SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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BESY VENTURA

Plaintiff,

-against-

RICHARD HORN, KEVIN HORN, MARTIN N. MENACHO, JOSE A. DOMINGUEZ, ELISA R. INDIK and XIOMARA FERNARDINI

Defendant.

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TRIAL PART: 19
NASSAU COUNTY

INDEX NO: 4544/06

MOTION SEQ: 4,5,6,7

SUBMIT: 12/18/08

The following papers having been read on this motion:

Notice of Motions.....	**1-3**
Cross-Motion.....	**4**
Opposition.....	**5-7**
Reply.....	**8-10**

The motion by defendants Richard Horn and Kevin Horn ("Horn defendants") for summary judgment on the issue of liability is granted for the reasons set forth herein.

The motion by defendant Jose A. Dominguez ("Dominguez") to strike the plaintiff's note of issue and certificate of readiness due to the fact all discovery has not been completed and in the alternative, to grant Dominguez a 60-day extension to file a summary judgment motion is denied for the reasons set forth herein.

The motion by defendants Martin N. Menacho ("Menacho") and Elisa Indik ("Indik") and the cross motion of Dominguez for an order granting summary judgment on the grounds the alleged offending vehicle was used without their consent are denied for the reasons set forth herein.

Plaintiff commenced this action for damages due to personal injuries allegedly sustained in a collision that occurred on October 7, 2005 at approximately 8:15 PM at or near the intersection of East Broadway and Neptune Boulevard, Long Beach, N.Y.

Plaintiff was a passenger in the vehicle being operated by defendant Xiomara Fernardini ("Fernardini") and allegedly owned by Menacho, Indik and Dominguez. Defendant Kevin Horn ("Horn") was operating a vehicle owned by co-defendant Richard Horn. Horn was traveling eastbound on East Broadway with the intention of going straight, i.e., continuing eastbound on East Broadway. Horn stated he was traveling at the speed limit of 30 MPH and he had the green light to proceed . (Horns Notice of Motion, Exhibit H, Horns deposition, pp. 12, 13, 22) Horn saw the Fernardini vehicle in the westbound lane of East Broadway make a left turn onto southbound Neptune Boulevard (pp. 14, 24). Horn stated the Fernardini vehicle had a red light to make the left turn (p. 25). Horn stated there was a separate traffic light for the left turn off East Broadway onto southbound Neptune (pp. 25-26). Horn stated he was 20' from the intersection traveling at 30 MPH when he saw the Fernardini vehicle turn left into Horn's, path (p. 25). Horn stated he took his foot off the gas, hit the brake and turned left to avoid the Fernardini vehicle (p. 27). The Horn defendants allege the Fernardini vehicle ran the red light in violation of VTL § 1111(d), crossed into the Horn vehicle path and caused the collision. Dominguez alleges there was no indication the Fernardini vehicle had a red traffic signal. Dominguez states there are issues as to the reasonableness of Horn's action in the collision.

Although the plaintiff may have settled her claim (see the reply affirmation of Sanford L. Pirotin dated December 17, 2008 and Exhibit A attached thereto), the court notes the Horn defendants have a cross complaint against the defendants Menacho, Indik, Dominguez and Fernardini (Horns' Notice of Motion, Exhibit B, paragraph Thirteenth) as do the defendants Menacho and Indik as to the Horn defendants, Dominguez and Fernardini (Horns' Notice of Motion, Exhibit C, p 4). Defendant Dominguez also presents a cross complaint as to the Horns, Menacho, Indik and Fernardini (Horns' Notice of Motion, Exhibit D, p 3).

The motion by Dominguez to strike the plaintiff's action from the calendar, and vacate her note of issue and statement of readiness extending his time to move for summary judgment, alleging the plaintiff has failed to submit to a neurological evaluation as the reason for his request is, apparently, a moot one. As noted previously, the plaintiff has allegedly settled her uninsured motorist claim. Plaintiff has not opposed Dominguez's motion nor any other of the motions or cross motion. The only questions remaining pertain to the remaining cross-claims or cross complaints of the various co-defendants.

A driver of a vehicle traveling in a lane has the right of way and is entitled to anticipate that

another driver would obey the traffic laws which require him to yield (*see Jacino v Sugerman*, 10 AD3d 593).

Since the Horn vehicle had the right of way, it was entitled to anticipate that the Fernardini vehicle would obey the traffic lanes which required the Fernardini vehicle to yield to the Horn vehicle (*Jacino v Sugerman, supra*; *Lucksinger v M.T. Unloading Services*, 280 AD2d 741; *Cenovski v Lee*, 266 AD2d 424).

Here, Fernardini was bound to see the approaching Horn vehicle for Fernardini was bound to see what, by the proper use of his senses, he should have seen (*Almonte v Tobias*, 36 AD3d 636; *Stiles v County of Dutchess*, 278 AD2d 304).

There was no evidence to support defendants' conclusory allegations that Horn saw Fernardini coming into his lane or could have avoided the collision (*see Persaud v Darbeau*, 13 AD3d 347).

Here, the collision was a result of the negligence of Fernardini who entered Horn's lane of traffic without yielding the right of way to Horn's vehicle which was proceeding lawfully (*see Shuman v Maller*, 45 AD3d 566).

A party must offer more than mere speculation as to the fault of another driver involved in a collision; such speculation is insufficient to defeat a motion for summary judgment (*Coumbes v Taylor*, 298 AD2d 350).

Defendants' contention that Horn's vehicle should have taken evasive action is pure speculation (*see LeClaire v Pratt*, 270 AD2d 612).

Here, there are only conclusory and speculative assertions as to Horn's speed and possible negligence that were not supported by competent evidence (*Pitt v Alpert*, 51 AD3d 650).

Fernardini's conduct created an emergency situation that was not of Horn's making (*Pawlukiewicz v Boisson*, 275 AD2d 445).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 negligence if the actions taken are reasonable and prudent in the emergency context providing the person has not created the emergency (*Caristo v Sanzone*, 96 NY2d 172).

A party fails to raise a triable issue of fact where the party merely alleges, unsupported by any evidence, that another party could have taken some unspecified action to avoid the collision or the party somehow contributed to its cause (*White v Gooding*, 21 AD3d 485).

Defendants' contention that Horn should be found negligent because Horn failed to notice the Fernardini vehicle until immediately before the collision is based on speculation and is insufficient to defeat a motion for summary judgment; also there is no evidence in the record to conclude that the speed at which Horn was traveling was a proximate cause of the accident (*See Wallace v Kuhn*, 23 AD3d 1042).

In the absence of evidence specifically demonstrating how a further reduction in speed or other evasive action would have permitted Horn to avoid the Fernardini vehicle, defendants' conclusions are speculative. Here, Horn's conduct was, at worst, indicative of an error in judgment in responding to the emergency created by Fernardini's vehicle, i.e., improperly turning in front of Horn's vehicle, which is not sufficient to constitute negligence on Horn's part (*Lamey v County of Cortland*, 285 AD2d 885).

Negligence will not be found when a driver in his or her proper lane of travel is confronted with an automobile or vehicle crossing into his or her lane of travel and the driver reacts as a reasonable person would in a similar situation (*Lamey v County of Cortland, supra*).

Thus, the record does not support the defendants' contention that issues of fact exist as to whether Horn was negligent in some degree in the operation of his vehicle (*Agin v Rehfeldt*, 284 AD2d 352). Defendants' conclusory and speculative assertions concerning the Horn vehicle's possible negligence are as noted unsupported by any competent evidence, and, therefore, do not raise triable issues of fact (*Mora v Garcia*, 3 AD3d 478).

A defendant/driver's negligence was the sole proximate cause of a motor vehicle collision where the defendant's vehicle failed to stop at a red traffic light and proceeded into the intersection directly into another driver's lane, and there was no evidence that the other driver was at fault or could have done anything to avoid the collision (*Pitt v Alpert*, 51 AD3d 650).

Defendants note an Appellate Division, Second Department case that holds a driver with the right of way has a duty to use reasonable care to avoid a collision (*Cox v Nunez*, 23 AD3d 427). That case noted there were triable issues of fact as to whether a vehicle that did not run a stop sign used reasonable care to avoid a vehicle that did "run" a stop sign at a four-way or all way stop sign. In *Cox v Nunez, supra*, the triable issues are not set forth therein.

The negligence of the driver whose vehicle proceeded through an intersection against a red traffic light was the sole proximate cause of a collision with a vehicle whose driver had a green light in his favor when he, the second driver, entered the intersection; there was no viable evidence offered

that the second driver with the green light could have done anything to avoid the collision (*see Lestingi v Holland*, 297 AD2d 627).

From the depositions, it is clear that from the description of the intersection of East Broadway and Neptune Boulevard, once Fernardini made the left turn at the intersection of East Broadway and Neptune Boulevard off East Broadway, Fernardini's travel was controlled by the same traffic signal as the southbound traffic on Neptune Boulevard, i.e., the green light for east-west travel on East Broadway was red for traffic heading southbound on Neptune Boulevard.

Here, even without the red traffic signal against Fernardini, Horn, as the driver with the right of way, was entitled to anticipate that Fernardini would obey the traffic laws requiring him to yield to the Horn vehicle as Horn approached the intersection (*See Hull v Spagnoli*, 44 AD3d 1007).

Where a driver proceeds through an intersection against a red traffic signal without stopping, it is usually the sole proximate cause of the collision where the opponent failed to raise a triable issue of fact as to whether the other driver was at fault or whether the other drive could have done anything to avoid the impact (*Ramos v Triboro Coach Corp.*, 31 AD3d 625). That is the situation here.

Menacho, Indik and Dominguez all contend the vehicle was stolen by Perez, a non-party, and, therefore they have no liability because there no permissive use given by defendants to Perez.

Notification of the police and the police report reflecting the theft are substantial evidence of theft (*Guerra v Kings Plaza Leasing Corp.*, 172 AD2d 583).

A vehicle owner's failure to report the unauthorized use to a law enforcement agency may be considered evidence of permissive use (*County-Wide Insurance Co. v National Railroad Passenger Corp.*, 6 NY3d 172).

As to the stolen vehicle issue, Menacho, Indik and Dominguez all state they were owners of the offending vehicle. Dominguez, a cousin of Menacho and one of the alleged titled owners to the offending vehicle, delivered the vehicle to Menacho at Joyce Road a few weeks before the collision since Dominguez could no longer afford to make payments on the vehicle. Menacho and Indik contend a non-party named Daniel Perez took a set of keys to the offending vehicle from Menacho's and Indik's house on Joyce Road, Plainview, Long Island. Perez was working on the house when it was undergoing instruction. They allege Perez took the vehicle, then lent the car to co-defendant Fernardini who was driving the vehicle with plaintiff as a passenger when the collision occurred (see the Menacho affidavit, Exhibit D annexed to the Menacho/Indik motion).

Menacho and Indik indicate they went to the Nassau County Police to report their vehicle

stolen by Perez, but officers allegedly told them that if they, Menacho and Indik, reported the vehicle stolen by Perez, Perez would be arrested and probably deported. Menacho and Indik allegedly left the matter alone. Menacho and Indik offer no concrete evidence of their visit to the police such as a name, shield number, affidavit, etc. of an officer that they allegedly spoke to.

A triable issue of fact as to whether defendants/owners gave constructive permission to the driver to operate the vehicle exists wherein it was shown that the defendants/owners knew the person who had taken the vehicle, but delayed in reporting the vehicle stolen (*Burke v Elmendorf*, 30 AD3d 553). Here, Menacho and Indik failed to report the incident and allowed the theft to go unreported, allegedly, for fear that the offending driver would be deported. Clearly, there is an issue of permissive use herein.

Defendants need to proffer substantial evidence to rebut the presumption of permissive use under VTL § 388(1) and to establish as a matter of law, that the driver of the defendant's vehicle at the time of the collision did not have the defendant/owner's permission, express or implied, to use the vehicle. Such substantial evidence usually consists of the report of theft to the appropriate police department, an affidavit to the defendant/owner's insurance company (*see McDonald v Rose*, 37 AD3d 781), as well as an affidavit of the driver of the vehicle (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172; *Murphy v Carnisi*, 30 AD3d 570). Here, no police report or insurance report to the alleged theft was ever filed and the alleged thief, Perez, and the alleged driver, Fernardini, are not available to give affidavits.

Where competent evidence suggests implausibility, collision or implied permission the issue of consent is an issue for the trier of fact (*County-Wide Ins. Co. v National R.R. Passenger Corp.*, *supra*). Here, whether or not the alleged owners of the offending vehicle gave Perez and Fernardini permission, implied or actual, is an issue for the trier of fact.

This constitutes the decision and order of this Court.

ENTER

DATED: January 27, 2009

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