TRANSPORTATION SYSTEMS, INC., SUFFOLK TRANSPORTATION CORP., and OBDULIA GONZALEZ:
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ATTORNEY FOR LONG ISLAND POWER AUTHORITY and KEVIN G. DONNELLY:
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Upon the following papers numbered 1 to 57 read on this motion for summary judgment and this cross motion for summary judgment and other relief: Notice of Motion and supporting papers 1 - 10: Affirmation in Opposition and supporting papers 11 - 18; Notice of Cross Motion and supporting papers 19 - 31; Affidavit in Opposition and Reply and supporting papers 32 - 39; Reply Affirmation 40 - 42; Affirmation in Opposition and supporting papers 43 - 51; Reply Affirmation 52 - 57; it is

ORDERED that this motion (001) by the plaintiffs is decided as follows:

1) That part of this application seeking dismissal of the defendants' affirmative defenses based upon culpable conduct, no serious injury and failure to use a seat belt, is granted and, accordingly, affirmative defenses fifth, tenth and eleventh in the amended verified answer of the Suffolk Transportation and Obdulia Gonzalez defendants and affirmative defenses first, second and third in the amended verified answer of the LIPA and Kevin G. Donnelly defendants are dismissed;

2) that part of this application seeking summary judgment in favor of the plaintiffs on the issue of liability is granted to the extent that liability is found as to the LIPA and Donnelly defendants and it is found that the plaintiffs are not liable; and

3) that part of this application seeking an inquest as to damages is denied;

and it is further

ORDERED that this cross motion (002) by the Suffolk Transportation and Gonzalez defendants is decided as follows:

1) That part of this cross motion seeking summary judgment in favor of the cross movants on the issue of liability is granted; and

2) that part of this cross motion seeking an order to compel is denied as moot;

and it is further

ORDERED that the Suffolk Transportation and Gonzalez defendants are hereby severed from this action and the action shall continue as against the LIPA and Donnelly defendants only; and it is further

ORDERED that the plaintiffs are directed to serve copies of this decision and order upon counsel for all parties pursuant to CPLR 2103(b)(1), (2) or (3); and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the remaining parties are directed to appear for a preliminary conference on July 5, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is a personal injury action arising out of a motor vehicle accident on November 21, 2005 in which a four-year old autistic child, while a passenger in a school bus/van suffered several bone fractures (to right hand and left tibia) when a utility pole being towed on a small two-wheel trailer (with over half the pole extending away from the truck beyond the axle of the trailer[1]) by a Long Island Power Authority (hereinafter LIPA) truck came into contact with the driver's side of the bus/van, damaging a window, the side panel and a window next to which the child was sitting. The parties and witnesses agree that the LIPA truck was in a left turn lane and was making a left turn while the bus/van was traveling in the through lane adjacent to the turning lane. When the LIPA truck turned, the end of the pole apparently swung out into the adjacent lane where the bus/van was traveling and hit the bus/van near the driver and immediately behind the bus/van driver.

According to the driver of the bus/van (as well as statements by other witnesses), the accident was solely caused by the telephone pole going into the adjacent lane and hitting the bus/van. According to the LIPA driver, while he did not see and does not know how the pole and the bus/van came into contact with each other, he was aware of the contact because he felt a "push" when the contact was made. Indeed, LIPA and Donnelly use this statement in a disingenuous effort to liken the incident to a rear-end collision with the bus/van being the vehicle which did the rear-ending.

The plaintiffs - who are the infant by his mother and his mother individually - are moving for a dismissal of three of the various affirmative defenses put forth on behalf of all the defendants (three corporate versions of Suffolk Transportation [hereinafter ST] and its driver, Obdulia Gonzalez [hereinafter Gonzalez]; LIPA and its driver, Kevin G. Donnelly [hereinafter Donnelly]). The three affirmative defenses are: 1) culpable conduct on the part of the infant; 2) lack of a serious injury as defined in Insurance Law §5102; and 3) failure by the infant to use a seatbelt.

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[1] Based upon photographs submitted in support of the underlying motion.

In addition, the plaintiffs are seeking partial summary judgment as to liability and, if so granted, an inquest as to damages.

The ST and Gonzalez defendants are cross-moving for summary judgment on the premise that only LIPA and Donnelly are liable and an order to compel with regard to discovery.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (***Winegrad v New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman v City of New York,*** *supra*).

In support of that part of the plaintiffs' motion which seeks summary judgment as to the affirmative defenses and partial summary judgment as to liability, the plaintiffs submit the police accident report with, annexed to it, sworn statements by Donnelly and three non-party witnesses (Stacy Figman, Joseph M. Tyson and Anthony Scalfano), an unsworn incident report by Gonzalez, photographs of the scene and the vehicles, medical records from Southside Hospital, the pleadings, plaintiffs' bill of particulars, medical records of the treating orthopedist and a certified copy of Gonzalez' signed Accident Report for School Vehicles Transporting Pupils/ Students/Supervisors (Form MV-104F).

Not all of these submissions are in admissible form but those that are (the sworn witness statements, medical records, certified MV-104F form) clearly point to the negligence of LIPA in making a left turn while towing a utility pole in a manner that ensures it will invade the adjacent lane to the right when making a turn. Moreover, although LIPA and Donnelly argue that there is an issue as to ST's and Gonzalez' liability, it is sufficiently shown in support of the plaintiffs' motion that the infant plaintiff was not at fault or liable in any way for the accident and injuries. In addition, and more specifically as to the affirmative defenses, the plaintiffs make a prima showing that the infant plaintiff was not guilty of any culpable conduct, did suffer serious injuries as expressly defined in Insurance Law §5102 and was not only secured in a built-in car seat but, in any event, would not have been responsible if he were not.

Accordingly, the plaintiffs have sustained their burden of making a prima facie showing of entitlement to summary judgment on the three respective affirmative defenses and as to liability insofar as finding that the plaintiffs were not liable and that some or all of the defendants were liable (*see* ***Winegrad v New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

The burden now shifts to the defendants to come forward with evidence of material issues of fact requiring a trial (***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, the defendants ST and Gonzalez expressly state that they have no objections to the plaintiffs' application for summary judgment dismissing their three affirmative defenses in issue. Accordingly, summary judgment is granted to the plaintiffs with regard to the ST and Gonzalez affirmative defenses as to culpable conduct, serious injury and seat belts (*see* defendants ST and Gonzalez' amended verified answer; fifth, tenth and eleventh affirmative defenses) and said affirmative defenses are dismissed

As to liability, the defendants ST and Gonzalez have come forward with evidence in admissible form which clearly points to their co-defendants (LIPA and Donnelly) as being solely liable to the plaintiffs and , thus, material issues of fact are raised which require the denial of summary judgment to the plaintiffs as to liability of the ST and Gonzalez defendants.[2]

Turning now to the opposition by the LIPA and Donnelly defendants, they argue that at this stage of the litigation - before a preliminary conference, with only minimal discovery thus far and before depositions of the participants and witnesses - it would be premature to award summary judgment on any of these issues and that summary judgment should be denied without prejudice to being raised again later. In further support of this contention, the LIPA and Donnelly defendants argue that while there is no question that the utility pole and the bus/van came into contact with each other, there is an issue as to who caused the contact based upon Donnelly's statement that he felt a "push." This is the sole basis for these defendants contending that maybe the LIPA vehicle was rear ended by the bus/van which, if proven, would show that ST and Gonzalez were presumably negligent (*see* ***Johnson v Phillips,*** 261 AD2d 269, 690 NYS2d 545 [1st Dept 1999]).

The problem with this argument is that it has no factual basis in light of all the eye witness testimony from non-party witnesses as well as from Gonzalez that the two vehicles were in their own lanes at all times relevant to the accident and it was the utility pole which was cause by the actions of Donnelly to swing into the adjacent lane, hitting the bus/van. Furthermore, the photographs show evidence of a side impact only. The LIPA/Donnelly defendants also argue that, perhaps, further discovery would show that Gonzalez may have been able to stop or swerve or otherwise avoid the intrusion into her lane of the utility pole. But this is pure speculation and not supported by any facts. Indeed, as to liability, there are no other essential facts that need to be uncovered (*cf.* ***DiGiulio v Kirch,*** 5 AD3d 625, 774 NYS2d 776 [2d Dept 2004]).

Furthermore, as to the LIPA/Donnelly affirmative defenses, these defendants make the following arguments: As to culpability of the infant plaintiff, they raise no counter arguments; as to serious injury, they ask for the opportunity to have their own doctor further examine the medical records; and, as to seat belt use, they basically argue that notwithstanding all the indications of seat belt use, further discovery may reveal that the ST and Gonzalez were negligent in this regard. However, this again is based upon mere speculation without any support or basis for the contention. In addition, the issue would not bear upon the affirmative defenses but upon the culpability, if any, of ST and Gonzalez.

The court also notes that the medical records clearly indicate the objective presence of fractures due to the accident and a "fracture" is, by statute, a "serious injury" per se (*see* Insurance Law §5102[d]).

In conclusion, the LIPA and Donnelly defendants have not met their burden in presenting any material issues of fact in opposition to the application to dismiss these particular affirmative defenses and, instead, placed reliance upon mere conclusions, expressions of hope and unsubstantiated allegations and assertions. Such a reliance is insufficient to oppose an application for summary judgment (*see* ***Zuckerman v City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). Accordingly, the first, second and third affirmative defenses of the LIPA/Donnelly defendants (alleging culpable conduct, no serious injury and lack of a seat belt) are dismissed.

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[2] This issue of liability, however, will be revisited later in this decision in the discussion of ST's and Gonzalez' cross motion.

And as to the liability issue, this is a case where the actions of Donnelly and LIPA in operating the vehicle which was towing what appears to be a full-sized utility pole and making a turn in a manner which could only result in the end of the pole invading the adjacent lane to the detriment of any vehicle traveling therein, can lead to no other reasonable conclusion than that the LIPA/Donnelly defendants were solely responsible for the resulting accident and injuries and, thus, summary judgment as to liability is granted with regard to and against the LIPA/Donnelly defendants.

In view of this holding, the cross motion by the ST/Gonzalez defendants for summary judgment on the issue of liability is granted and the court finds that the ST/Gonzalez defendants are not liable under any viable theory under the facts and circumstances of this case and, furthermore, the court concludes that no further discovery could possibly alter these facts and, accordingly, the court dismisses the complaint and any cross claims as against the ST and Gonzalez defendants.

In view of this dismissal as to the ST/Gonzalez defendants, that part of their cross motion seeking an order to compel is denied as moot.

This action will now proceed to trial - not an inquest - as to damages only and with only LIPA and Donnelly remaining as defendants. In addition, the court will allow further discovery to take place in this regard and the remaining parties are directed to appear for a preliminary conference as provided herein.

This decision constitutes the order of the court.

Dated: June 21, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR. J.S.C.