Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19
Justice

----------X

HENRYK MIKSA and ELIZABETH MIKSA,

Plaintiffs,

Index No: 20119/06
Motion Date: 1/9/08
Motion Cal. No.: 24
Motion Seq. No.: 2

-against-

LUIGI STASI, FINANCIAL SERVICES VEHICLE TRUST, SAVERIO STASI, BLESSEN BABU, STASI BROTHERS ASPHALT CORP., and LUIGI DADDIO,

Defendants.

----------X

The following papers numbered 1 to 15 read on this motion for an order granting summary judgment in favor of the defendant Luigi Daddio, and dismissing plaintiffs' complaint and any cross claims, on the basis that plaintiff has failed to establish a prima facie case of negligence.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Plaintiffs' Affirmation in Opposition-Exhibit.....	5 - 7
Defendant Babu's Affirmation in Opposition-Exhibit.....	8 - 9
Co-Defendants Luigi Stasi, Saverio Stasi and Financial Services Vehicle Trusts' Affirmation in Opposition.....	10 - 11
Reply Affirmation to Defendant Babu's Affirmation in Opposition-Exhibit	12 - 13
Reply Affirmation to Co-Defendant Luigi Stasi, Saverio Stasi and Financial Services Vehicle Trusts' Affirmation in Opposition.....	14 - 15

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is a personal injury action in which plaintiffs Henryk Miksa and Elizabeth Miksa ("plaintiffs") seek to recover damages for injuries sustained by plaintiff Henryk Miksa as a result of a multi-vehicle automobile accident that occurred on November 27, 2005, between the vehicles operated by defendants Blessen Babu (car number two), Saverio Stasi (car number three), Luigi

Daddio(car number four) and that of plaintiffs (car number one). By order of this Court dated March 21, 2007, the motion by defendant Financial Services Vehicle Trust ("Financial Trust"), the title owner of the vehicle leased by it to defendant Luigi Stasis, for summary judgment dismissing the complaint as to it was granted, and the complaint was dismissed on the ground that 49 USC § 30106 bars the action against the leasing company, defendant Financial Services.

At issue in this four (4) car chain collision is the negligence of each of the drivers of the vehicles. Plaintiff Henryk Miksa ("plaintiff") testified at his deposition that his vehicle was struck in the rear on two separate occasions. The Police report sets forth that "Car one (STASI) struck car two (BABU) pushing him into car three (MIKSA). Car four unable to stop in time struck car one." Defendant Luigi Daddio ("Daddio") now moves for summary judgment in his favor, contending that the Stasi vehicle struck the Babu vehicle before Daddio struck the rear of the Stasi vehicle, and that his vehicle did not cause the Stasi vehicle to move.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2d Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, plaintiff, the driver of the first car in the chain, attributes the accident and resulting injuries to the negligence of all of the drivers, the vehicle driven by each of which struck another in the rear. As a general proposition, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rearmost vehicle and imposes a duty of explanation to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause. See, Milskiy v Solanky, 8 A.D.3d 353 (2nd Dept. 2004); Barile v. Lazzarini, 222 A.D.2d 635 (2nd Dept. 1995); see also McGregor v Manzo, 295 A.D.2d 487 (2nd Dept. 2002); Gambino v City of New York, 205 A.D.2d 583 (2nd Dept.1994); Power v. Hupart, 260 A.D.2d 458 (2nd Dept. 1999); see, also, Caputo v. Schaumeyer, 252 A.D.2d 512 (2nd Dept. 1998); Danza v. Longieliere, 256 A.D.2d 434 (2nd Dept. 1998). In short, the driver of the offending vehicle is required to rebut the inference of negligence, and if he or she cannot do so, the driver of the lead vehicle may properly be awarded judgment as a matter of law. [See, McGregor v Manzo, supra; see also Leal v Wolff, 224 A.D.2d 392 (2nd Dept. 1996); Barile v Lazzarini, 222 A.D.2d 635 (2nd 1995)]. This is because he or she is in the best position to explain whether the collision was due to a reasonable, non-negligent cause. Carter v. Castle Elec. Contr. Co., 26 A.D.2d 83, 85 (2nd Dept. 1966). If the operator cannot come forward with any evidence to rebut the inference of negligence, the moving

party may properly be awarded judgment as a matter of law on the issue of liability. Lopez v. Minot, 258 A.D.2d 564 (2nd Dept. 1999).

Defendant Daddio made the requisite prima facie showing of his entitlement to summary judgment through reference to the deposition testimonies of all drivers that support his contention that the movement of his vehicle into the rear of the Stasi vehicle occurred after plaintiff's vehicle had struck twice in the rear. Plaintiff Miksa testified that there were only two impacts to the rear of his vehicle. Defendant Babu, whose vehicle was the second in the chain directly behind plaintiff's vehicle testified that his vehicle sustained two impacts, only one of which was to the rear of his vehicle. Defendant Stasi, the driver of the third vehicle in the chain directly behind the Babu vehicle, testified that his vehicle struck the Babu vehicle only once in the rear, and then his vehicle was struck by defendant Daddio's vehicle. Based upon the deposition testimony, defendant Daddio makes two arguments. First, he argues that the subsequent contact between his vehicle and the Stasi vehicle "is irrelevant to the claim of negligence by the plaintiff because it was not the proximate cause of the subject accident or resulting alleged injury of plaintiff." Secondly, he argues that because the "testimony clearly demonstrates that the subsequent contact between the DADDIO vehicle and the STASI vehicle did not result in any impact to the plaintiff's vehicle," the "only question of fact for a jury to determine in this matter is between the contacts/impacts involving the plaintiff, BABU and STASI vehicles and not the DADDIO vehicle." The burden thus shifts to plaintiffs and the co-defendants to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact. See, Zuckerman v City of New York, supra.

Without reference to any deposition testimony to support their conclusion, plaintiffs make the conclusory argument that there is a "question of fact as to whether or not DADDIO's vehicle caused one of the impacts in this collision." It is well recognized that "averments merely stating conclusions, of fact or of law, are insufficient' to defeat summary judgment [citations omitted].' " Banco Popular North America v. Victory Taxi Management, 1 N.Y.3d 381, 383 (2004); JPMorgan Chase Bank v. Gamut-Mitchell, Inc., 27 A.D.3d 622 (2nd Dept. 2006). However, defendant Babu, in referring to deposition testimony and pointing to alleged inconsistencies, concluded that "it is very possible that it was the impact with the STASI vehicle by the DADDIO vehicle that caused the BABU vehicle to move forward into the MIKSA vehicle," and argues:

> This is a multiple car accident where each party tells a different tale as to what had occurred. There are questions regarding core facts ranging from the number of impacts the plaintiff felt, to the positions of the vehicles, to the basic credibility of the defendants.

Similarly, the Stasi defendants argue that the deposition testimonies raise issues of fact related to defendant Daddio's role in causing plaintiff's accident, stating:

> Further, the testimony of Mr. Miksa indicates that his vehicle was struck from behind on two occasions, however, the testimony of both Mr. Babu and Mr. Stasi, contradict that testimony. Yet, it should be

> noted that the testimony as to the number of impacts sustained by the Miksa vehicle, gives credence to the theory offered by the co-defendant BABU, in the opposition papers, which asserts that co-defendant, DADDIO, struck the Stasi vehicle in the rear causing a second chain reaction, that would cause the Miksa vehicle to have sustained a second impact. Consequently, the testimony in this matter clearly creates and issue of fact that would require a jury to make a determination as to the credibility of the witnesses and as to how the subject accident actually occurred.

In opposing defendant Daddio's motion for summary judgment dismissing the complaint as to him, it was incumbent upon plaintiffs and the co-defendants "to submit evidentiary facts or materials, by affidavit or otherwise * * * demonstrating the existence of a triable issue of ultimate fact" (Indig v Finkelstein, 23 N.Y.2d 728, 729 (1968); Carrington v City of New York, 201 A.D.2d 525 (2nd Dept. 1994]; see also Morales v Foodways, Inc., 186 A.D.2d 407 (2nd Dept 1992). Here, co-defendants' utilization of the deposition testimony was sufficient to raise triable issues of fact. Moreover, "[a] court may not weigh the credibility of witnesses on a motion for summary judgment , 'unless it clearly appears that the issues are not genuine, but feigned' (citations omitted)." Conciatori v. Port Authority of New York and New Conciatori v. Port Authority of New York and New Jersey, 46 A.D.3d 501 (2nd Dept. 2007). See, also, Bengston v. Wang, 41 A.D.3d 625 (2nd Dept. 2007)[. "credibility issues can only be resolved by a jury"]. Defendant Daddio's reply papers fail to establish his lack of negligence as a matter of law. Accordingly, where, as here, there is conflicting evidence as to the circumstances surrounding the accident, contradictory versions of the accident raise a material issue of fact warranting the denial of summary judgment. Accordingly, as there are triable issues of fact precluding summary judgment with respect to causation, defendant Daddio's motion for summary judgment is denied.

Dated: February 6, 2008

_____

J.S.C.