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SHORT FORM ORDER

INDEX No. 04-28238
CAL. No. 08-00079-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-9-08
ADJ. DATE 2-27-08
Mot. Seq. # 005 - MD
006 - XMOTD
007 - XMD

ELIZABETH MILLER and DONALD MILLER, Plaintiffs, - against - SEAN F. KEEGAN, RICHARD T. KEEGAN, V.A.U.L. TRUST, JANICE TALENTO, D.L. PETERSON TRUST, PHH VEHICLE MANAGEMENT SERVICES, LLC, PHH FLEET AMERICA CORPORATION and NANCY HAMILTON, Defendants.	DANIEL P. BUTTAFUOCO & ASSOCIATES Attorneys for Plaintiffs 144 Woodbury Road Woodbury, New York 11797 ABAMONT & ASSOCIATES Attorneys for Defendants Keegan 200 Garden City Plaza, Suite 400 Garden City, New York 11530-9250 LEWIS JOHS AVALLONE AVILES, LLP Attorneys for Defendants Talento, D.L. Peters Trust, PHH Vehicle Management & PHH Flee America 425 Broad Hollow Road, Suite 400 Melville, New York 11747 CHESNEY & MURPHY, LLP Attorneys for Defendant Hamilton 2305 Grand Avenue Baldwin, New York 11510

Upon the following papers numbered 1 to 29 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notices of Cross Motion and supporting papers 4 - 6; 7 - 9 ; Answering Affidavits and supporting papers 10 -23 ; Replying Affidavits and supporting papers 24 - 29 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#005) by defendants Talento, D.L. Peterson Trust, PHH Vehicle Management Services, LLC and PHH Fleet America Corporation and the cross motion (#007) by

defendant Hamilton for summary judgment dismissing all claims interposed in this action against these moving defendants are considered under CPLR 3212 and are denied; and it is further

ORDERED that the cross motion (#006) by the plaintiffs for partial summary judgment on the issue of the defendant's liability for the occurrence of the motor vehicle accident that is the subject of this action is granted only to the extent that the court determines pursuant to CPLR 3212(g) that the plaintiffs engaged in no acts of culpable conduct and all affirmative defenses and/or claims asserted by the defendants which rest upon allegations of comparative fault on the part of the plaintiffs are dismissed.

The plaintiffs commenced this action to recover damages, both direct and derivative, attributable to the personal injuries which plaintiff Elizabeth Miller (hereinafter plaintiff) sustained in a motor vehicle accident that occurred on February 2, 2004. On that date, the plaintiff was riding as a passenger in a vehicle operated by defendant Talento which was owned or leased by defendants, DL Peterson Trust, PHH Vehicle Management Services, LLC, and PHH Fleet America Corporation (hereinafter Talento). Prior to the accident, the Talento vehicle was proceeding in the left, eastbound lane of travel on Jericho Turnpike in the Town of Huntington. A vehicle owned by defendant, Richard F. Keegan and operated by defendant Sean F. Keegan (hereinafter Keegan) was also traveling eastbound on Jericho Turnpike in the travel lane immediately to the right of Talento vehicle. Keegan claims that as his vehicle began to overtake the Talento vehicle a vehicle which had just entered Jericho Turnpike from a side street or driveway cut in front of his vehicle. Although Keegan's vehicle did not come in contact with the vehicle that cut in front of him, Keegan swerved into the path of the Talento vehicle and Keegan's vehicle impacted the passenger side of the Talento vehicle one or more times. The plaintiffs claim that defendant Hamilton was the operator of the vehicle that cut in front of the Keegan vehicle.

The Talento defendants now move for summary judgment dismissing all claims interposed in this action against them. In support thereof, the Talento defendants claim that evidence in the record indicates that Janice Talento was operating her vehicle in the left, eastbound lane when defendant Keegan's vehicle, which was traveling in the same direction in the lane immediately to the right, veered into Talento's lane of travel and collided with the passenger side of the Talento vehicle. The Talento defendants argue that such evidence demonstrates the absence of any acts of culpable conduct on the part of Janice Talento in the operation of her vehicle and warrants an award of summary judgment dismissing all claims interposed in this action against them.

The plaintiffs cross-move for summary judgment but their application is limited to an award of a partial summary judgment on the issue of the liability of all defendants for the occurrence of the accident. The plaintiffs' motion is predicated upon claims that an award of summary judgment is warranted because the injured plaintiff was merely an innocent passenger in one of the several vehicles involved in the subject accident. The plaintiffs argue that since the record is devoid of any evidence

of the injured plaintiff's engagement in any unreasonable conduct while riding as a passenger in the Talento vehicle, they are entitled to the award of partial summary judgment demanded by them.

Defendant Hamilton also cross-moves for summary judgment and therein demands a dismissal all claims interposed against her in this action. Defendant Hamilton's cross motion is premised upon claims that there is insufficient evidence of any involvement on her part in the subject accident which was limited, insofar as contact, to the vehicles operated by defendants Talento and Keegan. Defendant Hamilton argues that these circumstances warrant the granting of the summary judgment dismissing all claims interposed against her in this action.

To succeed on a motion for summary judgment, the moving party must make a prima facie showing of his or her entitlement thereto, as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In negligence cases, an award of summary is judgment is usually inappropriate since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances can rarely be resolved as a matter of law (*see,* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Chahales v Garber***, 195 AD2d 585, 600 NYS2d 739 [1993]; ***Alotta v City Hospital Center at Elmhurst***, 134 AD2d 391, 520 NYS2d 867 [1987]). A party does not carry his or her burden in moving for summary judgment by pointing to gaps in the case or proof asserted by an opponent, as the moving party must affirmatively demonstrate the merit of his or her claim or defense as a matter of law (***Velasquez v Gomez***, 44 AD3d 649, 843 NYS2d 368 [2007]).

In cases arising out of motor vehicle accidents, the existence of fact issues regarding the comparative negligence of the drivers involved in the collision will preclude the granting of summary judgment in favor of one or more of said drivers (*see,* ***Perla v Wilson,*** 287 AD2d 606, 732 NYS2d 35 [2001]; ***Young v Mauch***, 268 AD2d 583, 702 NYS2d 848 [2000]). Those same issues of fact will also preclude an award of summary judgment in favor of innocent passengers *(see,* ***Morrison v Montzouotsos***, 40 AD3d 717, 835 NYS2d 713 [2007]; ***Martinez v Mendon Leasing Corp***, 295 AD2d 408, 744 NYS2d 44 [2002]***; Mundo v City of Yonkers***, 249 AD2d 522, 672 NYS2d 128 [1998]; ***Rios v Nicoletta***, 119 AD2d 562, 500 NYS2d 730 [1986]; *Cf.,* ***Silberman v Surrey Cadillac Limousine Service***, 109 AD2d 833, 486 NYS2d 357 [1985]).

Upon application of the foregoing principles to the instant case, the court finds that material questions of fact exist with respect to liability on the part of the defendant drivers which preclude the granting of summary judgment in favor of either the Talento defendants or defendant Hamilton. Even a most cursory review of the evidentiary submissions of the parties reveal the existence of conflicting versions of the material facts surrounding the occurrence of the subject accident including the number and timing of the impacts between the Talento and Keegan vehicles; the position of each of the defendants' vehicles prior to and during said impacts; and whether one or more of the drivers of the subject vehicles were faced with an emergency situation not of their own making. Questions of fact

regarding the reasonableness of the conduct of each of the defendant drivers under the circumstances and questions regarding the credibility of the parties testifying to their recollections of the facts of the accident were not eliminated by the proof adduced on the instant motions. The motion (#005) by the Talento defendants and cross motion (#007) by defendant Hamilton are thus denied.

Those portions of the plaintiffs' cross motion wherein they seek an award of partial summary judgment on the issue of the defendants' liability for the occurrence of the subject accident is also denied. Although the Supreme Court Appellate Division for the Second Department held in the case of ***Silberman v Surrey Cadillac Limousine Service***, reported at 109 AD2d 833, 486 NYS2d 357, (*supra*) that the existence of issues of fact with respect to comparative negligence on the part of defendant drivers does not preclude an award of partial summary judgment in favor of an innocent passenger on the issue of said defendants' liability, more recent case authorities have held otherwise (*see, **Morrison v Montzouotsos***, 40 AD3d 717, 835 NYS2d 713 [2007], *supra*; ***Martinez v Mendon Leasing Corp.***, 295 AD2d 408, 744 NYS2d 44 [2002], *supra*; ***Mundo v City of Yonkers***, 249 AD2d 522, 672 NYS2d 128 [1998], *supra*; ***Rios v Nicoletta***, 119 AD2d 562, 500 NYS2d 730 [1986], *supra*). Under these later case authorities, summary judgment in favor of an innocent passenger is precluded where issues of comparative negligence on the part of the drivers of the vehicles cannot be resolved as a matter of law. Not precluded, however, is an award of summary judgment in favor of the innocent passenger on the issue of said passenger's freedom from engagement in any acts of culpable conduct which may have caused or contributed to the occurrence of the subject accident (*see, **Garcia v Tri-County Ambulette Service, Inc.***, 282 AD2d 206, 723 NYS2d 163 [2001]).

Here, the factual issues regarding whether the drivers of the three vehicles allegedly involved in the occurrence of the subject accident preclude the granting of those potions of the plaintiffs' motion wherein they demand partial summary judgment on the issue of the defendants' liability. However, there is no evidence in the record suggesting that the injured plaintiff, who was merely an innocent passenger in the Talento vehicle, engaged in any acts of culpable conduct which may have caused or contributed to the occurrence of the subject accident. Under these circumstances, the plaintiffs are entitled to an award of partial summary judgment dismissing all affirmative defenses and/or claims asserted by the defendants which rest upon allegations of comparative fault on the part of the plaintiffs.

Dated: MAR 20 2008

JEFFREY ARLEN SPINNER J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION