Bah v Benton
2010 NY Slip Op 33896(U)
July 22, 2010
Sup Ct, Bronx County
Docket Number: 8667/2007
Judge: Lucindo Suarez
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NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 04
Mot. Seq. 05

L.W.

PART 19

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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BAH, SALIMATOU, et ano

Index Nº. **8667/2007**

- against -

Hon. **LUCINDO SUAREZ**,
Justice.

BENTON, CHRISTOPHER, et al

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and a third-party action.

The following papers numbered 1 to **11** read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #4)**, noticed on **March 3, 2010** and duly submitted as No. _____ on the Motion Calendar of **May 26, 2010**, and the following papers numbered **7** to **19** read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #5)**, noticed on **April 12, 2010** and duly submitted as No. _____ on the Motion Calendar of **May 26, 2010**

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affidavits Annexed **(Motion Sequence #4)**	1, 2, 3, 4	
Memoranda of Law **(Motion Sequence #4)**	5	
Replying Affidavit and Exhibits **(Motion Sequence #4)**	6	
Notice of Motion - Exhibits and Affidavits Annexed **(Motion Sequence #5)**	12, 13, 14, 15	
Notice of Cross-Motion - Exhibits and Affidavits Annexed **(Motion Sequence #5)**	7, 8, 9, 10, 11	
Answering Affidavit and Exhibits **(Motion Sequence #5)**	16, 17	
Replying Affidavit and Exhibits **(Motion Sequence #5)**	18, 19	

Upon the foregoing papers, the motions of defendants for summary judgment and the cross-motion of plaintiff for leave to serve a supplemental bill of particulars are consolidated for decision and disposed of in accordance with the annexed decision and order.

Dated: **07/22/2010**

Hon. _____
LUCINDO SUAREZ, J.S.C.

P.N.

FILED Aug 02 2010 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

----------X

SALIMATOU BAH, as conservator of the person and estate of OUMAR KAMANO, and SALIMATOU BAH, individually,

Plaintiffs,

- against -

CHRISTOPHER BENTON, ARROW RECYCLING, TEMPESTA & SON CO., INC. and TRUCK KING INTERNATIONAL SALES & SERVICE, INC.,

Defendants.

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CHRISTOPHER BENTON, ARROW RECYCLING and TEMPESTA & SON CO., INC.,

Third-Party Plaintiffs,

- against -

TRUCK KING INTERNATIONAL SALES & SERVICE, INC.,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 8667/2007

Third-Party Index No. 86312/2007

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated February 5, 2010 of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc. and the memorandum of law, affidavit, affirmation and exhibits submitted in support thereof; the notice of motion dated March 5, 2010 of defendant Truck King International Sales & Service, Inc. and the affirmation, affidavit and exhibits submitted in support thereof; the notice of cross-motion dated April 5, 2010 of plaintiff and the affirmation, affidavits (2) and exhibits submitted in support thereof; the affirmation in partial opposition dated April 6, 2010 of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc.

and the exhibits submitted therewith; the affirmation in reply dated April 19, 2010 of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc.; the affirmation in reply dated May 24, 2010 of defendant Truck King International Sales & Services, Inc. and the exhibits submitted therewith; and due deliberation; the court finds:

Inasmuch as plaintiff's cross-motion contains opposition to both the motion of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc. (Motion Sequence #4) and the motion of defendant Truck King International Sales & Service, Inc. ("Motion Sequence #5), the motions are consolidated for decision herein.

This action seeks monetary damages for personal injuries allegedly sustained on November 24, 2005 at approximately 7:45 a.m. on the southbound Bruckner Expressway when the vehicle driven by plaintiff Oumar Kamano ("Kamano") struck the rear of the garbage collection truck owned by Tempesta & Son Co., Inc. ("Tempesta"), doing business as defendant Arrow Recycling ("Arrow"), and driven by defendant Christopher Benton ("Benton"), which had become disabled on the expressway. The complaint also alleges that defendant Truck King International Sales & Service, Inc. ("Truck King") was negligent in its servicing and maintenance of the truck. Benton, Arrow, Tempesta and Truck King move for summary judgment on the ground that plaintiff's negligence in driving into the rear of a stopped vehicle was the sole proximate cause of the accident. Truck King also argues that even if its repairs were negligent, which it denies, such negligence merely furnished the occasion for the accident and was not a proximate cause of the accident. Plaintiff cross-moves for leave to serve a third supplemental bill of particulars alleging the violation of an additional Rule of the City of New York.

Benton, Arrow and Tempesta submit the transcript of Benton's July 14, 2008 deposition testimony, wherein Benton testified that the engine of the refuse collection truck he was driving "cut

off" while he was traveling in the left-most of three travel lanes, that Benton had to wait for a vehicle in the center lane to pass him before moving to the right of the roadway, that Benton attempted to pull to the right of the roadway and that the truck stopped completely with one-quarter of its width remaining in the right lane and three-quarters of its width resting in the right shoulder. Benton further testified that upon losing the ability to accelerate, he activated the truck's flashers and attempted to re-start the truck four or five times. Upon the truck coming to rest, Benton's partner got out of the truck to place reflective triangles on the ground behind the truck, although Benton was unsure whether or where such triangles had been placed. He did not attempt to re-start the truck again after it came to rest. The accident occurred on a straight roadway with no appreciable traffic approximately two to three minutes after the truck stopped.

Also submitted is the affidavit of accident reconstruction expert C. Bruce Gambardella, P.E., who examined case materials, visited the site, inspected the subject vehicles and conducted surveys and analysis. Mr. Gambardella opines that as the roadway was level and unobstructed, Kamano should have been able to observe the truck for over one-half of one mile prior to the accident; that Kamano had over thirty seconds of perception reaction time, assuming a speed of fifty-five miles per hour; and that Kamano would have had to turn the steering wheel of his vehicle one-half of one turn to the left to avoid the truck. He further opines that Kamano's vehicle was not braking and was drifting to the right at the time of the accident, and that the accident is consistent with Kamano's gross inattention.

A rear-end collision with a stationary vehicle presents a *prima facie* case of negligence on the part of the rear vehicle's driver, and requires judgment in the lead vehicle's favor unless the rear vehicle's driver is able to proffer a non-negligent explanation for his failure to maintain a safe distance between the vehicles. *See Mitchell v. Gonzalez*, 269 A.D.2d 250, 703 N.Y.S.2d 124 (1st

Dep't 2000). This principle extends to rear-end collisions with disabled vehicles in lanes of travel. *See Russo v. Sabella Bus Co.*, 275 A.D.2d 660, 713 N.Y.S.2d 315 (1st Dep't 2000). Neither the sudden stop of the lead vehicle, *see Woodley v. Ramirez*, 25 A.D.3d 451, 810 N.Y.S.2d 125 (1st Dep't 2006), nor a wet roadway, *see LaMasa v. Bachman*, 56 A.D.3d 340, 869 N.Y.S.2d 17 (1st Dep't 2008), suffices as such non-negligent explanation. A driver is expected to observe traffic conditions, *see Malone v. Morillo*, 6 A.D.3d 324, 775 N.Y.S.2d 312 (1st Dep't 2004), as well as weather and roadway conditions, *see Mitchell, supra.* The awareness of traffic conditions includes vehicles stopped on the roadway. *See Guzman v. Schiavone Constr. Co.*, 4 A.D.3d 150, 772 N.Y.S.2d 25 (1st Dep't 2004), *appeal denied*, 3 N.Y.3d 694, 818 N.E.2d 655, 785 N.Y.S.2d 13 (2004). Further, a finding that the lead vehicle has been stopped for at least several seconds may suffice "as a matter of law to place sole responsibility for the accident" on the rear vehicle. *See Rue v. Stokes*, 191 A.D.2d 245, 594 N.Y.S.2d 749 (1st Dep't 1993). Here, defendants have presented *prima facie* entitlement to summary judgment. *See Golubchik v. Das Trading Corp.*, 62 A.D.3d 480, 879 N.Y.S.2d 408 (1st Dep't 2009); *Vespe v. Kazi*, 62 A.D.3d 408, 878 N.Y.S.2d 46 (1st Dep't 2009). Plaintiff must present evidence tending to explain his failure to maintain a safe distance from the truck, *see Ewens v. Roy*, 45 A.D.3d 353, 846 N.Y.S.2d 12 (1st Dep't 2007), given his obligation to "see what should be seen and to exercise reasonable care under the circumstances to avoid an accident," *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545, 547 (1st Dep't 1999).

It is not contested for purposes of these motions that Kamano's injuries have rendered him unable to recall or relate the accident or any of its circumstances. In opposition to the motions, however, plaintiffs, as they must, present "medical evidence establishing the loss of memory and its causal relationship to defendants' fault," *Tselebis v. Ryder Truck Rental, Inc.*, 72 A.D.3d 198, 199,

895 N.Y.S.2d 389, 391 (1st Dep't 2010), to obtain the benefit of a lesser standard of proof applicable to a party unable to present his version of the facts, *see Schechter v. Klanfer*, 28 N.Y.2d 228, 269 N.E.2d 812, 321 N.Y.S.2d 99 (1971); *Johnson v. Goldberger*, 286 A.D.2d 604, 730 N.Y.S.2d 309 (1st Dep't 2001); Pattern Jury Instruction 1:62. Plaintiff, however, retains the burden to present *prima facie* evidence of defendants' negligence before being afforded the benefit of the lesser standard of proof. *See Schechter, supra; Rosado v. Kulsakdinun*, 32 A.D.3d 282, 820 N.Y.S.2d 239 (1st Dep't 2006).

In opposition, plaintiffs argue that Benton's violation of various traffic-related statutes, regulations and rules was a substantial factor in causing the accident. Plaintiffs submit the affirmed report of their accident reconstruction experts, who opine that Benton was negligent in driving in the left lane, in bringing his vehicle to a stop in the right lane of traffic in contravention of the Vehicle and Traffic Law and Rules of the City of New York when he had sufficient momentum to steer the vehicle onto the shoulder, in failing to attempt to move the vehicle off the roadway once he was in the right lane and in failing to place warning devices around the disabled vehicle as required by the Code of Federal Regulations. They argue that because trucks are not permitted in the left lane of the Bruckner Expressway in the vicinity of the accident, not only did Benton violate a state law and/or local regulation, but had he been traveling in any other lane, he would have been able to stop on the shoulder since he was able to travel from the left lane to the right lane. Furthermore, they argue that had warning devices been placed as required under 49 CFR 392.22, Kamano would have had over two hundred feet to avoid the stalled vehicle and be alerted to its presence, which would have increased his ability to react and maneuver, because determining whether the truck was stopped was rendered "difficult" and "harder to judge" because of the straightness of the roadway. A lane change at a speed of fifty miles per hour would have required less than two hundred thirty feet of

roadway. Plaintiffs' experts argue that the failure to place such warning devices was a substantial factor in causing the accident.

What 49 CFR § 392.22(b)(1) in fact requires is one warning device (e.g. flare or reflective triangle) ten feet behind the truck (toward oncoming traffic), one warning device one hundred feet behind the truck (toward oncoming traffic) and one warning device one hundred feet in front of the truck. Furthermore, Vehicle and Traffic Law §§ 1201 and 1202 are inapplicable in the City of New York. *See* Vehicle and Traffic Law § 1642; 34 RCNY § 4-02(e). Plaintiffs, however, cite to alternative provisions prohibiting vehicles stopped in traffic lanes.

The court's role on a motion for summary judgment is merely the identification of issues of fact, and not the determination of factual questions requiring an assessment of witness memory and credibility. *See Lindgren v. New York City Hous. Auth.*, 269 A.D.2d 299, 704 N.Y.S.2d 30 (1st Dep't 2000). Given the lack of clarity in Benton's testimony regarding the feasibility of driving the truck onto the shoulder and regarding the placement of warning devices, and the questions of visibility presented by the gloomy, wet weather, plaintiffs adequately raised questions of material fact as to whether Benton's actions were reasonable under all of the attending circumstances, *see Mahar v. US Xpress Enters., Inc.*, 688 F. Supp.2d 95 (N.D.N.Y 2010), whether they constituted evidence of negligence, and whether they may have contributed to the accident, *see Newell v. Rodriguez*, 300 A.D.2d 258, 751 N.Y.S.2d 365 (1st Dep't 2002). On the record here, it cannot be said as a matter of law that the accident was caused solely by Kamano's negligence.

Truck King's motion for summary judgment on the ground that its repairs merely furnished the occasion for the accident must be denied in light of the evidence that the truck had ongoing maintenance issues with regard to the mechanical failure alleged to have caused the accident and that the truck was in Truck King's possession for maintenance and repair until the afternoon

preceding the accident. *See Maliszewska v. Potamkin N.Y. LP Mitsubishi Sterling*, 281 A.D.2d 353, 723 N.Y.S.2d 16 (1st Dep't 2001).

The cross-motion for leave to supplement the bill of particulars to assert a violation of section 4-08(e)(1) of Chapter 34 of the Rules of the City of New York is unopposed. This rule addresses the prohibition of stopping, standing and parking in, *inter alia*, lanes designated for the movement of traffic. Despite the failure to present a reasonable excuse for the untimeliness of the amendment, the proposed additional rule is not so removed from the claims and theories heretofore asserted by plaintiff so as to prejudice or surprise the defendants, despite the filing of the Note of Issue and Certificate of Readiness for Trial. *See e.g. Orros v. Yick Ming Yip Realty, Inc.*, 258 A.D.2d 387, 685 N.Y.S.2d 676 (1st Dep't 1999).

Accordingly, it is

ORDERED, that the motion of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc. for summary judgment dismissing plaintiffs' complaint (Motion Sequence #4) is denied; and it is further

ORDERED, that the motion of defendant Truck King International Sales & Service, Inc. for summary judgment dismissing plaintiffs' complaint (Motion Sequence #5) is denied; and it is further

ORDERED, that plaintiff's cross-motion for leave to serve a third supplemental bill of particulars (Motion Sequence #5) is granted.

This constitutes the decision and order of the court.

Dated: July 22, 2010

Lucindo Suarez, J.S.C.