**Status Conference: May 9, 2011**

**To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties**

**SUPREME COURT OF THE STATE of NEW YORK**
**COUNTY OF PUTNAM**

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JOHN C. BOOKLESS,

Plaintiff,

-against -

ACTION CARTING ENVIRONMENTAL SERVICES, INC. and DARRELL W. HALL,

Defendants.

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**DECISION & ORDER**

Index No. 3038-2008

Sequence No. 6

**LUBELL, J.**

The following papers were considered in connection with this motion by plaintiff for an ORDER pursuant to CPLR §3212 granting plaintiff summary judgment on the issue of negligence against the defendants and for a determination, as a matter of law, that defendants created an emergency situation in the roadway which was not of plaintiff's making:

| **PAPERS** | **NUMBERED** |
|---|---|
| Motion/Affidavit/Affirmation/Exhibits A-N | 1A-B |
| Affirmation in Opposition/Exhibits A-O | 2A |
| Memorandum of Law | 2B |
| Affirmation in Opposition/Exhibits A-H | 3 |
| Reply Affirmations/Exhibits A-B | 4 |
| Sur-Reply Affirmation/Exhibit | 5 |
| Sur-reply Affirmation/Exhibits | 6 |
| February 28, 2011 letter objecting to Sur-Replies | 7 |

This personal injury action arises out of a motor vehicle accident which took place on November 17, 2007, at approximately 4:30 a.m. when, while plaintiff was traveling northbound on

Interstate 684 in the Town of North Salem, County of Westchester, he crashed his vehicle into the underside of an overturned garbage truck that had been operated by defendant Darrell W. Hall ("Hall") during his course of employment with truck owner, defendant Action Carting Environmental Services, Inc.

Plaintiff's principal contention in support of this motion is his assertion that, after having caused the garbage truck to overturn due to his own fault, Hall took no measures to warn oncoming drivers that there was an overturned truck on the roadway with its dirty, black bottom facing oncoming traffic. Consequently, without warning and with no time to react, plaintiff had no choice but to collide with the truck; thus, sustaining serious injuries.

In support of the motion, plaintiff has come forward with, among other things, various deposition testimony adduced from plaintiff, defendant Hall, and the New York State Troopers who responded to the scene, both before and after plaintiff's collision with the truck. Plaintiff also presents the Affidavit of one William Houston, an asserted accident reconstruction expert, who concludes from the facts as adduced by and/or presented to him that:

> [I]t is clear that the overturned truck in the roadway presented an emergency situation, which Plaintiff would have had insufficient time to perceive and react to, and would have been unable to stop his vehicle in time to avoid impact.

Upon a reading of plaintiff's papers, the Court concludes that plaintiff has met his initial burden of establishing entitlement to summary judgment, as a matter of law, by establishing that he was confronted with a sudden and unanticipated situation that was not of his own making (Lester v. Chmaj, 251 A.D.2d 1069 [4th Dept., 1998] citing Cohen v. Masten, 203 A.D.2d 774, 775 [3d Dept., 1994] lv. denied 84 N.Y.2d 809 [1994]; Gouchie v. Gill, 198 A.D.2d 862 [4th Dept., 1993]; Hornacek v. Hallenbeck, 185 A.D.2d 561, 562 [3d Dept., 1992]). In addition, plaintiff has come forward with sufficient proof establishing that defendant Hall failed to take measures which would have warned oncoming drivers of the existence of the overturned truck.

In response, however, defendants have submitted proof in admissible form raising triable issues of fact as to whether plaintiff was negligent in responding to that emergency by, among other things, raising issues regarding the distance from which plaintiff should have been able to see the overturned truck and whether, from such distance, he could have stopped his vehicle or

maneuvered it in sufficient time to have avoided the accident. This is so, even upon disregard of the opinion of defendants' expert, Fawzi Pascal Bayan, P.E.

The papers currently before the Court, in and of themselves and without regard to defendants' expert submission, evidence sufficient questions of fact such as to preclude the granting of summary judgment in favor of plaintiff as a matter of law. Among other things, there is evidence that just moments before plaintiff's collision, other drivers successfully navigated their vehicles around the overturned truck by use of the right lane or right shoulder. There is also evidence that the second Trooper to have arrived that morning was able to view the accident scene from approximately one half-mile away.

From the record before the Court and the open questions of fact created by, among other things, the pre-crash ability of other drivers to have successfully navigated their vehicles around the accident scene in contrast to plaintiff's action to the contrary, the Court cannot conclude as a matter of law that plaintiff was "faced with a sudden and unexpected circumstance which le[ft] little or no time for thought, deliberation or consideration, or cause[d] [plaintiff] to be reasonably so disturbed that [he had to] make a speedy decision without weighing alternative courses of conduct" and that such actions "were reasonable and prudent in the emergency context" such that he cannot be deemed to have been negligent (Rivera v. New York City Tr. Auth., 77 N.Y.2d 322, 327 [1991]). In short, there are questions of fact as to whether plaintiff could have more adequately addressed the situation he was caused to encounter, such as others had that morning.

While the same result would have been reached had the Court considered defendants' expert submission (see, Barbuto v. Winthrop University Hosp., 305 A.D.2d 623, 624 [2d Dept., 2003] citing Stoves v. City of New York, 293 A.D.2d 666 [2d Dept., 2002][summary judgment is properly denied where there are divergent opinions of asserted experts on material issues raised in the action, and papers present credibility battle between experts]), the Court did not rely upon same upon rendering its determination.

The role of the Court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist (Dyckman v. Barrett, 187 A.D.2d 553 [2d Dept., 1992); Barr v. County of Albany, 50 N.Y.2d 247, 254 [1980]; James v. Albank, 307 A.D.2d 1024 [2d Dept.2003); Heller v. Hicks Nurseries, Inc., 198 A.D.2d 330 [2d Dept., 1993]).

As such, this Court makes no factual findings in connection with this determination and only determines the motion to the extent that it is hereby

ORDERED, that the motion for summary judgment be and is hereby denied in all respects.

The parties are reminded of the already scheduled 9:30 a.m., May 9, 2011,_Status Conference, Courtroom 401.

The foregoing constitutes the Opinion, Decision, and Order of the Court.[1]

Dated: Carmel, New York
March 2, 2011

S/ _____
**HON. LEWIS J. LUBELL, J.S.C.**

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[1] The Court notes that although plaintiff argued that defendants' expert disclosure is late and, as such is not entitled to consideration, and upon reaching its determination, the Court did not consider the expert's opinion, the Court has not been presented with a properly noticed motion by either party as to the propriety of the CPLR 3101(d) notice. As such, it should not be considered ruled upon for trial purposes herein.

[* 5]