

**Mitchell v North Shore-Long Is. Jewish Health Sys.,
Inc.**

2011 NY Slip Op 32621(U)

October 4, 2011

Supreme Court, Suffolk County

Docket Number: 26904/2008

Judge: William B. Rebolini

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Byron R. Mitchell,

Plaintiff,

-against-

 North Shore-Long Island Jewish Health System,
 Inc., Gregory G. Hill, Time Warner Entertainment
 Company, L.P. and Michael P. Dunn,

Defendants.

Clerk of the Court
Index No.: 26904/2008Motion Sequence No.: 004; MGMotion Date: 5/18/11Submitted: 5/18/11Motion Sequence No.: 005; XMDMotion Date: 5/18/11Submitted: 5/18/11Attorney for Plaintiff:
 Siben & Siben, LLP
 90 East Main Street
 Bay Shore, NY 11706

Attorney for Defendant North Shore-
Long Island Jewish Health System, Inc.:

 Mintzer, Sarowitz, Zeris, Ledva
 17 West John Street, Suite 200
 Hicksville, NY 11801

Attorney for Defendant
Time Warner Entertainment
Company, L.P. and Michael P. Dunn:

 Gottlieb, Siegel & Schwartz
 180 East 162nd Street, Suite 1D
 Bronx, NY 10451

Upon the following papers numbered 1 to 31 read upon this motion for leave to renew the prior summary motion, and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Notice of Cross Motion and supporting papers, 18 - 20; Answering Affidavits and supporting papers, 21 - 29; Replying Affidavits and supporting papers, 30 - 31.

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This is an action for personal injuries allegedly sustained by plaintiff Byron Mitchell as a result of a three car accident in the westbound lane of the Long Island Expressway near exit 42 in the Town of Oyster Bay, New York, on April 17, 2008. The accident allegedly occurred when a motor vehicle owned by North Shore Long Island Jewish Health System Inc. (hereinafter "NSLIJHS") and operated by its employee Gregory Hill rear-ended a vehicle owned by Time Warner Entertainment Company L.P. (hereinafter "Time Warner") and operated by its employee, Michael Dunn, which in turn collided with plaintiff's vehicle. Although it is undisputed that the NSLIJHS vehicle rear-ended the Time Warner vehicle, all defendants contend that it was a two vehicle collision and that the plaintiff's vehicle was not involved in the collision.

By order dated April 11, 2011, the prior motion of Time Warner and Michael Dunn for summary judgment in their favor dismissing the complaint was denied on the basis that movants failed to submit a complete set of pleadings. Movants' additional request, contained in the affirmation of Time Warner's counsel, for an order granting summary judgment on the issue of liability as against co-defendants NSLIJHS and Hill, was also denied on the basis that the relief was not sought in the notice of motion or verified answer (see CPLR §§2214, 3019). The motion by Time Warner and Dunn was denied without prejudice to renewal upon proper papers.

Time Warner and Dunn now seek leave to renew their prior motion for summary judgment dismissing the complaint and all cross claims against them. In view of the fact that defendants Time Warner and Dunn have now submitted a complete set of pleadings, their motion for leave to renew their prior summary judgment motion is granted (see, DeLeonardis v. Brown, 15 AD3d 525 [2nd Dept., 2005]; Simpson v. Tommy Hilfiger, 48 AD3d 389 [2nd Dept., 2008]).

In support of the motion, Time Warner and Dunn contend that the accident occurred solely due to NSLIJHS's negligence and that the Time Warner vehicle never came in contact with plaintiff's vehicle. In support of the motion for summary judgment, movants submit the deposition testimony of Michael Dunn and Gregory Hill, the operator of the NSLIJHS vehicle, nine photographs and the pleadings.

In opposition, plaintiff contends that the Time Warner vehicle struck his vehicle after being rear-ended by the NSLIJHS vehicle. Plaintiff submits his deposition testimony and the affirmation of his attorney.

Defendant NSLIJHS and Hill cross move for dismissal of the complaint and all cross claims contending that although Hill admits that he took his eyes off the road momentarily and that he hit the Time Warner vehicle, he did not observe the Time Warner vehicle strike plaintiff's vehicle. They assert that plaintiff was not involved in the collision and that he did not sustain personal injury or damage to his vehicle. They contend that plaintiff left his vehicle with a cup of coffee in hand and submit photographs to show that there was no damage to the front of the Time Warner vehicle.

Plaintiff Mitchell testified at his deposition that he was traveling at a rate of 40 to 45 miles per hour at the time of impact, that he heard the first impact, and a split second later he felt the

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second impact to his car. He stated that as a result thereof, he was no longer fully in control of his vehicle, that his car was pushed forward 15 to 20 feet, and he hit his head on the headrest. In addition, he testified that he saw the Time Warner and NSLIJHS vehicles only after the impact and that he did not observe what happened behind him as the collisions were occurring. Plaintiff stated that the Time Warner vehicle was damaged on all four sides and that it came to rest across the HOV lane, perpendicular to the meridian. Plaintiff testified that his vehicle's rear fender was dented on the left side, a light was knocked out, and the trunk was dented. After the impact, he left his vehicle to inquire of the other drivers to determine if they were hurt. He became dizzy, his legs gave out and he was taken by ambulance to the hospital.

Defendant Dunn, operator of the Time Warner vehicle, testified that immediately prior to the impact his vehicle was stopped and that all traffic in front of him was stopped. Dunn states that there was only one impact and that was with the NSLIJHS vehicle when it rear-ended his vehicle. He testified that he saw the NSLIJHS vehicle in the rear view mirror momentarily before the impact, and that the impact moved his vehicle 90 degrees to the left and across the HOV lane. He submits photographs, which he states demonstrate that only the back end of his vehicle was crushed, along with the rear portion of the side quarter panel. The back window and the side rear windows were also broken. He asserts that plaintiff's testimony as to damage to all four sides of his vehicle is false, as there was no damage to the front of the vehicle.

Defendant Hill, operator of the NSLIJHS vehicle, testified that at the time of the accident, the Time Warner vehicle and the vehicles in front of it had their brake lights on and were coming to a stop. He admitted that he took his eyes off the lane in front of him momentarily to observe a sports car. He testified that he was fifteen feet from the Time Warner vehicle when he attempted to stop and that two or three seconds later he struck it. Hill also conceded that the Time Warner vehicle did not slam on its brakes or come to a sudden stop. Rather, it came to a gradual stop, three to four seconds from when he first observed it. Hill stated that the front of his vehicle rear-ended the Time Warner vehicle. As a result of the impact, the Time Warner vehicle was pushed to the left across the HOV lane and his vehicle moved to the right into the middle lane. Hill stated that the middle portion of the front bumper on the driver's side of his vehicle was damaged. Hill averred that he did not see or hear a second impact with a third vehicle.

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 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, 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, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

As a general rule, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden

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stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (see, DeLouise v. S.K.I. Wholesale Beer Corp., 75 AD3d 489 [2nd Dept., 2010]; Klopchin v. Masri, 45 AD3d 737 [2nd Dept., 2007]; Leal v. Wolff, 224 AD2d 392 [2nd Dept., 1996]). In addition, when a driver of an automobile approaches from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle (see, Filippazzo v. Santiago, 277 AD2d 419 [2nd Dept., 2000]). The occupants of the front vehicle are entitled to summary judgment on the issue of liability, unless the driver of the rear vehicle can provide, by way of admissible evidence, a non-negligent explanation for the collision (see, Power v. Hupart, 260 AD2d 458 [2nd Dept., 1999]).

Here, defendants Time Warner and Dunn established their *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting evidence that their vehicle was stopped or stopping when it was rear-ended by the defendants Hill/NSLIJHS' vehicle (see, DeLouise v. S.K.I. Wholesale Beer Corp., 75 AD3d 489 [2nd Dept., 2010]; Klopchin v. Masri, 45 AD3d 737 [2nd Dept., 2007]; Leal v. Wolff, 224 AD2d 392 [2nd Dept., 1996]). In addition, based on the documentary evidence submitted, defendant Hill failed to maintain a reasonably safe rate of speed and control over his vehicle and to exercise care to avoid colliding with the other vehicle (see, Filippazzo v. Santiago, 277 AD2d 419 [2nd Dept., 2000]). Moreover, neither did plaintiff produce evidentiary proof sufficient to establish the existence of a material issue of fact as to whether the Time Warner vehicle caused the accident.

In opposition to Time Warner's *prima facie* showing, defendants NSLIJHS and Hill did not come forward with a non-negligent explanation for the rear-end collision with plaintiff's vehicle. Rather, defendant Hill admitted that he had momentarily averted his eyes from the traffic in front of him, proximately causing the collision. Accordingly, Time Warner and Dunn's motion for summary judgment dismissing plaintiff's complaint and all cross claims is granted.

As to the motion of defendants NSLIJHS and Hill, they failed to establish their *prima facie* entitlement to summary judgment in their favor dismissing the complaint and all cross claims. In view of the conflicting statements of the parties, a triable issue of fact exists as to whether the Time Warner vehicle collided with plaintiff's vehicle after it was rear-ended by the NSLIJHS vehicle. The cross motion of defendants NSLIJHS and Hill for an order granting summary judgment dismissing the complaint is denied. Insofar as the cross motion seeks dismissal of cross claims, the motion is denied as no cross claims have been asserted by Time Warner and Dunn.

Based on the foregoing, it is

ORDERED that this motion (sequence 004) by defendant, Time Warner Entertainment Company, L.P. and Michael Dunn, for an order granting renewal of its prior motion for summary judgment dismissing the complaint and all cross-claims against it is determined as follows: renewal is granted and, upon renewal, the motion is granted; and it is further

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ORDERED that the cross motion (sequence 005) by defendant North Shore Long Island Jewish Health System Inc. and Gregory Hill for summary judgment dismissing the complaint and all cross claims is denied.

Dated: OCT 04 2011



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION