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SHORT FORM ORDER

INDEX No. 08-9153
CAL. No. 09-00857-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8-28-09
ADJ. DATE 10-19-09
Mot. Seq. # 001 - MG; CASEDISP

PATRICIA BONO and THOMAS BONO, Plaintiff, - against - HALBEN'S TIRE CITY, INC. d/b/a and t/a THEO'S CAR CARE CENTER d/b/a and t/a THEO'S METRO 25 CAR CARE CENTER, THEO'S CAR CARE CENTER, INC., THEO'S CAR CARE CENTER, THEO'S METRO 25 CAR CARE CENTER and MAROUN ABI-ZEID, Defendants.	DANIEL A. ZAHN, P.C. Attorney for Plaintiff 1597 Grundy Avenue Holbrook, New York 11741 HAMMILL, O'BRIEN, CROUTIER, DEMPSEY PENDER & KOEHLER, P.C. Attorneys for Defendants 6851 Jericho Turnpike, Suite 250 P.O. Box 1306 Syosset, New York 11791

Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 14 ; Replying Affidavits and supporting papers 15 - 16 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Halben's Tire City, Inc. d/b/a Theo's Car Care Center for summary judgment dismissing the complaint is granted.

The instant action arises from a motor vehicle accident that occurred on July 16, 2007 at the intersection of Boyle Road and Hawkins Road in the Town of Brookhaven, New York. The accident occurred when a vehicle owned and operated by the 79 year-old non-party Philip Rose failed to stop at a red light and struck the front passenger side of a vehicle owned and operated by the plaintiff Patricia Bono. Shortly prior to the date of the accident, on or about July 12, 2007, Rose had brought his vehicle to the defendant automobile repair shop for service because he was having problems with his brakes. The defendant Maroun Abi-Zeid, who has since changed his name to Danny Abi-Zeid, owns the defendant automobile repair shop, Halben's Tire City, Inc., d/b/a Theo's Car Care Center (hereinafter

Halben's). The defendants performed certain repairs to the braking system of Rose's vehicle and informed him that further repairs were needed. Specifically, the defendants told Rose that the car needed a new master cylinder and two front tires. Rose paid for the repairs that had been made and took his vehicle. The accident at issue occurred several days later and prior to the time Rose brought the vehicle back to the defendants for the remaining repairs. The complaint alleges that the defendants are liable for the serious personal injuries sustained by the plaintiff Patricia Bono in the accident. It alleges that the defendants are liable for the plaintiff's injuries as a result of their negligence in inspecting, maintaining, and repairing Rose's vehicle. In this regard, it alleges that the defendants were negligent in, *inter alia*, sending a dangerous instrumentality onto the public roads, failing to warn the owner the dangers of operating the vehicle with a defective and broken master cylinder, giving the owner of the offending vehicle the impression he would be able to safely operate the vehicle without a properly functioning master cylinder, performing incomplete brake work, and in failing to order and install a master cylinder. It further alleges that the defendants breached their agreement with Rose to properly and completely repair the braking system of his vehicle so that it would be safe to operate on the public roadways and when applying the brakes the vehicle would come to a stop. The complaint asserts a derivative cause of action against defendants on behalf of the plaintiff's husband, plaintiff Thomas Bono. Rose is not a party to this litigation. According to the papers, the plaintiff has settled her claim against Rose for $100,000, which was the maximum coverage of his insurance policy, and has released him from any claims arising from the accident.

Halben's now moves for summary judgment dismissing the complaint on the ground that the defendants cannot be held liable because they did not owe the plaintiff a duty of care. Alternatively, Halben's argues that summary judgment is appropriate based on spoliation of evidence. In this regard, Halben's argue that the complaint should be dismissed because the plaintiff failed to preserve Rose's vehicle and, thus, cannot establish that such vehicle was negligently repaired.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, Halben's submits, *inter alia*, a police accident report, the plaintiff's deposition testimony, the deposition testimony of Philip Rose, the deposition testimony of Danny Abi-Zeid and the invoice for the repairs performed on July 12, 2007.

The police accident report contains the signed statement of Philip Rose that, at the time of the

accident, his brakes failed and he was caused to "plow" into the plaintiff's vehicle.

During her deposition, the plaintiff Patricia Bono testified that the accident occurred as she was proceeding through a green light at the intersection of Hawkins Road and Boyle Road. The vehicle of Philip Rose struck her passenger side with a heavy impact. Following the accident, she did not speak directly to Rose but overheard him talking to a witness, apologizing, and stating that his brakes failed and he couldn't stop. Following the accident, Rose telephoned the plaintiff and told her that he was sorry, that he was still shaken up from the accident and that he was not driving anymore.

During his deposition, Rose testified that he owned and was operating a 1989 Ford Taurus at the time of the accident. Immediately prior to the accident he was approaching a red light at the intersection of Boyle Road and Hawkins Road. As he entered the left turning lane his brakes were failing. He pumped his brakes, but his vehicle did not slow down. His vehicle entered the intersection and struck the plaintiff's vehicle. At the scene of the accident, he told the police that his brakes did not work and his vehicle was unable to stop. Rose testified that he took his vehicle to Halben's approximately a week before the accident because his brakes had not been working for two or three days. At the time he brought the car, the brakes did not work and, when he pushed on the brake pedal, it would go down to the floor. He told someone at Halben's that his brakes were failing, and they told him they would call him in a few days and let him know what the problem was. When he went back to pick up the car, he was told that the car needed more work and he would have to come back. He was told that the car needed a master cylinder, but that the brakes should work and he should not have any problem with the brakes prior to the time he came back to have the work done, in two or three days. Rose did not recall being told that his brakes could fail. According to Rose, the brakes were fine on the day he picked the vehicle up. Although they depressed a little more than usual, he was able to stop. As time went on, the brakes became worse. On the second day, Rose noticed that the brakes seemed a little "iffy." On the third day, which was the day of the accident, he was having problems with the brakes, but he kept driving. While Rose operated the vehicle to run errands he noted that he had a problem stopping. When he pushed on the brake pedal the car was not slowing down. However, prior to the time of the accident, the vehicle would eventually come to a stop. When he reached the intersection of the accident, the vehicle did not stop despite the fact that he was pumping his brakes.

During his deposition, Danny Abi-Zeid testified that Halben's was a licensed auto repair shop and inspection service. On July 12, 2007, Halben's performed work on Rose's 1989 Ford Taurus. When Rose brought the vehicle in, it had no brakes at all and the pedal would go all the way down to the floor. When they inspected the vehicle they found that the two rear brakes were rotted and that there was no fluid in the master cylinder. They replaced the rear brake lines, bled the braking system, replaced the front brake pads and replaced the fluid in the master cylinder. After performing the repairs, Abi-Zeid test drove the vehicle and noted that while the brake pedal had pressure, it would "fade," which indicated that Rose needed a new master cylinder. According to Abi-Zeid, Rose damaged his master cylinder by letting it run without any fluid. When Rose came to pick up the vehicle, he told him that he needed a new master cylinder and that his brakes could fail. Rose declined to have the master cylinder done at that time, stating he could not afford it. Rose paid his invoice, which indicated that his vehicle needed a

master cylinder and two front tires. According to Abi-Zeid, when Rose left with the vehicle the brakes were 90% better than the brakes were when he brought the car in.

The invoice prepared by the defendant for the repairs performed on July 12, 2007 indicates that Rose's vehicle needs a new master cylinder and new front tires.

The evidence submitted by Halben's demonstrated the defendants prima facie entitlement to summary judgment dismissing the complaint by establishing that they owed no duty of care to the plaintiff (*see* ***Naz v Christian Eckhoff Truck Bodies***, 66 AD3d 747, 886 NYS2d 345 [2d Dept 2009]; ***Altinma v East 72nd Garage Corp.***, 54 AD3d 978, 865 NYS2d 109 [2d Dept 2008]; *see also* ***Vermette v Kenworth Truck Co.***, 68 NY2d 714, 506 NYS2d 313 [1986]). It is well settled that a finding of negligence must be based on the breach of a duty (*see* ***Neidhart v K.T. Brake & Spring Co.***, 55 AD3d 887, 866 NYS2d 352 [2d Dept 2008]; *see e.g.*, ***U.S. Underwriters Ins. Co. v Meenan Oil Co.***, __ AD3d __, 2009 NY Slip Op 8610, 2 [2d Dept Nov. 17, 2009]). "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (***Lauer v City of New York***, 95 NY2d 95, 100, 711 NYS2d 112 [2000]; *see* ***U.S. Underwriters Ins. Co. v Meenan Oil Co.***, *supra*; ***Neidhart v K.T. Brake & Spring Co.***, *supra*). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; *see* ***Stiver v Good & Fair Carting & Moving***, 9 NY3d 253, 848 NYS2d 585 [2007]; ***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). The Court of Appeals has identified only three exceptions to this general rule, where a promisor is subject to tort liability for failing to exercise due care in the execution of the contract. These are (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm" (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see* ***Stiver v Good & Fair Carting & Moving***, *supra*; ***Church v Callanan Indus.***, *supra*). The evidence submitted in support of the motion for summary judgment establishes that the instant matter does not fall within one of the recognized exceptions to the rule (*see* ***Stiver v Good & Fair Carting & Moving***, *supra*; ***Church v Callanan Indus.***, *supra*). Contrary to the plaintiffs' contention, the evidence fails to demonstrate the existence of a triable issue of fact as to whether the defendants created an unreasonable risk of harm to others or increased the risk posed by performing some repairs on the previously inoperable brakes (*see* ***Stiver v Good & Fair Carting & Moving***, *supra*; ***Neidhart v K.T. Brake & Spring Co.***, *supra*; ***Collins v Laro Serv. Sys. of N.Y.***, 36 AD3d 746, 829 NYS2d 168 [2d Dept 2007]; *compare* ***Naz v Christian Eckhoff Truck Bodies***, *supra*; ***Bienaime v Reyer***, 41 AD3d 400, 837 NYS2d 737 [2d Dept 2007]; ***Ocampo v Abetta Boiler & Welding Serv.***, 33 AD3d 332, 822 NYS2d 52 [1st Dept 2006]; ***Dappio v Port Auth.***, 299 AD2d 310, 749 NYS2d 150 [2d Dept 2002]). Indeed, the record is devoid of evidence that the defendants' inspection and repairs of Rose's vehicle made the vehicle less safe than it was beforehand (*see* ***Altinma v East 72nd Garage Corp.***, *supra*).

In opposition to the defendants prima facie showing of entitlement to judgment, as a matter of law, on the ground that it did not owe a duty to the plaintiff, the plaintiff submitted the affidavit of Jason

Metzger. However, this affidavit was insufficient to raise a triable issue of fact (*see* ***Stiver v Good & Fair Carting & Moving***, *supra*; ***Neidhart v K.T. Brake & Spring Co.***, *supra*; ***Altinma v East 72nd Garage Corp.***, *supra*). Accordingly, the motion by Halben's for summary judgment dismissing the complaint is hereby granted.

In light of the foregoing determination, the defendants' remaining contention that they are entitled to summary judgment based on spoliation of evidence need not be addressed.

Dated: 11/6/10

THOMAS F. WHELAN, J.S.C.