

**Lee v Waste Mgt. of Pa., Inc.**

2007 NY Slip Op 32957(U)

August 30, 2007

Supreme Court, New York County

Docket Number: 0101995/2004

Judge: Deborah A. Kaplan

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

JENNY LEE and CHIU CHUNG LEE,  
individually and as the parent and natural guardian  
of JESSICA LEE, an Infant

INDEX NO.	101995/04
MOTION DATE	
MOTION SEQ. NO.	005
MOTION CAL. NO.	2/5

- v -

WASTE MANAGEMENT of PENNSYLVANIA, INC.,  
WASTE MANAGEMENT, INC. and CHUN YU LAM

The following papers, numbered 1 to 4 were read on this motion by defendant Waste Management of Pennsylvania, Inc. for partial summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Reply Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1

2,3

4

Cross-Motion:  Yes  No

**FILED**  
SEP 21 2007  
NEW YORK COUNTY CLERK'S OFFICE

This personal injury action arises from a motor vehicle collision which occurred at approximately 11:30 a.m. on June 30, 2003, at the intersection of State Route 863 and Interstate 78 in Pennsylvania, wherein a Pontiac owned and operated by defendant Chum Yu Lam collided with a garbage truck owned by defendant Waste Management of Pennsylvania, Inc., (WMPA) and operated by its employæ Mark Peccarelli.

The Lam vehicle exited I-78, proceeded to the stop sign at the end of the exit ramp and into the path of the truck, which was traveling south on Route 863, and which did not have a traffic signal or stop sign. The plaintiffs, Lam's 19-year-old girlfriend, Jenny Lee, and her 16-year-old sister Jessica, were passengers in Lam's car. Joshua Martonyak, also a WMPA employee, was a front passenger in the truck, which was equipped with an additional steering wheel, brake pedal, speedometer and horn on the passenger side. Martonyak testified at his deposition that Lam's vehicle did not fully stop at the stop sign;

MDAF

[\* 2 ]

Mitchell Kidd, the driver of the vehicle behind Lam, testified that Lam came to a "rolling stop" or stopped "momentarily"; Peccarelli did not see the Lam vehicle until just prior to impact; Lam was never deposed; the plaintiffs, who were both seriously injured, testified that they have no recall of the accident.

Defendant WMPA now moves (1) pursuant to CPLR 3212, for partial summary judgment on the issue of liability on its cross claims against co-defendant Lam or, in the alternative, an order precluding Lam from offering evidence in support of his affirmative defenses and cross-complaint at trial based upon his failure to appear for a deposition; (2) for partial summary judgment dismissing the fourth and fifth causes of action of the plaintiffs' complaint, which assert claims sounding in negligent infliction of emotion distress; and (3) for leave to amend the caption to remove Waste Management, Inc, as a defendant, to reflect the prior dismissal of the complaint as against Waste Management, Inc.. Plaintiffs oppose WMPA's motion insofar as it seeks summary judgment against Lam on the issue of liability, do not address the alternative relief requested, and agree to withdraw their fourth and fifth causes of action. In his opposition papers, co-defendant Lam adopts the arguments asserted by the plaintiffs.

(1) It is well settled that 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 issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 567 (1980). If the movant meets this burden, the opponent, in order to defeat the motion, must forward with proof in admissible form to raise a triable issue of fact. See Alvaraz v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*.

In deciding a motion for summary judgment, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v. Lever House Restaurant, 29 AD3d 302 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 12 AD3d 289 (1<sup>st</sup> Dept. 2004).

In regard to the automobile accidents, the First Department has repeatedly held that "[i]t cannot be said as a matter of law that [one driver's] conduct was the sole proximate

cause of the accident simply because his approach into the intersection was regulated by a stop sign whereas no traffic control devices regulated [the other driver's] approach." Wilson v Trolio, 30 AD3d 255, 256 (1<sup>st</sup> Dept. 2006); see Pappalardi v Jones, 29 AD3d 391 (1<sup>st</sup> Dept. 2006); Hernandez v Bestway Beer & Soda Distributors, Inc., 301 AD2d 381 (1<sup>st</sup> Dept. 2003). This is because, under the doctrine of comparative negligence, "a driver who lawfully enters an intersection ... may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection [citations omitted]." Romano v 202 Corp., 305 AD2d 576, 577 (2<sup>nd</sup> Dept 2003); see Johnson v Phillips, 261 AD2d 269 (1<sup>st</sup> Dept. 1999); DeAngelis v Kirshner, 171 AD2d 593 (1<sup>st</sup> Dept. 1991). In other words, even a driver who has the right of way has a corresponding duty to use reasonable care to avoid a collision. See Johnson v Phillips, *supra*; DeAngelis v Kirshner, *supra*.

It is also well settled that "[i]n general, questions of negligence regarding a road accident are best resolved at a jury trial." Lindgren v NYCHA, 269 AD2d 299, 302 (1<sup>st</sup> Dept. 2000). This is because in all but the most extraordinary instances, whether a defendant has acted as a reasonably prudent person would under the circumstances, the standard of conduct required by law, is a question of fact. See Andre v Pomeroy, 35 NY2d 361, 366 (1974). Thus, the drastic remedy of summary judgment is rarely granted in negligence cases and should be denied where there is any doubt as to the existence of a triable issue. See Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Andre v Pomeroy, *supra*.

In support of their motion, defendant WMPA proffers, *inter alia*, the pleadings, and the deposition testimony of all those involved in the accident, excluding Lam, who was not deposed. In addition to the facts set forth above, the deposition testimony established that Peccarelli was driving at about 40 mph, the speed limit being 40. He noticed Lam's vehicle to his left while it was still on the ramp slowly approaching the stop sign, but he did not keep it under observation. Despite his claim that he consistently scanned the roadway up to the moment of impact, Peccarelli testified that he did not see Lam's vehicle again until it was 15 feet from the intersection, traveling at about 32-35 mph. He testified that he was looking at his right side mirror to make sure no one was trying to pass on that side and heard Martonyak, who had been talking on his cell phone, yell that a car was "going to blow the stop sign." He immediately looked to his left and saw the Lam car approaching. He then applied his brake but it was too late. Peccarelli testified that he did not sound his horn, turn the steering wheel or brake until after he heard Martonyak's warning. The front

[\* 4 ]

bumper of the truck came into contact with the front passenger side of Lam's car. Peccarelli testified that the truck was "on top of" the car. He got out to assist the car passengers, all of whom were injured.

Martonyak testified that the WMPA truck was traveling about 30-35 mph prior to the collision, and that he saw the Lam vehicle earlier than Peccarelli, when the truck was still 500 feet from the intersection. He saw the Lam slowed to about 5-10 mph like it was stopping but then passed through the stop sign and into the lanes of Route 863. Martonyak yelled "watch out, he is not stopping!" He testified that just prior to the impact, Peccarelli was scanning his mirrors and looking straight ahead. Peccarelli did not apply his brakes, sound his horn, turn the steering wheel or take any other action to avoid the collision, and he tried to alert him to the Lam car approaching on the left. Martonyak also testified that he would have had time to brake, swerve or sound the horn using the controls from his side prior to impact but he did not take any of these actions because he was instructed by defendant WMPA during his training not to use his controls unless the driver loses consciousness. Peccarelli applied the brakes after the impact and both vehicles continued moving down Route 863 for about five seconds. When he got out of the truck, Martonyak saw blood on the truck's driver's side door and heard Jenny Lee screaming for help.

Mitchell Kidd, who was driving a tractor trailer just behind Lam's on the exit ramp, observed the collision. While he was about 60 feet behind Lam, Kidd saw Lam's left turn signal and brake lights go on as it reached the stop sign, indicating to Kidd that the driver was uncertain of which direction to go. Kidd saw the Lam car come to nearly a complete stop, which he described as a "rolling stop." The car was "barely moving for about a second." Kidd had observed the WMPA truck approaching from the right southbound lane, about 100 feet away from the intersection. He testified that the truck was traveling at about 40 mph and never slowed down. He then saw the Lam car accelerate across the highway across the northbound lane into the southbound lane, at a speed of about 10-15 mph, right into the path of the WMPA truck. By Kidd's estimation, 10-15 seconds passed between the time he first saw the WMPA truck and the time of impact. Kidd did not notice anything on the roadway which could have blocked the truck's view of the intersection.

Pennsylvania State Trooper John Carr testified at his deposition that he interviewed Mitchell Kidd just after the accident and Kidd told him that Lam did not come to a complete stop at the stop sign and appeared to be trying to "beat the garbage truck."

Based upon the legal principles set forth above and the proof adduced in the motion papers, the court cannot conclude, as a matter of law, that Lam was the sole proximate cause of the accident so as to warrant summary judgment in WMPA's favor. As stated above, the mere fact that Lam's approach into the intersection was regulated by a stop sign and the WMPA truck's approach was not subject to any traffic control devices does not, without more, warrant summary judgment. In other words, even if Lam failed to stop at the stop sign, this alone would not preclude a finding, as a matter of law, that negligent conduct by Peccarelli or Martonyak, in, e.g. failing to notice the car in the intersection sooner and take precautions to avoid the collision, contributed to the accident. Moreover, the moving parties' own proof raises further issues of fact as to whether Martonyak, who also had control over the vehicle and admittedly saw Lam's vehicle before Peccarelli and saw it go through the stop sign, was negligent in failing to use his own brakes, steering wheel, horn or other controls, to avoid the collision. These issues of fact preclude the granting of summary judgment to WMPA on this motion.

In regard to its claim for alternative relief, WMPA alleges that co-defendant Lam has been precluded from testifying at trial due to his repeated failure to appear for a deposition and argues that Lam should also be precluded from offering evidence in support of his affirmative defenses and cross-complaint at trial. However, WMPA has not included in its motion papers and the court's file does not contain any order of preclusion. Thus, while the failure to appear for a deposition subjects the recalcitrant party to certain sanctions (see e.g. Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488 [1<sup>st</sup> Dept. 1998]), there is no indication in the motion papers that Lam has been precluded. Nor has WMPA otherwise established a basis to preclude Lam from offering evidence in support of his affirmative defenses and cross-complaint. Contrary to WMPA's contention, even if Lam were precluded from testifying, this alone, would not entitle it to judgment as a matter of law. "[S]ummary judgment based on an order of preclusion is not automatic in the First Department." Instead, "the Court must analyze the effect of the preclusion order in each particular case." Mendez v Queens Plumbing Supply, Inc., 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, Lam's answer has not been stricken and he is not precluded from establishing any affirmative defense or cross-claim of comparative negligence asserted therein through the cross-examination of the other parties and their witnesses. See Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1<sup>st</sup> Dept. 2004).

(2) The fourth and fifth causes of action of the complaint, asserting claims sounding in negligent infliction of emotion distress, are dismissed, on consent.

[\* 6 ]

(3) By an order dated August 13, 2004, the court (Tingling, J.) granted a motion by defendant Waste Management, Inc. to dismiss the action as against them. Since that defendant is no longer in the case, WMPA's motion to amend the caption to reflect the dismissal is granted, without opposition.

For these reasons and upon the foregoing papers, it is,

ORDERED that the branch of the motion of defendant WMPA which seeks partial summary judgment against co-defendant Chun Yu Lam on the issue of liability dismissing the complaint and all cross-claims as against them, and alternative relief, is denied its entirety; and it is further,

ORDERED that the branch of the motion of defendant WMPA which seeks partial summary judgment dismissing the fourth and fifth causes of action of the complaint is granted, on consent, and it is further,

ORDERED that the branch of the motion of defendant WMPA which seeks leave to amend the caption is granted, without opposition, and the caption is amended to reflect the court's prior dismissal of the complaint as against defendant Waste Management, Inc., and it is further,

ORDERED that the parties shall appear for a pre-trial conference on November 1, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

This constitutes the Decision and Order of the Court.

Dated: August 30, 2007

**FILED**  
SEP 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*Deborah A. Kaplan*  
Deborah A. Kaplan J.S.C.  
**DEBORAH A. KAPLAN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE