

<b>Marcinkowski v Capra</b>
2011 NY Slip Op 31319(U)
May 9, 2011
Supreme Court, Queens County
Docket Number: 2610/09
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES  
Justice

PART 17

-----X  
ALICIA MARCINKOWSKI and JOSEPH A.  
CASTELLANA,

Plaintiffs,

-against-

ALLEGRA CAPRA and SAM SCIBELLI,

Defendants.  
-----X

ACTION NO. 1  
Index No.: 2610/09  
Motion Date: 5/4/11  
Motion Cal. No.: 27 & 28

ALLEGRA CAPRA,

Plaintiff,

-against-

JOSEPH A. CASTELLANA, JOSEPH T. CASTELLANA,  
and SAM SCIBELLI,

Defendants.  
-----X

ACTION NO. 2  
Index No.: 22272/10

The following papers numbered 1 to 39 read on this motion by defendant **SAM SCIBELLI** in Actions Nos. 1 and 2, for an order pursuant to CPLR 3212 granting summary judgment in his favor and cross-motion by plaintiffs in Action No. 1 **ALICIA MARCINKOWSKI and JOSEPH A. CASTELLANA** for an order pursuant to CPLR 3212 granting summary judgment in their favor, and motion by plaintiff on Counterclaim **JOSEPH A. CASTELLANA** Action 1, and **JOSEPH A. CASTELLANA and JOSEPH T. CASTELLANA**, Action 2, for an order pursuant to CPLR 3212 granting summary judgment in their favor based on their lack of liability for the subject accident, and cross-motion by defendant **ALLEGRA CAPRA** for an order granting summary judgment in her favor. For purposes of disposition, the motions under calendar numbers 27 and 28 are consolidate.

PAPERS  
NUMBERED

Notice of Motion-Affirmation-Exhibits.....	1- 4
Affirmation in Opposition-Exhibits.....	5- 7
Notice of Cross-Motion-Affirmation In Opposition To Defendant' Motion and Cross-Motion for Summary Judgment and In Support of Plaintiffs' Motions for Summary Judgment As To Liability-Affidavit of Service-Exhibits.....	8- 11
Reply Affirmation-Exhibits.....	12- 14
Affirmation in Opposition to Cross-Motion-Exhibits.....	15 -17
Reply Affirmation.....	18- 19
Notice of Motion-Affirmation-Exhibits.....	20-23

Affirmation in Opposition.....	24-25
Affirmation in Opposition.....	26-27
Notice of Cross-Motion-Affirmation-Exhibits.....	28-31
Reply Affirmation.....	32-33
Affirmation in Reply-Exhibits.....	34-36
Affirmation in Reply-Exhibits.....	37-39

Upon the foregoing papers it is ordered that this motion by defendant **SAM SCIBELLI** in Actions Nos. 1 and 2, for an order pursuant to CPLR 3212 granting summary judgment in his favor and cross-motion by plaintiffs in Action No. 1 **ALICIA MARCINKOWSKI and JOSEPH A. CASTELLANA** for an order pursuant to CPLR 3212 for an order granting summary judgment in their favor, and motion by plaintiff on Counterclaim **JOSEPH A. CASTELLANA** Action 1, and **JOSEPH A. CASTELLANA** and **JOSEPH T. CASTELLANA**, Action 2, for an order pursuant to CPLR 3212 granting summary judgment in their favor based on their lack of liability for the subject accident, and cross-motion by defendant **ALLEGRA CAPRA** for an order granting summary judgment in her favor, are decided as follows:

The action arises out of an automobile accident which occurred on December 6, 2008, on Route 25 A near its intersection with Quail Path, Nassau County, New York. According to the complaints and the evidence submitted with these motions, defendant Sam Scibelli was operating the vehicle owned by co-defendant Allegra Capra, who was a passenger, eastbound on Route 25 A. At about that time, plaintiff Joseph A. Castellana was operating the vehicle owned by co-defendant Joseph T. Castellana, with co-plaintiff Alicia Marcinkowski as a passenger, westbound on Route 25 A. There were solid yellow lines separating traffic traveling east and west. Scibelli claims to have been placed in a situation that required him to swerve his vehicle to the left, whereupon he lost control of the vehicle and it slid across the double yellow lines and collided with the Castellana vehicle. Thereafter, plaintiffs in actions numbers one and two commenced the instant actions against defendants to recover for personal injuries sustained. These two actions were consolidated for joint trial and joint discovery in an Order of this Court, dated April 5, 2010.

Defendant Scibelli now moves for summary judgment. The basis for this motion is that he was faced with an emergency situation not of his own making, and since this emergency was the cause of the accident, the claim against him must be dismissed. He claims the emergency situation consisted of a car that was traveling in the westbound lane that crossed the double yellow lines, entered the eastbound lane and was heading toward Scibelli's vehicle. To avoid hitting this vehicle, Scibelli turned to the left, lost control of his vehicle, crossed the double yellow lines and entered the westbound lane and then hit the vehicle being operated by Castellana. Plaintiffs Marcinkowski and Castellana and co-defendants oppose this motion,

claiming the facts present a question as to whether defendant Scibelli failed to observe the alleged oncoming vehicle and take alternative driving actions that would have avoided the collision. They point to his deposition testimony that the oncoming vehicle was only one or two feet into his lane and Scibelli had seen this vehicle in his lane from about one hundred fifty feet away, and he did not take any action until the oncoming vehicle was about twenty to twenty five feet away. His testimony also shows he intended to go to his left because there was a car to his right. However, portions of his testimony suggest that there was not a vehicle immediately to his right and going to the right was a viable option, and, in any event, given the distance between the oncoming vehicle, when it was first seen, and Scibelli's vehicle, there was sufficient time to maneuver the Scibelli vehicle safely to the right lane.

The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance not of his or her own making, which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be held negligent if the actions taken are reasonable and prudent in the emergency context, even if it later appears that the actor made a wrong decision, provided the actor has not created the emergency. Caristo v. Sanzone, 96 N.Y.2d 172 (2001); Pawlukiewicz v. Boisson, 275 A.D.2d 446 (2d Dept. 2000.) "This is not to say that an emergency automatically absolves one from liability for his conduct. The standard then still remains that of a reasonable man under the given circumstances, except that the circumstances have changed" Ferrer v. Harris, 55 N.Y.2d 285 (1982.)

Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact, they may, in appropriate circumstances, be determined as a matter of law. *Id.*; *See also*, Cathey v. Gartner, 15 AD3d 435 (2d Dept. 2005); Guevara v. Zaharakis, 303 A.D.2d 555(2d Dept. 2003.) In this vein, it is well settled that, under the emergency doctrine, "a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic" Huggins v. Figueroa, 305 A.D.2d 460 (2d Dept 2003.)

The moving defendant has met his burden to support the application of the emergency doctrine by showing his conduct was the product of a sudden and unforeseen occurrence not of her own making. *See*, Rivera v. New York City Transit Authority, 77 NY2d 322 (1991). However, plaintiffs and co-defendants have submitted sufficient evidence to raise an issue of fact as to whether the emergency doctrine should apply. By statute, Scibelli was obliged to see that which he should have seen with the proper use of his senses (*see*, Mohamed v Frische, 223 AD2d 628). Given the circumstances confronting Scibelli, a reasonable jury could conclude that the emergency doctrine is not applicable. Pawlukiewicz v. Boisson, 275 A.D.2d 446 ( 2d Dept. 2000.) *See also*, Burke v. Kreger Truck Renting Co., 272 A.D.2d 494 (2d Dept 2000.) (Emergency doctrine does not apply to driver who created emergency.) Further, assuming that

the emergency doctrine is applicable, Scibelli's motion should be denied. Given the circumstances confronting Scibelli, it cannot be said, as matter of law, that a reasonable jury could not conclude that Scibelli's failure or inability to avoid coming into contact with the Castellana vehicle was unreasonable, even under emergency circumstances. Pawlukiewicz v. Boisson, *supra*. In sum, whether Scibelli was negligent and, if so, whether such negligence was a proximate cause of the injuries alleged, present issues of fact for the jury. Accordingly, the motion for summary judgment by Scibelli is denied.

The cross-motion by plaintiffs Castellana and Marcinkowski for an order pursuant to CPLR 3212 granting summary judgment in their favor is denied. As set forth above, there is an issue of fact as to whether the emergency doctrine applies to the actions of defendant Scibelli. Plaintiffs' motion is premised on Scibelli not being confronted by an emergency situation and thereby being responsible for his vehicle hitting the Castellana vehicle. Consequently, there is an issue of fact preventing this Court from finding as a matter of law that defendant Scibelli is responsible for the causing of the accident and plaintiffs in Action 1's motion is denied.

The motion by plaintiff on Counterclaim Joseph A. Castellana, Action 1, and Joseph A. Castellana and Joseph T. Castellana, Action 2, for an order pursuant to CPLR 3212 granting summary judgment in their favor based on their lack of liability for the subject accident is granted. As set forth above, it is well settled that, under the emergency doctrine, "a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic" Huggins v. Figueroa, 305 A.D.2d 460 (2d Dept 2003.) Here, the evidence is clear that the Scibelli vehicle crossed double yellow lines and hit the Castellana vehicle. It is also clear that this took place in a matter of seconds and there was no reasonable opportunity for Joseph A. Castellana to take any evasive actions. Contrary to the opposition, it is of no import whether Marcinkowski saw the Scibelli vehicle sliding toward the Castellana vehicle and Castellana did not. Clearly, a passenger's eyes are allowed to wander in directions that a driver's eyes may not. Also, given the few seconds it took for Scibelli's vehicle to cross the double yellows and hit the Castellana vehicle, it would be mere speculation to find Castellana had an opportunity to take evasive actions. Pawlukiewicz v. Boisson, *supra*. Accordingly, plaintiff on Counterclaim Joseph A. Castellana, Action 1, and Joseph A. Castellana and Joseph T. Castellana have no liability regarding the causing of this accident and their motion is granted. Lee v. Ratz, 19 A.D.3d 552 (2d Dept 2005.)

The cross-motion by defendant Allegra Capra for an order granting summary judgment in her favor, on the ground that she can bear no vicarious liability for the causing of this accident is denied. Capra bases her motion on the ground that the emergency doctrine applies to Scibelli's actions and consequently, he is not liable for the causing of this accident. As set forth above, there are issues of fact regarding whether the emergency doctrine shields Scibelli from liability. Accordingly, Capra's motion is denied.

In sum the motion by defendant Scibelli for an order pursuant to CPLR 3212 granting

summary judgment in his favor is denied; the cross-motion by plaintiffs in Action No. 1 Alicia Marcinkowski and Joseph A. Castellana, for an order pursuant to CPLR 3212 granting summary judgment in their favor is denied; the motion by plaintiff on Counterclaim Joseph A. Castellana, Action 1, and Joseph A. Castellana and Joseph T. Castellana, Action 2, for an order pursuant to CPLR 3212 granting summary judgment in their favor based on their lack of liability for the subject accident is granted; and the cross-motion by defendant Allegra Capra for an order granting summary judgment in her favor is denied.

**Dated: May 9, 2011**

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**ORIN R. KITZES, J.S.C.**