Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

JOSPEH A. LUPO and DOLORES LUPO, his wife,

Plaintiff(s),

-against-

DANIEL M. BECKERMAN, GLORIA BECKERMAN, MORGAN STANLEY, MORGAN STANLEY DEAN WITTER & CO. and MORGAN STANLEY & CO., INC.,

Defendant(s).

Index No. 8776/06

Motion Submitted: 12/4/07
Motion Sequence: 002, 003

Action No. 1

JOSEPH A. LUPO and DOLORES LUPO,

Plaintiff(s).

-against-

RICHARD G. HENNING, JR.,

Defendant(s).

Index No. 14530/06

Action No. 2

JOSEPH A. LUPO and DOLORES LUPO,

Plaintiff(s),

-against-

HELMUT PETZOLD,

Defendant(s).

Index No. 14528/06

Action No. 3

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Plaintiffs' motion seeking consolidation or joint trial in actions #1, #2 and #3 is granted for the reasons set forth herein.

Plaintiffs' motion for summary judgment on the issue of liability as to action #1 is granted for the reasons set forth herein.

The three actions herein involve automobile collisions with plaintiffs' vehicle and those of the various defendants set forth in the three causes of action. The collision in action #1 occurred on March 8, 2006; the collision in action #2 occurred on June 10, 2006; the collision in action #3 occurred on July 5, 2006. Plaintiffs contend a stipulation conceding liability has been executed in action #2 and summary judgment on the issue of liability as to defendants has been granted. Plaintiffs argue that similar circumstances, common questions of law and fact are involved, proof in each action will be the same and the parties and witnesses in each action will be similar if not the same. Plaintiffs allege all the defendants in the three actions are using Dr. A. Robert Tantleff as their expert witness. Plaintiffs are further alleging the collisions in actions #2 and #3 aggravated injuries sustained in action #1.

A joint trial is appropriate where, as here, the plaintiff alleges a second incident has aggravated a prior injury (*see,* ***Romandetti v. County of Orange***, 289 A.D.2d 386, 734 N.Y.S.2d 629 [2d Dept., 2001]). In the absence of any demonstration by defendants that a substantial right would be prejudiced by a joint trial (***Gottlieb v. Budget Rent-A-Car***, 18 A.D.3d 429, 794 N.Y.S.2d 425 (2d Dept., 2005) and given the possibility of inconsistent verdicts if separate trials ensued (***Rivera v. Ricciardi***, 264 A.D.2d 442, 693 N.Y.S.2d 454 (2d Dept., 1999), the interest of justice and judicial economy will be best served by a joint trial. Defendants herein have failed to establish that a substantial right would be prejudiced.

Turning next to plaintiffs' motion for summary judgment as to liability in action #1, plaintiffs contend plaintiff Joseph A. Lupo (the "plaintiff") sustained a serious injury on March 8, 2006 at approximately 9 a.m. when a motor vehicle driven by defendant Daniel M. Beckerman ("Beckerman") made a U-turn on Jericho Turnpike 200' west of Rugby Road, Old Westbury, N.Y. and collided with plaintiff's vehicle. Plaintiff Dolores Lupo's cause of action is a derivative one.

According to Plaintiff's deposition testimony, he was in the eastbound left-most lane (of three lanes) on Jericho Turnpike. Plaintiff was traveling at approximately 50 mph with the speed limit at 55 mph. There was a car to his right and one behind him with a concrete divider on his left. Plaintiff first saw Beckerman's vehicle less than a quarter mile in the far left lane, westbound, at the break in the concrete divider. When Beckerman's vehicle was approximately 200' from plaintiff's vehicle, he was making a left turn into the eastbound lanes of Jericho Turnpike. Beckerman's vehicle went into the parking lane or shoulder of Jericho Turnpike, eastbound. Plaintiff testified that Beckerman then went from the far right eastbound lane to the left lane (in front of plaintiff) almost directly across eastbound Jericho Turnpike. As a result, plaintiff's vehicle struck Beckerman's vehicle. Plaintiff's version of the collision was partially corroborated by the eyewitness testimony of Nassau County Police Detective Michael Dunne, who was traveling behind plaintiff's vehicle when the collision occurred.

In this case, it is not disputed that the vehicle operated by Beckerman made a U-turn across and into the opposite lane of traffic.

Det. Dunne testified he issued Beckerman a failure to yield right of way summons. The summons was apparently dismissed as "illegible" (see Exhibit R annexed to plaintiffs' cross motion).

It is undisputed the plaintiff had the right of way, and was entitled to anticipate that Beckerman would obey the traffic laws, which required him to yield to defendant's vehicle (***Jacino v. Sugerman***, 10 A.D.3d 593, 781 N.Y.S.2d 663 (2d Dept., 2004); ***Spivak v. Erickson***, 40 A.D.3d 962, 836 N.Y.S.2d 676 [2d Dept., 2007]). Beckerman argues that there is an issue as to the speed at which plaintiff's vehicle was traveling. Plaintiff has, as noted, testified his speed was 50 mph. Detective Michael Dunne stated his speed and that of plaintiffs just before the collision was 30-35 mph. Nonetheless, under the emergency doctrine, when a person is faced with a sudden and unexpected circumstance, which leaves little or no time for thought, deliberation or consideration, the person is not negligent if the actions taken are reasonable and prudent in the emergency context providing the person has not created the emergency (***Caristo v. Sanzone***, 96 N.Y.2d 172, 750 N.E.2d 36, 726 N.Y.S.2d 334 [2001]).

The credible deposition testimony demonstrates plaintiff had a vehicle to his right and a vehicle behind him when he was confronted with Beckerman's vehicle darting across the eastbound lanes of Jericho Turnpike. To the left of plaintiff was the concrete barrier and head-on westbound traffic. Plaintiff's options, with the presence of Beckerman's vehicle suddenly upon him, were severely limited. In any event, there is no evidence that plaintiff's vehicle speed was a proximate cause of the collision. In the absence of evidence

specifically demonstrating how a further reduction in speed or other evasive action would have permitted plaintiff to avoid Beckerman's vehicle, Beckerman's conclusions as to plaintiff's actions are speculative. Here, the conduct was, at worst, indicative of an error in judgment in responding to the emergency created by Beckerman's vehicle and is not sufficient to constitute negligence (***Lamey v. County of Cortland***, 285 A.D.2d 885, 727 N.Y.S.2d 551 [3d Dept., 2001]). Negligence will not be found when a driver in his or her proper lane of travel is confronted with a car traveling in the opposite direction crossing into his or her lane of travel and reacts as a reasonable person would in a similar situation (***Lamey v. County of Cortland, supra***). Here, Beckerman was negligent in admittedly failing to see the plaintiff's vehicle approaching and in crossing the path of the plaintiff's vehicle when it was hazardous to do so (***Torro v. Schiller***, 8 A.D.3d 364, 777 N.Y.S.2d 915 [2d Dept., 2004]).

To the extent that Beckerman contends that plaintiff might have executed some maneuver to avoid the collision, that is mere speculation. The record herein does not support Beckerman's contention that issues of fact exist as to whether the plaintiff was negligent in some degree in the operation of his vehicle (***Agin v. Rehfeldt***, 284 A.D.2d 352, 726 N.Y.S.2d 131 (2d Dept., 2001) lv app den, 97 N.Y.2d 603, 760 N.E.2d 1288, 735 N.Y.S.2d 492 [2001]). The conclusory and speculative assertions of Beckerman concerning the plaintiff's speed and possible negligence were unsupported by any competent evidence and, therefore, did not raise a triable issue of fact (***Mora v. Garcia***, 3 A.D.3d 478, 771 N.Y.S.2d 138 (2d Dept., 2004); ***Maloney v. Niewender*** 27 A.D.3d 426, 812 N.Y.S.2d 585 [2d Dept., 2006]).

In opposition to plaintiffs' prima facie showing, Beckerman failed to prove the existence of any genuine issue of material fact as to whether the plaintiff was comparatively negligent including whether he was speeding just prior to the occurrence of the accident (***Meretskaya v. Logozzo***, 2 A.D.3d 599, 769 N.Y.S.2d 580 (2d Dept., 2003); ***Trzepacz v. Jara***, 11 A.D.3d 531, 782 N.Y.S.2d 852 (2d Dept., 2004); ***Exime v. Williams***, 45 A.D.3d 633, 845 N.Y.S.2d 450 [2d Dept., 2007]).

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least ten (10) days prior thereto, this matter shall appear on the calendar of the Calendar Control Part ("CCP") for a hearing on the issue of damages, costs and disbursements on the 25th of March, 2008 at 9:30 a.m.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed, accompanied by proof that a copy has been mailed to all parties within 15 days after entry.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice as he or she deems appropriate.

The foregoing constitutes the Order of this Court.

Dated: February 19, 2008
Mineola, N.Y.

Karen J. Murphy
J. S. C.