SHORT FORM ORDER

INDEX No. 06-4885
CAL. No. 07-00244-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-11-07
ADJ. DATE 4-25-07
Mot. Seq. # 002 - MG

ANIBAL SOSA,	:	GRUENBERG & KELLY, PC
	:	Attorneys for Plaintiff
Plaintiff,	:	3275 Veterans Memorial Hwy, Suite B-9
	:	Ronkonkoma, New York 11779
- against -	:	
	:	RUSSO & APOZNANSKI
BRENDAN W. ABT and NICOLE R. McNULTY,	:	Attorneys for Defendants
	:	875 Merrick Avenue
Defendants.	:	Westbury, New York 11590

Upon the following papers numbered 1 to 9 read on this motion for summary judgment on issue of liability; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 8; Replying Affidavits and supporting papers 9; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor and against the defendants on the issue of liability, and setting this matter down for an assessment of damages, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Anibal Sosa as a result of a motor vehicle accident on August 4, 2005. The verified complaint alleges that the plaintiff was driving a vehicle on Express Drive North in Ronkonkoma, when a vehicle owned by defendant Nicole R. McNulty (McNulty) and operated by defendant Brendan W. Abt (Abt), came into contact with his vehicle, injuring him. The defendants' verified answer admits that McNulty owned the vehicle and Abt was operating the vehicle.

The plaintiff now moves for summary judgment alleging that the defendant Abt was the sole proximate cause of this accident. In support of his motion, the plaintiff submits the pleadings, his deposition testimony, defendant Abt's deposition testimony, and a copy of the police accident report. The plaintiff testified at his deposition that he was traveling in the left lane, of the two westbound lanes, of the service road to the Long Island Expressway. The plaintiff also alleged that he saw defendants'

vehicle stopped in the right lane about two blocks ahead of him, and just about when his vehicle's front bumper was even with the back bumper of defendants' vehicle, defendants' vehicle suddenly moved into his lane. Plaintiff further testified to the effect that: his vehicle was going approximately thirty-five miles per hour; his vehicle was completely in the left lane and had not changed lanes up until the time of the accident; he did not see any directional signals on the defendants' vehicle, nor did he hear any horn or screeching of tires; the accident took place in the left lane; he hit his brakes and moved his vehicle to the left to try and avoid defendants' vehicle; there was a heavy impact; and his vehicle then hit a tree. In addition, the plaintiff stated that the defendants' vehicle traveled about four blocks down the service road and the driver and a passenger got out of the vehicle and left the scene of the accident. Specifically, the plaintiff testified to the effect that a man from the defendants' vehicle approached his vehicle after the accident, stumbling and slurring his words, and the man looked drunk and said something that the plaintiff could not understand. The plaintiff testified that he was busy helping his passenger, so that he did not see the man leave, but when he next looked, the man and his friend were way down the block, walking eastbound in the westbound lane.

Defendant Abt testified at his deposition that defendant McNulty, owned the vehicle and gave him permission to drive the vehicle on the day of the accident. He further testified that at the time of the accident he was, however, the passenger and his friend Bob was driving. When asked why Bob was driving defendant Abt responded, "I believe I might— I don't remember, but I might have had a suspended license." Defendant Abt explained that his vehicle had been on the Long Island Expressway when his friend Bob pulled onto the service road because "the brakes felt funny" and within seconds they were in a car accident. He also stated that prior to the accident he never had a problem with the brakes on this vehicle, but he did not remember the last time prior to the accident that he brought the vehicle in for service, and he did not remember whether the vehicle had a valid New York State inspection sticker. He testified to the effect that his vehicle went from the entrance ramp, to the left lane, and then to the right lane because they were going to make a right turn to go to a friend's house. Defendant Abt further testified that: he did not remember exactly in which lane the accident occurred; they were about to make a right turn and their vehicle got struck from another vehicle; he does not know if before the accident Bob began to move their vehicle into the left lane; he does not recall if accident took place in the left or right lane of the service road; he does not recall seeing the other vehicle prior to the accident: there was a fairly heavy impact and he might have been knocked out because he does not remember anything; and when he got out of his vehicle it was on the left side of the road. When defendant Abt was asked what he did when he got out of the vehicle, he answered, "Besides walk away, nothing." He stated that he did not look at the damage to his vehicle, he did not look at the damage to the other vehicle, and he did not approach the other vehicle to talk to the driver or anyone else. When defendant Abt was then asked, "When you say you walked away, where did you go?" he answered, "Bob had stayed and I had walked to his friend's house, to Dan's house." He also stated in pertinent part that he was at Dan's house and talking to Dan for a few minutes, when Bob walked up to the house and said that the "cops were there, don't go back to the accident." Finally, defendant Abt testified that he has not seen nor spoken to Bob since right after the accident and he has no idea as to Dan's address.

The plaintiff also point to the police report in support of his summary judgment motion wherein it states that the operator and passenger of vehicle #2 (defendants' vehicle) fled scene. The plaintiff argues that the facts herein make a prima facie showing of entitlement to summary judgment on the issue of liability. He contends that it is undisputed that he was traveling under the speed limit and that

he was fully in his lane at the time of the accident. He maintains that defendant Abt, suddenly and without warning, moved his vehicle into the left lane striking his vehicle. The plaintiff asserts that he had no time to avoid the collision, and that defendant Abt has failed to provide a non-negligent explanation as to why he struck him.

The defendants oppose this motion alleging that they were faced with a sudden and unexpected emergency situation, mechanical brake failure, and acted reasonably under the circumstances. They contend that summary judgment is an inappropriate remedy where as here, the driver of a motor vehicle experienced sudden and unanticipated brake failure just prior to the accident. They point to, *inter alia*, portions of defendant Abt's deposition testimony wherein he testified that: he had operated the vehicle within one week before the accident, and did not experience any mechanical problems with the brakes; at no time before the accident happened did defendant McNulty tell him that the brakes on her vehicle were acting either funny or strange; and he realized that the brakes were not working as they were slowing down at the intersection. The defendants argue that whether they are negligent as a matter of law is a question of fact to be decided by a jury.

Initially, the court finds defendant Abt's testimony that he was not the driver of the vehicle and that his vehicle was hit, to be incredible as a matter of law. While the determination of a witness' credibility is, in general, within the province of the trier of fact, it is also recognized that when evaluating testimony, a court should not discard common sense (***Loughlin v City of New York***, 186 AD2d 176, 587 NYS2d 732 [1992], *lv. denied* 81 NY2d 704). Testimony which is incredible and unbelievable, that is, contrary to experience or self-contradictory, should be disregarded as being without evidentiary value, even though it has not been contradicted by other testimony (***Malanga v City of New York***, 300 AD2d 549, 752 NYS2d 391 [2002]). Given defendant Abt's testimony that he "might" have had a suspended license, his selective memory as to the event, his admission that he left the scene of the accident without any explanation as to why, and his admission that his friend told him not to go back to the accident scene because the police were there, the court finds his claims that he was not driving and that his vehicle was struck by plaintiff's vehicle, to be simply incredible (*see*, ***Cruz v Port Authority of New York***, 243 AD2d 251, 664 NYS2d 514 [1997]).

In addition, Vehicle and Traffic Law §1128(a) provides in pertinent part that whenever any roadway has been divided into two or more clearly marked lanes for traffic, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." In this case, the plaintiff has established that while driving in the left westbound lane, the defendants' vehicle entered the left lane in violation of Vehicle and Traffic Law §1128(a) and collided with the plaintiff's vehicle (*see*, ***Williams v New York City Transit Authority***, 37 AD3d 827, 832 NYS2d 54 [2007]; ***Neryaev v Solon***, 6 AD3d 510, 775 NYS2d 348 [2004]).

In opposition, the defendants have failed to raise a triable issue of fact. While unexpected brake failure might, in certain circumstances, provide a satisfactory excuse for failing to comply with the Vehicle and Traffic Law, it is incumbent on the offender to come forward with evidence showing that a problem with the brakes was unanticipated and that he had exercised reasonable care to keep them in good working order (***Stanisz v Tsimis***, 96 AD2d 838, 465 NYS2d 592 [1983]). Here, defendant Abt had no recollection as to when he brought defendant McNulty's vehicle in for service or whether the vehicle

had a valid New York State inspection sticker (*see*, ***Reid v Rayamajhi***, 17 AD3d 557, 795 NYS2d 56 [2005]). Moreover, even if there was a brake failure, the defendants have offered no explanation as to why their vehicle suddenly moved to the left lane. There was no testimony indicating that the defendants were attempting to avoid something in their lane. Therefore, the emergency doctrine does not apply herein, "because the party seeking to invoke it created or contributed to the emergency" (***Mead v Marino***, 205 AD2d 669, 613 NYS2d 650 [1994]).

Accordingly, the plaintiff's motion for summary judgment on the issue of liability is granted. Issues concerning the extent of plaintiff's injuries, including whether the plaintiff suffered a serious injury, remain to be determined during the damages trial. Upon service of a copy of this order with notice on entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part Calendar for the next available date.

Dated: JUL 24 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**