

Jarvis v Aquilone

2011 NY Slip Op 30161(U)

January 5, 2011

Sup Ct, Nassau County

Docket Number: 22250/07

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

**SANDRA JARVIS, individually and as
Administratrix of the Estate of SHANELLE
SULLIVAN, Deceased, and SANDRA JARVIS,
individually,**

Plaintiffs,

-against-

**DAWN AQUILONE, EDWARD BUSSIE, as
proposed Administrator of the Estate of
ANTHONY N. BUSSIE, Deceased, JOSEPH
GIUGLIANO and ELAINE SIMOS,
Defendants.**

M(1), M(01)

**Motion Sequence #4, #5
Submitted November 18, 2010**

INDEX NO: 22250/07

KAMELL BUSSIE,

Plaintiff,

-against-

**JOSEPH GIUGLIANO and ELAINE SIMOS,
Defendants.**

INDEX NO: 12029/08

**JOSEPH GIUGLIANO and ELAINE SIMOS,
Third-Party Plaintiff,**

-against-

**SETH WALKER,
Third-Party Defendant.**

KAMELL BUSSIE,

Plaintiff,

-against-

**SETH WALKER,
Defendant.**

INDEX NO: 22843/08

The following papers were read on this motion:

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Affs in Opposition.....	15&16
Affs in Reply.....	17&18

This motion by defendants, Joseph Giugliano and Elaine Simos, for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, together with any and all cross-claims asserted against them and cross motion by defendant, Dawn Aquilone, for an order pursuant to CPLR 3025[b], granting her leave to serve an amended answer to include the affirmative defense of the "Emergency Doctrine", and for an order pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's complaint are disposed of as follows:

This is a wrongful death action which arises out of a motor vehicle accident that occurred on December 31, 2005, in the westbound lanes of the Southern State Parkway at or near Exit 17, in the Town of Hempstead, County of Nassau, State of New York. On said date, a 1999 Ford SUV, operated by defendant, Anthony Bussie, and owned by defendant, Dawn Aquilone (hereinafter "the Bussie vehicle"), came into contact with the 1991 Toyota sedan, operated by defendant, Joseph Giugliano, and owned by defendant, Elaine Simos (hereinafter "the Giugliano vehicle"). At the time of subject accident defendant, Elaine Simos, was a passenger in the Giugliano vehicle and Shanelle Sullivan, the infant plaintiff, was a passenger in the Bussie vehicle. Defendant, Anthony Bussie, and infant plaintiff, Shanelle Sullivan, both died as a result of the subject accident.

During the course of the within litigation, depositions were conducted of the parties, as well as with regard to a non-party witness, Eric Padro. Defendant, Joseph Giugliano, testified that on December 31, 2005, he was driving westbound on the Southern State Parkway, in the center right lane of traffic, between the exits 16 and 17. He states that a "split second" prior to the collision, he saw the Bussie vehicle, which was traveling the center-left lane of traffic, cross over into the center right lane of traffic and make contact with his vehicle. As a result thereof, the defendant states that he applied the brakes and "cut the wheel to get away". Defendant Giugliano further testified that subsequent to the collision, he saw the Bussie vehicle "keep on going * * * across us, * * * and then it went off over the shoulder, and turned 180 degrees" and flipped over.

Defendant, Elaine Simos, testified that a "split second" prior to impact, she witnessed the Bussie vehicle "going at a high rate of speed" after which it came into her lane of traffic and collided with the vehicle in which she was a passenger (the Giugliano vehicle).

Non-party witness, Eric Padro, testified that he was in the left most lane of traffic when he witnessed the subject accident unfold. Mr. Padro testified the he observed a "silver pickup truck" traveling in the left hand lane which, without warning, changed lanes and moved to the right almost colliding with the Bussie vehicle, which in turn "slammed on its brakes and cut towards the right hand lane". Mr. Padro stated that he subsequently witnessed the Bussie vehicle "flipping into the woods".

Kamell Bussie, the plaintiff in a companion action, as well as a passenger in the Bussie vehicle, testified that the Bussie vehicle was traveling between 55 and 60 miles per hour in the westbound middle lane of traffic on the Southern State Parkway. He testified

that the Bussie vehicle sustained an impact to the drivers side fender. Kamell Bussie further stated that subsequent to that impact, the Bussie vehicle began turning to the right and thereafter struck another vehicle, which was to the right of the Bussie vehicle.

The Court will initially address the motion for summary judgment of defendants, Joseph Giugliano and Elaine Simos. In support of said motion defendants contend that the above-referenced evidence demonstrates that the actions of defendants, Giugliano and Simos, were not the proximate cause of the subject accident thus warranting dismissal of the within action. Specifically, they contend that the evidence establishes that it was the Bussie vehicle which unlawfully moved into the lane of traffic in which the Giugliano vehicle was legally proceeding, and accordingly it was the actions of the operator of the Bussie vehicle which were the cause of the subject accident.

The defendants' application is opposed by both plaintiff, Sandra Jarvis, and plaintiff, Kamell Bussie. In opposing the application, plaintiff Jarvis contends that the defendants' moving papers are insufficient as a matter of law, that the credibility of the various witnesses is a determination which should only be rendered by the trier of fact and that there are unresolved questions of fact with respect to the happening of the subject accident. Therefore, summary judgment is inappropriate. Plaintiff Kamell Bussie similarly argues that the record demonstrates the existence of questions of fact and as such the defendants' instant application must be denied.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557; *Sillman v Twentieth*

Century Fox, 3 NY2d 395; *Bhatti v Roche*, 140 AD2d 660). The moving party must establish its claim or defense by tendering proof, in admissible form, sufficient to warrant the Court granting judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065). 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).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving 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, supra*). A motion for summary judgment is the procedural equivalent of a trial, and when entertaining such an application, the Court may not determine matters of credibility, but rather must confine its inquiry to determining whether material issues of fact exist (*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338; *Sillman v Twentieth Century Fox, supra*).

The Court has searched the record and upon said review finds that the defendants have failed to demonstrate their entitlement to judgment as a matter of law (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc., supra*). The evidence in support of the within application and upon which the moving defendants primarily rely, is the deposition testimony of defendants, Giugliano and Simos, plaintiff, Kamell Bussie, as well as non-party witness, Eric Padro. Upon review of the annexed transcripts, same were not executed by the respective deponents. Unsigned deposition transcripts, which are proffered in support of a motion for summary judgment, are not admissible absent a

showing that the transcripts have been provided to the deponents for their review (*Marmer v IF USA Express, Inc.*, 73 AD3d 868; *Martinez v 123-16 Liberty Avenue Realty Corp.*, 47 AD3d 901; *Pina v Flik International Corp.*, 25 AD3d 772; *Santos v Intown Assoc.* 17 AD3d 564). In addition, there has been no showing that the various unsigned deposition transcripts were forwarded to the respective deponents for their review.

Therefore, said evidence is inadmissible and moving defendants have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law and as such the instant application is hereby denied (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, *supra*; *Marimer v IF USA Express, Inc.*, *supra*).

That portion of the cross-motion of defendant, Dawn Aquilone, which seeks summary judgment dismissing the plaintiffs' complaint is denied.

Cross movant argues that the testimony as adduced herein demonstrates that the Bussie vehicle was struck on the drivers side by a silver pickup truck and as a result was caused to careen out of control and that the operator of the Bussie vehicle was not negligent as a matter of law inasmuch as the driver of said vehicle was not responsible for the initial impact involving the silver pickup truck and was rather presented with an emergency situation to which he responded reasonably under the circumstances.

The Emergency Doctrine stands for the proposition that drivers, when faced with "a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency" (*Bello v Transit Authority of New York City*, 12 AD3d 58). While under certain

circumstances “the questions of the existence of an emergency and the reasonableness of the response to it” can be determined as a matter of law, as a general rule such questions are reserved for the trier of fact (*Smit v Phillips*, 74 AD3d 782; *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443; *Bello v Transit Authority of New York City*, 12 AD3d 58).

The evidence upon which the moving defendant relies in support of the within application is the deposition testimony of Kamell Bussie, Eric Padro, as well as that of defendants, Joseph Giugliano and Elaine Simos. A reading of the transcripts provided reveals that only that of Kamell Bussie is signed and the remainder fail to contain the signatures of the particular deponent. As noted above, unsigned deposition transcripts may be admissible in support of a motion for summary judgment upon a showing that said transcripts have been provided to the deponents for their review (*Marmer v IF USA Express, Inc.*, *supra*; *Martinez v 123-16 Liberty Avenue Realty Corp.*, *supra*; *Pina v Flik International Corp.*, *supra*; *Santos v Intown Assoc.*, *supra*). There has been no showing that the transcripts of either Mr. Padro or defendants, Giugliano and Simos, were provided for their review and accordingly same are inadmissible. Thus, the only evidence in admissible form is the deposition transcript of Kamell Bussie. In the instant matter, given the absence of other admissible evidence, and in consideration that the credibility attributable to Kamell Bussie’s testimony is a function of the trier of fact, the Court finds that the defendant has failed to demonstrate her entitlement to judgment as a matter of law and accordingly that branch of the instant cross motion, which seeks dismissal of the within action must be denied (*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, *supra*; *Sillman v Twentieth Century Fox*, *supra*).

So much of the defendant's cross-motion for an order pursuant to CPLR 3025(b) granting leave to amend her answer to include the affirmative defense of the "Emergency Doctrine" is granted. Defendant contends that based upon the actions of the heretofore referenced silver pickup truck as described by Mr. Padro, the affirmative defense is meritorious and the relief herein requested should be granted. Counsel further asserts that no prejudice will be borne by plaintiffs, Jarvis and Sullivan, and accordingly the application should be granted.


This is opposed by plaintiff, Sandra Jarvis, who contends that the proposed amendment lacks merits and that she would be prejudiced since the defendant previously has never alleged such a defense.

"Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment" (*Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558; *Adams v Jamaica Hospital*, 258 AD2d 604).

After a review of the record, the Court finds that the proposed amendment is neither "palpably improper" nor lacking in merit (*Maloney Carpentry, Inc. v Budnik, supra*). Mr. Padro testified that he witnessed the silver pickup truck in the left hand lane of traffic suddenly change lanes and move to the right and in so doing almost collide with the Bussie vehicle. In addition, the record demonstrates that plaintiff was in possession of a statement made by Mr. Padro dated 1/1/06, in which he indicated that he observed the silver pickup truck move "into the next lane on the right almost hitting the a [sic] dark colored SUV, which was already in the lane". Thus, plaintiff was aware of the facts which form the predicate of the amendment.

The amended Verified Answer in the form annexed to the Cross Motion as Exhibit "J" shall be deemed served five (5) days after service of a copy of this order with notice of entry upon the attorneys for the various parties herein.

Dated: January 5, 2011


UTE WOLFF LALLY, J.S.C.

TO: Martyn, Toher & Martyn, Esqs.
Attorneys for Defendants Joseph Guigliano and Elaine Simos
330 Old Country Road
Mineola, NY 11501

The Cochran Firm
Attorneys for Plaintiff in Action #1
233 Broadway, 5th floor
New York, NY 10279

Carman, Callahan & Ingham, LLP
Attorneys for Defendant Dawn Aquilone
266 Main Street
Farmingdale, NY 11735

John F. Kuhn, Esq.
Attorney for Plaintiff Kamell Bussie in Actions 2 and 3
22 Oakwood Road
Huntington, NY 11743

Martin Silver, Esq.
Attorney for Third Party Defendant Seth Walkeer
330 Motor Parkway, Suite 201
Hauppauge, NY 11788

ENTERED
JAN 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE