SHORT FORM ORDER

INDEX No. 05-6687
CAL. No. 07-00812-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-24-08
ADJ. DATE 1-31-08
Mot. Seq. # 005 - MotD

DANIEL A. BRAUSCH,	:	CONSTANTINO & COSTANTINO Attorneys for Plaintiff 632 Merrick Road Copiague, New York 11726
Plaintiff,	:	
- against -	:	McCABE, COLLINS, McGEOUGH, et al. Attorneys for Defendants Berman 346 Westbury Avenue, P.O. Box 9000 Carle Place, New York 11514
BRUCE BERMAN, ROBERT BERMAN and FIRST HARBOR RESTAURANT, INC. d/b/a LOUIS XVI RESTAURANT,	:	JOHN P. HUMPHREYS, ESQ. Attorneys for Defendant First Harbor Restaurant 3 Huntington Quad., Suite 102S, P.O. Box 11747 Melville, New York 11747
Defendants.	:	

Upon the following papers numbered 1 to 39 read on this motion for leave to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 30 - 37 ; Replying Affidavits and supporting papers 38 - 39 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Bruce Berman and Robert Berman for leave to reargue a prior motion for summary judgment dismissing the claims against them, which was denied by order of this Court dated November 13, 2007, is granted to the extent set forth herein, otherwise denied.

This action arises out of a motor vehicle accident that occurred in the parking lot of Louis XVI Restaurant in Patchogue, New York on January 25, 2003. Plaintiff alleges he sustained serious personal injuries when a vehicle owned by defendant Bruce Berman rolled down an incline and struck him as he was waiting in the parking lot for the valet, defendant Robert Berman, to retrieve his vehicle.[1] Defendants Bruce

[1]A stipulation discontinuing the action with prejudice against defendant First Harbor Restaurant, Inc. was executed by the parties on June 21, 2007.

Berman and Robert Berman are father and son. By order issued November 13, 2007, this Court denied summary judgment in favor of defendants Robert and Bruce Berman, finding that the medical evidence submitted in support of the motion was insufficient to demonstrate prima facie that plaintiff did not sustain a serious injury as a result of the subject accident.

Defendants now move for leave to reargue the prior motion for summary judgment and, upon reargument, for dismissal of plaintiffs' claims against them. Defendants assert that, contrary to the determination made by the Court, the medical evidence submitted in support of the motion establishes that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102 as a result of the subject accident. Defendants further assert that reargument is appropriate, as the Court failed to make a determination on their argument that plaintiff is precluded from recovery under the doctrine of assumption of risk, because he "chose to stop defendant's vehicle with his hands" as it was rolling down the incline.

The portion of defendants' motion for leave to reargue the application to dismiss the complaint based on lack of serious injury is denied, as defendants submissions fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (*see* ***Saccomagno v City of New York***, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). The portion of defendants' motion seeking permission to reargue the application for dismissal of the complaint based on plaintiff's alleged assumption of the risk of injury, however, is granted.

It is axiomatic that to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the his or her injuries (*see*, ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Coral v State of New York***, 29 AD3d 851, 814 NYS2d 527 [2d Dept 2006]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eiseman v State of New York***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see*, ***Pulka v Edelman***, *supra*). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]).

A determination of the existence and scope of a duty involves a consideration of the wrongfulness of the defendant's conduct, as well as an examination of the plaintiff's own informed estimate of the potential risks, viewed in light of what people may reasonably expect of each other (***Vetrone v Ha Di Corp.***, 22 AD3d 835, 837-838, 803 NYS2d 156 [2d Dept 2005]; *see* ***Darby v Compagnie Natl. Air France***, *supra*; ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Pursuant to CPLR 1411, the comparative fault principles apply in cases involving an implied assumption of risk by a plaintiff (*see* ***Arbegast v Board of Educ. of S. Berlin Cent. School***, 65 NY2d 161, 490 NYS2d 751 [1985]; ***Cohen v Heritage Motor Tours***, 205 AD2d 105, 618 NYS2d 387 [2d Dept 1994]). However, primary assumption of risk, which applies to situations where there is an elevated risk of danger, typically an athletic or entertainment-related activity, may preclude recovery by an injured party (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Turcotte v Fell***, *supra*). Recovery for negligence also will be barred if the sole cause of the plaintiff's injuries was the plaintiff's own culpable conduct (*see* ***Howard v Poseidon Pools***, 72 NY2d 972,

534 NYS2d 360 [1988]; ***Belloro v Chicoma***, 8 AD3d 598, 779 NYS2d 231 [2d Dept 2004]), or if the plaintiff's injuries were the direct result of the plaintiff's commission of serious criminal or illegal conduct (*see* ***Manning v Brown***, 91 NY2d 116, 667 NYS2d 336 [1997]; ***Barker v Kallash***, 63 NY2d 19, 479 NYS2d 201 [1984]).

Further, a driver of a motor vehicle who leaves such vehicle unattended in the street owes a duty to leave the vehicle in such a condition that it could not be put in motion except by the application of an external force (*see* ***Tierney v New York Dugan Bros.***, 288 NY 16, 41 NE2d 161 [1942]; ***Flood v Travelers Vil. Garage***, 66 AD2d 726, 411 NYS2d 324 [1st Dept 1978]; ***Carney v Buyea***, 271 AD 338, 65 NYS2d 902 [4th Dept 1946]; *see also* ***Kemenyash v McGoey***, 306 AD2d 516, 762 NYS2d 629 [2d Dept 2003]). Vehicle and Traffic Law § 1210 (a) also provides that "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the parking brake thereon and, when standing upon any grade, turning the front wheels to the curb." The Court notes that Vehicle and Traffic Law § 1210 applies where, as here, the vehicle is kept in a parking lot as defined in Vehicle and Traffic Law §129-b (*see* Vehicle and Traffic Law § 1100 [a]; *cf.* ***Surace v Kersten***, 278 AD2d 226, 717 NYS2d 283 [2d Dept 2000]; ***Epstein v Mediterranean Motors***, 109 AD2d 340, 491 NYS2d 391 [2d Dept 1985]).

Summary judgment dismissing the claims against the Berman defendants on the ground that plaintiff voluntarily assumed the risk of injury by moving in front of the vehicle as it rolled down the incline is denied. Here, defendants have not alleged that they are insulated from liability under the doctrine of primary assumption of risk. Further, the excerpts of Robert Berman's deposition testimony submitted in support of the motion show that Robert had driven his father's vehicle, which was equipped with a standard transmission, to the restaurant the day of the subject accident, and had parked it at the top of an incline in the restaurant's parking lot located just outside the front door of the restaurant. It is undisputed that immediately prior to the accident Robert was sitting inside the Berman vehicle with the engine running and the heat turned on, waiting to assist restaurant patrons who had used the restaurant's valet parking services, and that he left his vehicle, unattended and still running, to assist plaintiff. It also is undisputed that as plaintiff was waiting outside the building for Robert to retrieve plaintiff's vehicle from the lot, the Berman vehicle rolled down an incline and struck plaintiff. Although Robert testified at his deposition that his vehicle had rolled only seven feet before he jumped back inside and applied the brake, and that plaintiff had moved a few feet into the path of the Berman vehicle and placed his hands on the hood, he further testified that he did not know whether the emergency brake on his vehicle was fully engaged when he left the vehicle to assist plaintiff and that the subject incident occurred within seconds of his observing his vehicle rolling down the hill. Moreover, plaintiff testified at his deposition that he first observed the Berman vehicle when it was immediately in front of him, and that he put his hands on the hood of the vehicle in an effort to stop it from hitting him. He also testified that the vehicle pushed his body back eight or ten feet before coming to a complete stop.

Such evidence, standing alone, is insufficient to establish as a matter of law that plaintiff's alleged injuries were caused solely by his own conduct (*see* ***Farnham v Meder***, 45 AD3d 1315, 845 NYS2d 619 [4th Dept 2007]; ***Roach v Szatko***, 244 AD2d 470, 664 NYS2d 101 [2d Dept 1997], *lv dismissed* 91 NY2d 956, 671 NYS2d 717 [1998]; *cf.*, ***Shaw v Lieb***, 40 AD3d 740, 836 NYS2d 213 [2d Dept 2007]; ***Sy v Kopet***, 18 AD3d 463, 795 NYS2d 75 [2d Dept 2005], *lv denied* 6 NY3d 710, 813 NYS2d 46 [2006]; ***Bello v***

Chicoma, *supra*). Rather, the appropriateness of plaintiff's actions as the Berman vehicle rolled down the incline is an issue that must be determined by the trier of fact (*see* ***Garcia v Verizon N.Y., Inc.***, 10 AD3d 339, 781 NYS2d 93 [1st Dept 2004]; ***Gifford v Haller***, 273 AD2d 751, 710 NYS2d 187 [3d Dept 2000]). The Court notes that when a person is faced with sudden and unexpected circumstance, not of his or her own making, which leaves little or no time for thought, deliberation or consideration, or reasonably causes the person to be so disturbed that he or she must make a speedy decision without weighing alternative courses of conduct, he or she may not be negligent if the actions taken are reasonable and prudent in light of the emergency circumstances (***Caristo v Sanzone***, 96 NY2d 172, 174, 726 NYS2d 334 [2001]; *see* ***Mas v Two Bridges Assoc.***, 75 NY2d 680, 555 NYS2d 669 [1990]; ***Flanel v Maglione Italian Ices***, 266 AD2d 505, 698 NYS2d 711 [2d Dept 1999]). Accordingly, the application for summary judgment in defendants' favor on the ground that recovery by plaintiff is barred by the assumption of risk doctrine is denied.

Dated: MAY 0 7 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION