SHORT FORM ORDER

COPY

INDEX
NO.: 30481-05

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-16-08
SUBMITTED: 3-12-08
MOTION NO: 001-MG
002-MG; CASE DISP

ANTHONY A. CUOMO and JOAN M. CUOMO,

Plaintiffs,

-against-

BEAU LIMOUSINE, INC., NIKOLAY SMOLYAR, JOSEPH MALENA and CANDACE MALENA,

Defendants.

BERGMAN, BERGMAN, GOLDBERG, ET AL
Attorneys for Plaintiffs
100 Herricks Road
Mineola, New York 11501

CRUSER, MITCHELL & NOVITZ, LLP
Attorneys for Defendants Beau Limousine, Inc. and Nikolay Smolyar
175 Pinelawn Road, Suite 301
Melville, New York 11747

HAMMILL, O'BRIEN, CROUTIER, ET AL
Attorneys for Defendants Joseph Malena and Candace Malena
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

Upon the following papers numbered 1 to 36 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-10 ; Notice of Cross Motion and supporting papers 11-21 ; Answering Affidavits and supporting papers 22-34 ; Replying Affidavits and supporting papers 35-36 ; it is,

ORDERED that this motion (001) by the defendants Joseph Malenda and Candace Malenda (s/h/a Joseph Malena and Candace Malena) pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis they bear no liability for the occurrence of the accident is granted; and it is further

ORDERED that this motion (002) by the defendants Beau Limousine, Inc. and Nikolay Smolyar pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis they bear no liability for the occurrence of the accident is granted.

This is an action sounding in negligence arising out of a motor vehicle accident which occurred on November 14, 2004, at and about the intersection of Jones Street and Route 25A

(Jericho Turnpike/Main Street), Setauket, County of Suffolk, State of New York. It is alleged that the plaintiff, Anthony Cuomo made a left hand turn out of Jones Street onto Jericho Turnpike when his vehicle came into contact with the vehicle operated by the defendant Nikolay Smolyar and owned by the defendant Beau Limousine, Inc. The defendants, Joseph Malenda and Candace Malenda, are alleged to have maintained bushes and placed wooden signs on property located on the northeast corner of the intersection, which signs and bushes Anthony Cuomo claims obstructed his view of traffic on Route 25A at and about the intersection. A derivative claim has been asserted on behalf of Joan M. Cuomo, spouse of Anthony Cuomo.

Beau Limousine, Inc. (hereinafter Beau) claims entitlement to summary judgment dismissing the complaint asserting they bear no liability for the occurrence of the accident in that Anthony Cuomo made a left hand turn at the intersection in violation of Veh. & Traf. Law §1142(a) and while having a limited vision of the roadway. Candace Malenda and Joseph Malenda also seek summary judgment dismissing the complaint asserting that although they placed the signs on their property, they received no complaints about them, and that any trees along the roadway were planted by the Three Village Garden Club fifteen years prior to the accident.

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 from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.,** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.,** 46 NY2d 1065 [1979]).

Joseph Malenda and Candace Malenda have supported their motion with, inter alia, an attorney's affirmation; copies of the summons and complaint; answer; copies of the transcripts of the examinations before trial of the plaintiff Anthony Cuomo, and the defendants Nikolay Smolyar and Candace Malenda; and a certified copy of the MV 104 Police Accident Report with annexed signed statements. Beau Limo and Nikolay Smolyar have supported their motion with, inter alia, an attorney's affirmation; copies of the summons and complaint; answer; verified bill of particulars; copies of the transcripts of the examinations before trial of the plaintiff Anthony Cuomo, and the defendant Nikolay Smolyar; and a certified copy of the MV 104 Police Accident Report with annexed signed statements.

In opposition to both motions, the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; answer; verified bill of particulars; copies of the transcripts of the examinations before trial of the plaintiff Anthony Cuomo, and the defendants Nikolay Smolyar, Candace Malenda and Joseph Malenda; various photographs; and a certified copy of the MV 104 Police Accident Report without the annexed signed statements.

Candace Malenda testified that she and her husband, Joseph Malenda, are the owners of property located at the northeast corner of Route 25A and Jones Street, Setauket and have been since prior to the date of the accident. She described the business on that property as being a strip mall/shopping center. She testified that her husband manages the property and that she is not involved with the shopping center. She did not recognize photographs shown to her other than the location of the property at issue, and was not sure of the property lines. She did not know who placed signs on the grassy area of the property and was not aware of any violations from any municipalities regarding the operation of the shopping center.

Joseph Malenda testified he has owned the property at issue since 1976 and rents the premises to other businesses. He has managed the property since 1976 on a continuous basis by overseeing the property and collecting the rents. He testified he owned the sign that advertised "Tiffany Nails" which was installed by a sign contractor, and the sign that says "Office Space For Rent" which he installed himself. Payne and Palmieri installed the sign at 28 Jones Street without his knowledge and permission before November, 2004, but he permitted them to leave the sign up, but it was later removed as it was rotting. Mr. Malena testified it was his obligation to maintain or manicure the bushes on the property, which he did three times a year by having a crew come in. Three Village Garden Club planted a tree as part of a project about fifteen years ago, which tree is located on Town property. Mr. Malenda testified he never received any complaints, tickets or violations about the shrubs or signs located at the premises.

Anthony Cuomo testified at his examination before trial that on November 13, 2004 he was involved in an automobile accident. The weather was icy and drizzly, half ice and half snow; it was pre-dawn around 5:30 a.m. and he believed his headlights were on. He was traveling on Jones Street, described as having one lane of travel in each direction, when he came to a stop sign located on the right side of Jones Street about twenty or twenty five feet from the end of Jones Street. He stopped at the stop sign, with the front bumper of his truck at the stop sign, for one to two seconds, looked to his left up 25A eastbound and could not see anything, looked to his right up 25A westbound and saw nothing. He then testified that when he looked to his left after he stopped he could see signs located on 25A in front of and for the length of the shopping center. He then pulled up a little and looked left again and still could not see anything. He was at that time still a little ways from the corner of Jones and 25A. He then testified that he did not recall what was obstructing his view, just that it was obstructed by signs and bushes. He then testified that he crept up about another five to ten feet, stopped for the third time and pulled out to make a left onto Route 25A when his vehicle was struck on the driver's side front fender by what he thought was a limousine. He saw no cars traveling in either direction from the time he stopped at the intersection. He had been at the stop sign for a total of about ten seconds when he pulled out. He testified he determined it was the shrubbery and signs that obstructed his view when he returned to the scene of the accident several weeks later. He testified he never saw the other car before it hit him and stated

he guessed that it was because it was coming so fast. His car traveled across Route 25A in a southerly direction after the impact and hit a brick wall and sign.

Nikolay Smolyar testified that at the time of the accident he was employed by Beau Limousine as a driver and was driving a black Lincoln Town Car with the headlights on. He left his house at 5:30 a.m. for a 6:30 a.m. pick up off Route 25, East Setauket. He picked up a woman at about 6:10 or 6:15 a.m., who was a passenger in his vehicle when the accident occurred about five to seven minutes later on Route 25A at the intersection with Jones Street. He was traveling westbound on Route 25A for about one quarter mile. He described the roadway in the vicinity of the accident as flat and straight, with one travel lane in each direction. He stated it was light already and he saw no cars on the roadway at the time. There was a stop sign on Jones Street as he approached the intersection which he could see from about ten car lengths away and he was traveling about twenty miles per hour. He testified he was accelerating and traveling about twenty five miles per hour when he was about two car lengths from the intersection, saw the vehicle (plaintiff's) traveling fast (sixty five to seventy miles per hour) on Jones Street less than a half block away, when, in a split second, the car was in front of him. He took his foot off the accelerator and the impact occurred before he could apply the brakes. The front and right front of his vehicle impacted with plaintiff's vehicle.

N.Y. Veh. & Traf. Law §1142(a) provides in pertinent part that "Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection." In the instant action the adduced evidence establishes that the intersection from which plaintiff was emerging from in a southerly direction to make a left hand turn from Jones Street onto Route 25A was controlled by a stop sign. The adduced evidence further establishes that defendant Smolyar was operating the vehicle owned by Beau Limo in a westerly direction on Route 25A and was approaching the intersection with Jones Street so closely on said highway to constitute an immediate hazard when plaintiff pulled out from the stop sign in front of defendant Smolyar without yielding the right of way, in violation of N.Y. Veh. & Traf. Law §1142(a), and that plaintiff failed to see that which he should have seen with the proper use of his senses, namely, the vehicle being operated by defendant Smolyar (**Mohamed v Frische**, 223 AD2d 628 [2nd Dept 1996]). By proceeding into the intersection without yielding the right-of-way to the driver constitutes negligence as a matter of law (**Dellavecchia v Zorros,** 231 AD2d 549 [2nd Dept 1996]). Despite Anthony Cuomo's allegations that his view was obstructed by signs and bushes, he has not come forward with any explanation concerning why he pulled out in front of the other vehicle before ascertaining the roadway was clear knowing his view of the roadway was obstructed.

It is further determined that the testimony also establishes that the bushes and sign were not the proximate cause of the accident. Instead, the proximate cause of the accident was Mr. Cuomo pulling out from the side street in front of defendants' vehicle without ascertaining there were no cars coming prior to pulling all the way out onto the roadway. "Proximate cause and foreseeability are relative terms, nothing more than a convenient formula for disposing of the case.

The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. So it is with proximate cause and foreseeability. The word 'proximate' means that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point" (**Ventricelli v Kinney System Rent A Car, Inc.,** 45 NY2d 950 [1978]). Although proximate cause is generally a jury issue, liability cannot be imposed upon a party who merely furnished the condition or occasion for the occurrence of the event but was not one of its causes (**Wechter v Kelner,** 40 AD3d 747 [2nd Dept 2007]). Here, defendants have demonstrated prima facie that their actions were not the condition or occasion for the accident, and therefore was not the proximate cause of plaintiff having the accident with defendants' vehicle. Instead, proximate cause in this matter is determined as a matter of law as the result of plaintiff entering the roadway at a stop sign without determining that no other vehicles were coming before he pulled out of Jones Street to turn onto Route 25A. Mr. Cuomo's assertion that Mr. Smolyar's vehicle was traveling fast is conclusory and speculative and unsupported by any admissible evidence as he testified his view was obstructed and he could not see the defendant's vehicle. Although Mr. Cuomo claims his view was obstructed by bushes and signs, his assertions are conclusory and speculative and unsupported by admissible evidence and he has not demonstrated that the signs and bushes were in violation of local code, rules or regulations or that the Malenda defendants received complaints about the signs or bushes. The plaintiffs have failed to raise a triable issue of fact and have failed to demonstrate that any conduct on the part of any of the defendants was the cause of the accident.

Accordingly, motions (001) and (002) for summary judgment are granted and the complaint is dismissed as against all defendants.

HON. ELIZABETH HAZLITT EMERSON

DATED: April 4, 2008

J. S.C.