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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CHRISTIAN DEFOURNOY and CHRISTY DEFOURNOY,

Plaintiffs,

-against-

C.J. LONGHITO and JEROME IMPERIO, and DARNELL WILLIS

Defendants.

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DARNELL WILLIS,

Plaintiff,

-against-

C.J. LONGHITO and JEROME D'IMPERIO,

Defendants.

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CHRISTIAN PONCEAU and NICHOLAS PONCEAU,

Plaintiffs,

-against-

JEROME J. DIMPERIO, C.J. LONGHITO and DARNELL M. WILLIS,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 16859/07
Motion Seq. No.: 03

DECISION AND ORDER
Action No. I

Index No.: 00788/08
Action No. II

Index No.: 11593/06
Action No. III

Papers Read on this Motion:

Defendant Darnell Willis' Notice of Motion	03
Defendants Longhito and Imperio's Affirmation in Opposition	xx
Plaintiffs Ponceaus Affirmation in Opposition	xx
Defendant Darnell Willis' Reply Affirmation	xx

Darnell Willis [named Defendant in Actions numbered one and three and Plaintiff in Action numbered two], moves pursuant to CPLR §3212 for an order granting summary judgment dismissing the complaints asserted against him in Actions numbered one and three, together with any and all cross-claims asserted against him.

Action number one was commenced by the Plaintiffs, Christian and Christy Defournoy, to recover for injuries sustained when the vehicle in which they were passengers and operated by Defendant Darnell Willis was struck by the vehicle operated by Defendant C.J. Longhito and owned by Defendant Jerome Imperio (*see* Affirmation in Support at Exh. B; *see also* Exh. F). Action numbered three was commenced by the Plaintiffs, Christian Ponceau and Nicholas Ponceau for injuries each allegedly sustained when the vehicle in which they were passengers, and operated by Darnell Willis, was struck by the vehicle owned by Jerome Imperio and operated by Defendant C.J. Longhito (*id.* at Exh. C; *see also* Exh. F).

With particular regard to the circumstances surrounding the subject accident, moving Defendant Darnell Willis testified that on September 2, 2007, his vehicle was traveling at approximately 30 or 40 miles per hour when it was struck from behind by the vehicle operated by the Defendant Longhito (*id.* at Exh. F at pp. 9, 17, 18, 56). He stated that as a result of the impact, his vehicle was pushed to the right whereupon it hit a guardrail (*id.* at pp. 19, 20). Defendant C.J. Longhito, testified that his vehicle struck the rear of the vehicle operated by Defendant Willis (*id.* at Exh. D at pp. 24, 34). He further stated that just prior to the accident, the vehicle operated by Mr. Willis was proceeding at approximately 30 to 40 miles per hour at the moment of impact and the Willis vehicle was still moving (*id.* at Exh. D at p. 32, 33).

Defendant Willis' application which seeks an order granting him summary judgment

dismissing the complaints in Actions numbered one and three, together with any and all cross-claims asserted against him. In support thereof, counsel for the moving Defendant contends that summary judgment is warranted as the evidence as adduced herein unequivocally demonstrates that the vehicle operated by Defendant Willis was rear-ended by the vehicle owned by Defendant Imperio and as such these Defendants are negligent as a matter of law (*id.* at ¶10).

The application is opposed by Defendants C.J. Longhito and Jerome Imperio, as well as Christian and Nicholas Ponceau, Plaintiff's in Action numbered three.[1] Counsel contends that the negligence of Defendant Willis was a proximate cause of the subject accident and as such there are questions of fact which preclude the granting of summary judgment (*see* Ferretti Affirmation in Opposition at ¶4). In support of said contention, counsel relies primarily upon the Police Accident Report [hereinafter PAR] which contains a statement attributed to Defendant Willis whereby he informed the officer at the scene that "I fell asleep and hit the guard rail. I think, I'm not sure." (*id.* at Exh. A). In Reply, Defendant Willis asserts that he never made such a statement and contends that the police report and the statements contained therein are inadmissible hearsay (*id.* at Exh. F at pp. 53, 54; *see also* Reply Affirmation at ¶4).

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct

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[1] In opposing the within application, counsel for Christian and Nicholas Ponceau expressly adopts those arguments set forth by counsel for C. J. Longhito and Jerome Imperio (*see* Affirmation in Opposition of Dimitri Kotzamanis, Esq. at ¶3).

judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the nonmoving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is incumbent upon the nonmoving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]).

When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247; *Daliendo v Johnson*, 147 AD2d 312). Matters of credibility, the weighing of evidence, and the drawing of inferences from the facts presented are within the exclusive province of the trier of fact (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]). Further, the facts must be construed in a light most favorable to the nonmoving party (*id.*).

Within the particular context of the instant action, a motorist who rear-ends another vehicle is under a duty to maintain a safe distance between his or her vehicle and that which he or she struck in the rear (VTL §1129[a]; *Inzano v Brucculeri*, 257 AD2d 605 [2d Dept 1999]). A failure on the part of the rear-ending motorist to maintain such a distance, in the absence of an

adequate explanation, constitutes negligence as a matter of law (*id.*; *see also Rebecchi v Whitmore*, 172 AD2d 600 [2d Dept 1991]). As adduced from the above-cited deposition transcripts, it is undisputed that the vehicle operated by Defendant Willis was rear-ended by that which was operated by Defendant C.L. Longhito. Thus, in order to defeat the within application, it is incumbent upon Defendant Longhito to proffer an adequate explanation to rebut the inference of negligence (*id.*). In the instant matter, the question as to whether Defendant Longhito can meet his burden is dependent upon the admissibility of the heretofore referenced PAR, which contains the statement by Defendant Willis whereby he said "I fell asleep and hit the guard rail."

CPLR §4518 and the provisions embodied therein, permit a police report to be admitted as proof of the facts therein asserted if "(1) the entrant of those facts was the witness, or (2) the person giving the entrant the information was under a business duty to relate the facts to the entrant" (*Murray v Donlan*, 77 AD2d 337 [2d Dept 1980]; *Toll v State*, 32 AD2d 47 [3d Dept 1969]; *Johnson v Lutz*, 253 NY 124[1930]). Where neither of these two elements are applicable, but the subject police report contains a statement of a third party, such report may be admitted for the sole purpose of proving that such a statement was made (*id.*). However, to receive the statement into evidence for its truth, it must qualify under a hearsay exception (*id.*).

In the instant matter, the police officer making the report was not a witness to the within accident and Defendant Willis was not under a business duty to impart the information reported therein (*see Secor v Kohl*, 67 AD2d 358 [2d Dept 1979]). Therefore, in order for the statement to be admitted for its truth, it must fall within the purview of a recognized hearsay exception (*Murray v Donlan*, 77 AD2d 337 [2d Dept 1980], *supra*; *Toll v State*, 32 AD2d 47 [3d Dept 1969], *supra*; *Johnson v Lutz*, 253 NY 124 [1930], *supra*). Here, the Court finds the statement to

fall within the hearsay exception of an admission which is defined as " * * * an act or declaration of a party * * * which constitutes evidence against a party at trial." (Prince, Richardson on Evidence, [Farrell, 11th ed.], §8-201). As the Defendant's statement is evidence which could potentially be employed against him during a trial on the underlying automobile accident, it can be properly characterized as an admission and thus admitted for the truth asserted thereby (*Murray v Donlan*, 77 AD2d 337 [2d Dept 1980], *supra*; *Toll v State*, 32 AD2d 47 [3d Dept 1969], *supra*; *Johnson v Lutz*, 253 NY 124 [1930], *supra*).

Accordingly, in view of the foregoing, the Court finds that Defendant Longhito has demonstrated the existence of material issues of fact as to the proximate cause of the subject accident, and as such, the within application interposed by Defendant Willis which seeks summary judgment dismissing the Plaintiff's complaint's in Actions one and three is hereby **DENIED**. It is hereby

ORDERED, that the parties are directed to appear for trial in DCM on June 11, 2009 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are deemed **denied**.

DATED: May19, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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