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

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ALLEN MANDEL

Plaintiff(s),

-against-

GEORGE E. BENN, MSBA/MTA LONG ISLAND BUS, JOHN M. POWER, CON-KEL LANDSCAPING, AND JOHN N. VILLANI,

Defendant(s).

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JOHN M. POWER and CON-KEL LANDSCAPING,

Third-Party Plaintiff(s),

-against-

GENERAL CASUALTY COMPANY OF WISCONSIN,

Third-Party Defenant(s).

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Index No. 10079/05

Motion Submitted: 3/19/08
Motion Sequence: 007, 008

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.....

The motion by defendants MSBA/MTA Long Island Bus ("MTA") and George E. Benn ("Benn") and the cross motion by defendant John N. Villani ("Villani") both seeking summary judgment on the issue of liability are granted for the reasons indicated below.

Plaintiff commenced this action for injuries allegedly sustained when he was a passenger on a bus owned by MTA and operated by defendant Benn. The accident site was at/near the intersection of Stewart Avenue and Merrick Avenue, Westbury, N.Y. On April 11, 2005, a vehicle driven by defendant Villani was stopped in the left most eastbound lane of Stewart Avenue when it was struck in the rear by a vehicle owned by defendant Con-Kel Landscaping ("Con-Kel") and operated by defendant John M. Power ("Power"). The Villani vehicle was pushed into the westbound lanes of Stewart Avenue. The MTA's bus driven by Benn was heading southbound on Merrick Avenue and executed a right turn into the westbound lane of Stewart Avenue. Confronted by the Villani vehicle, Benn turned the bus sharply to the right avoiding the Villani vehicle, but the bus struck a telephone pole. Mandel alleges he sustained injuries in the collision.

While on Stewart Avenue, in the eastbound left lane, Power was behind the Villani vehicle. The light was red (see Ex. H attached to MTA's motion, p.20) and there were seven vehicles stopped for the light in front of the Villani vehicle (Ex. H, pp. 20, 22). Villani was attempting to make a U-turn at a cut in the divider on Stewart Avenue, just before the intersection with Merrick Avenue (pp. 22-23). Power was approaching the Villani vehicle faster than Power anticipated because the Villani vehicle was stopped (Ex. I, p.23). Power did not recall seeing Villani's turn signal or brake lights and did not know if they were on or not (Ex. I, pp. 28, 111,112). Power estimated that he struck the Villani vehicle at 5 miles per hour (Ex. I, p.23).

Power and Con-Kel contend the motion and cross motion for summary judgment submitted herein are untimely, and therefore should be denied. Movants deny that the motions are untimely, because the note of issue was vacated and the case is currently pending "re-certification," which would start the time limits to file summary judgment motions anew.

A party's motion for summary judgment must be denied as untimely without consideration of the merits where the motion was made well after the time limit set by the court for filing such motions and the motion is made without evidence of a legitimate good cause for delay (***DiBenedetto v. Lowe's Home Centers, Inc.***, 43 A.D.3d 853, 841 N.Y.S.2d 683 [2d Dept., 2007]). However, this matter was marked off the CCP trial calendar in late 2007. It is currently awaiting re-certification on Justice McCabe's calendar. Thus, the old

certification order, setting time limits to avoid delay just before trial, is a nullity with any new limits (limiting summary judgment motions to so many days after a new note of issue is filed) to be set by Justice McCabe (see, ***Dragutescu v. NY City Transit Authority***, N.Y.L.J. 6/19/07, p. 23, col 3). Thus, the motion and cross-motion sought by MTA/Benn and Villani, respectively are timely.

The conclusion set forth in the affidavit of Plaintiff's expert Timothy W. Smith, that Benn should have braked while turning the bus to avoid the Villani vehicle, is speculative, conclusory and unsubstantiated for the conduct of a bus driver facing an emergency situation and is contrary to the deposition testimony that Benn was braking. (See, Ex. G, p. 97 annexed to MTA's motion). Smith offers no factual support for his conclusion (see, ***Maldonado v. Lee***, 278 A.D.2d 206, 717 N.Y.S.2d 258 [2d Dept., 2007]). Where an expert states his conclusion without reliance on any facts or data, his opinion has no probative value (***Maldonado v. Lee, supra***; ***Aghabi v. Sebro***, 256 A.D.2d 287, 681 N.Y.S.2d 333 [2d Dept., 1998]). An expert opinion based on speculative and conclusory assertions is insufficient to defeat a motion for summary judgment (***Gonzalez v. 98 Mag Leasing*** **Corp.**, 95 N.Y.2d 124, 733 N.E.2d 203, 711 N.Y.S.2d 131 (2000); ***Rizzo v. Sherwin-Williams Co.***, 49 A.D.3d 847, 854 N.Y.S.2d 216 [2d Dept., 2008]).

In the absence of evidence specifically demonstrating how a further reduction in speed or other evasive action would have permitted Benn to avoid the Villani vehicle, the plaintiff and co-defendant Power's conclusion as to Benn's actions is speculative. Here, Benn's conduct might be indicative of an error in judgment in responding to the emergency created by the Villani vehicle, but no proof was offered to raise a question of fact as to the reasonableness of his actions, and this is not sufficient to constitute negligence. (***Cheung v. Dominican Convent of Our Lady of the Rosary***, 22 A.D.3d 450, 802 N.Y.S.2d 208 (2d Dept., 2005); ***Boos v. Bedrock Materials*** , 16 A.D.3d 447, 791 N.Y.S.2d 621 [2d Dept., 2005]).

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]). Negligence will not be found when a driver in his or her proper lane of travel is confronted with a second automobile or vehicle crossing into his or her lane of travel, and reacts as a reasonable person would in a similar situation (***Cheung v. Dominican Convent, supra; Caldon v. Tarazona***, 45 A.D.2d 797, 847 N.Y.S.2d 120 [2d Dept., 2007]). The conclusory and speculative assertions of the plaintiff concerning the defendant's 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); ***Draper v. Canada Dry Bottling of New York***, 45 A.D.3d 526, 845 N.Y.S.2d 420 [2d Dept., 2007]).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle, and such a collision imposes a duty of explanation on the operator (***Russ v. Investech Securities, Inc.***, 6 A.D.3d 602, 775 N.Y.S.2d 867 (2d Dept., 2004); ***Belitsis v. Airborne Express Frgt. Corp.***, 306 A.D.2d 507, 761 N.Y.S.2d 329 [2d Dept., 2003]). Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence arising from a rear-end collision with a stopped vehicle (***Shamah v. Richmond County Ambulance Service, Inc.***, 279 A.D.2d 564, 719 N.Y.S.2d 287 [2d Dept., 2001]). Where as here a *prima facie* case of liability with respect to the operator of the rear most vehicle is established, the operator must rebut the inference of negligence by providing a non-negligent explanation for the collision (***McGregor v. Manzo***, 295 A.D.2d 487, 744 N.Y.S.2d 467 [2d Dept., 2002]).

Herein, Power admitted that he was not paying attention when he struck Villani's vehicle (Ex. H, p. 37, annexed to MTA's motion) (see, ***Nozine v. Anurag***, 38 A.D.3d 631, 831 N.Y.S.2d 511 [2d Dept., 2007]). Under the circumstances of this accident, even if Mr. Villani's brake lights were not functioning, such a failure would not adequately rebut the inference of Power's negligence (see, ***Macauley v. Elrac, Inc.***, 6 A.D.3d 584, 775 N.Y.S.2d 78 [2d Dept., 2004]). Power has failed to offer proof of a non-negligent explanation for the collision. There is no further amplification by Power as to why he struck Villani's vehicle once he observed it was stopped regardless of unsubstantiated allegations that Villani's brake lights were not working or that Villani's vehicle had stopped suddenly (see, ***Francisco v. Schoepfer***, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept., 2006).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (***Miller v. Journal-News***, 211 A.D.2d 626, 620 N.Y.S.2d 500 [2d Dept., 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (***Ayotte v. Gervasio***, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). Both MTA/Benn and Villani have met their respective burdens as to the issue of liability. Once a prima facie showing has been made, the burden

shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish material issues of fact, which require a trial of the action. (***Alvarez v. Prospect Hospital (supra)***. Plaintiff has failed to meet that burden and the complaint is dismissed against Defendants Benn, MTA and Villani.

The foregoing constitutes the Order of this Court.

Dated: May 15, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.