

**Pisciotta v LaRocque**

2008 NY Slip Op 32546(U)

September 11, 2008

Supreme Court, Nassau County

Docket Number: 6552-06/

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

mg,mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

KRISTA PISCIOTTO,

Plaintiff(s),

MOTION DATE: 7/30/08

INDEX No.: 1655706

-against-

MOTION SEQUENCE NO: 5, 6

CAL. NO.: 2008H1041

STEPHEN N. LAROCQUE, et al.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
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Upon the foregoing papers, it is ordered that this motion by defendant Michael Damiano for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims and cross-claims against him in this action, on the grounds that there is no triable issue of fact regarding his liability for plaintiff's injuries, is granted.

Plaintiff and defendants Steven N. LaRocque and Steven A. LaRocque have discontinued, with prejudice, their claims and cross-claims respectively, against defendants Joseph Cervasio, Alessandro Cervasio, and Virginia Cervasio. The motion by the three Cervasio defendants for judgment dismissing all of the remaining cross-claims against them is granted there being no opposition.

This is an action to recover money damages for personal injuries allegedly sustained as the result of defendants' negligence. At approximately 3:44 A.M. on May 31, 2004, plaintiff was injured when the vehicle in which she was a passenger crashed into a tree on Town Path Road in Glen Cove, New York. Said vehicle was owned by defendant Steven A. LaRocque and driven by defendant Steven N. LaRocque. All further references in this determination are to Steven N. LaRocque, the driver.

A second vehicle, owned by defendant Delores Henne, and operated by her grandson defendant Michael Campagna, was involved in a car chase with the LaRocque vehicle on Town Path Road immediately prior to the crash. Early in the chase plaintiff and LaRocque allege that the LaRocque vehicle was rear-ended by the Campagna vehicle.

A third vehicle, owned and operated by defendant Michael Damiano, was proceeding on Town Path Road when the LaRocque vehicle pulled up on its right, and the Campagna vehicle pulled up on its left. As Town Path Road has one lane of traffic in each direction, the LaRocque vehicle was located on the shoulder of the road and the front lawns bordering the road, while the Campagna vehicle was completely in the lane for oncoming traffic. The LaRocque vehicle struck the Damiano vehicle as the LaRocque vehicle passed the Damiano vehicle on the right. According to LaRocque, his vehicle then collided with the Campagna vehicle, after which the LaRocque vehicle crashed into a tree.

Defendant LaRocque was placed under arrest and he later took a plea to an alcohol violation. Defendant Campagna fled the scene. He later pled guilty to reckless endangerment. Defendant Damiano argues that he was simply caught traveling in the wrong place at the wrong time, namely, in the middle of a car chase between defendants LaRocque and Campagna.

The complaint and all cross-claims contain allegations that Damiano was negligent in the operation of his vehicle, which did come into contact with the LaRocque vehicle in which plaintiff was a passenger. Careful review of the voluminous deposition testimony in this case is required in order to determine the factual basis, if any, that supports these allegations.

Plaintiff Kristin Pisciotta lost consciousness as a result of the crash, and the last thing she remembers is "telling Steven to go to the police." She did not recall the impact with the Damiano vehicle, and learned of it afterward when she was released from the hospital.

Defendant Steven LaRocque testified that he saw the Damiano vehicle approximately thirty seconds before his vehicle "scraped" Damiano's fender as the LaRocque vehicle passed on the right. At the time of the impact the Damiano vehicle was fully within the right lane and traveling at approximately 30-35 miles per hour.

Defendant Michael Campagna testified that his vehicle never came into contact with either the LaRocque vehicle or the Damiano vehicle, and that damage to his grandmother's car was from a prior accident. He stated that he followed the LaRocque vehicle in order

to get LaRocque to pull over because one of his passengers, Chris Wiek, was "enraged" and wanted to beat LaRocque up. Campagna added that both he and LaRocque attempted to pass the Damiano vehicle at approximately the same time, and that the speed of the Damiano vehicle was less than 40 miles per hour. Campagna stated that after the LaRocque vehicle had contact with the Damiano vehicle, the LaRocque vehicle began to spin, hit a ditch on the right side of the road, and then crashed into a tree on the other side of the road. Later in his deposition, Campagna admitted that when he pled guilty to reckless endangerment, he stated that he veered his vehicle toward the LaRocque vehicle and the result was that the LaRocque car crashed.

Defendant Damiano described LaRocque and Campagna as "engaged in some sort of rage" where "both vehicles were swerving at each other." He described the contact between his vehicle and that of LaRocque as a "shimmy shake," after which LaRocque lost control and crashed. Damiano states that the speed of his vehicle on Town Path Road was 10-15 miles per hour.

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341]. The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact [see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557]. Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial [*Alvarez*, *supra*; *Zuckerman*, *id.*]. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient [*Zuckerman*, *id.*]. Summary judgment will not be defeated by surmise, conjecture, or suspicion [*Shaw v Time-Life Records*, 38 NY2d 201, 207].

On this record, defendant Damiano has presented a *prima facie* case that he did not cause or contribute to the crash of the LaRocque vehicle. In the depositions of plaintiff, defendant LaRocque, and defendant Campagna, as well as in his own deposition, no evidence of negligence by Damiano is presented. The burden now shifts to the opponents of the motion.

Plaintiff, the LaRocque defendants, and defendant Campagna oppose defendant Damiano's motion. Their claim of a nexus between the contact between the LaRocque and Damiano vehicles (described above as a "scraping" or a "shimmy shake"), and the subsequent loss of control of the LaRocque vehicle, amounts to conclusory speculation. The same is true of the suggestion by the attorney for

the LaRocques that if Damiano had applied his brakes or steered away, the result would have been different. Mere speculation that a driver may have failed to take some unspecified accident-avoidance measures or in some other way contributed to the occurrence of the accident is insufficient to defeat summary judgment [*Koenig v Lee*, 53 AD3d 567; *Sirico v Beukelaer*, 14 AD3d 549; *Baker v Staria*, 6 Ad3d 639; *Salazar v Ospina*, 253 AD2d 550].

The deposition testimony herein plainly shows a car chase, where both participants in the chase simultaneously attempted to pass the Damiano vehicle that was, and continued to be, located completely within the right lane of a two-lane road. In the absence of any evidence that raises a triable issue of fact as to negligence on the part of defendant Damiano in connection with the LaRocque vehicle crash, the motion for summary judgment seeking dismissal of plaintiff's claim and all cross-claims against defendant Damiano, must be granted.

The motion by the three Cervasio defendants for summary judgment dismissing all remaining cross-claims against them is granted without opposition.

The court notes for the record that liability pursuant to General Obligations Law 11-100 is precluded as there is no evidence that any of the Cervasio defendants furnished or procured alcoholic beverages for consumption at the party at the Cervasio residence attended by defendants LaRocque and Campagna, immediately prior to the car chase [*Nelson v Neng*, 297 AD2d 313; *Walters v Sternlieb*, 255 AD2d 309]. Liability of any of the Cervasio defendants pursuant to General Obligations Law 11-101 is also precluded, as the record contains no evidence of the commercial sale of alcohol required by that statute [*Gaige v Kepler*, 303 AD2d 626]. Finally the record contains no evidence of negligent conduct on the part of any of the Cervasio defendants.

Based on the foregoing all claims and cross-claims against defendants Michael Damiano, Joseph Cervasio, Alessandro Cervasio, and Virginia Cervasio are hereby dismissed.

SEP 11 2008

Dated: \_\_\_\_\_

**ENTERED** *u/k/h*  
SEP 15 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE  
J.S.C.