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| <b>McGuire v Rosenberg</b>   |
| 2014 NY Slip Op 30707(U)   |
| March 10, 2014   |
| Supreme Court, Suffolk County  |
| Docket Number: 11-28129  |
| Judge: Peter H. Mayer  |
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 8-21-13  
ADJ. DATE 11-12-13  
Mot. Seq. # 001 -MG

-----X  
GINA MCGUIRE, as administrator of the estate  
of JEFFREY PAUL MCGUIRE, DECEASED,  
and GINA MCGUIRE, INDIVIDUALLY,

Plaintiff,

- against -

RUDOLPH ROSENBERG, ACCURATE  
CHEMICAL & SCIENTIFIC CORP.,  
CHRISTOPHER B. HOWES and TERESA G.  
MEEKINS,

Defendants.  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants Rosenberg and Accurate, dated July 23, 2013, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated October 16, 2013, and supporting papers; by defendants Howes and Meekins, dated August 2, 2013; (3) Reply Affirmation by the defendants Rosenberg and Accurate, dated November 7, 2013; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the branch of the motion by defendants Rudolf Rosenberg ("Rosenberg") and Accurate Chemical & Scientific Corp. ("Accurate") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and any and all cross-claims is granted

This is an action for wrongful death resulting from two motor vehicle accidents which occurred at approximately 6:45 p.m. on January 18, 2010, on Ocean Parkway, in the Town of Babylon. Plaintiff alleges that defendant Rosenberg was negligent while operating his vehicle, owned by the defendant Accurate, and that his negligence was the cause of a collision in which the vehicle of the decedent,

Jeffrey McGuire, rear-ended his vehicle. After that accident the decedent exited his vehicle and was later struck by a third vehicle, operated by the defendant Christopher B. Howes (“Howes”), and owned by the defendant Teresa G. Meekins (“Meekins”), which resulted in his death.

Defendants Rosenberg and Accurate now move for summary judgment dismissing the complaint and any and all cross-claims asserted against them. In support of the motion, they submit, *inter alia*, their attorney’s affirmation; the transcript of deposition of the plaintiff; the transcripts of depositions of the defendants Rosenberg, Howe and Accurate (by Marie Bonazinga); the pleadings; and the transcript of the deposition of Eric Swanger as a nonparty witness. In opposition to this motion, the plaintiff submits, *inter alia*, an attorney’s affirmation; the affidavit of John A. Serth, Jr., P.E., sworn to October 10, 2013; a certified copy of the collision reconstruction report prepared by the New York State Police; photographs; and portions of the deposition transcripts of the defendants and the nonparty witness. In opposition to this motion, defendants Howes and Meekins submit their attorney’s affirmation.

Plaintiff Gina McGuire testified as to how she learned of the accident and the details thereof, but she had no personal knowledge as to how the accident occurred.

Defendant Rosenberg testified that on January 18, 2010, at approximately 6:30 p.m., he was the driver of a 2008 Honda Odyssey involved in a motor vehicle accident. His vehicle was owned by the defendant Accurate, where he works as chief executive officer. There were no mechanical problems with the vehicle. His friend and Accurate employee, Marie Bonazinga was a passenger in the vehicle. After spending the weekend at his home in Oak Beach, he was headed to Roslyn Heights to drop off Ms. Bonazinga at her home, prior to returning to his residence in Williston Park. Rosenberg testified that he came out of the parking lot where the Oak Beach Inn was once located, and made a right hand turn onto Ocean Parkway. He testified that prior to turning onto the parkway he stopped his vehicle for 10 to 15 seconds and looked left twice to make sure he could safely pull out of the parking lot. He did not see any vehicle approaching prior to entering the parkway. In order to travel west to Roslyn Heights, he got into the left lane to head for the left turning lane to make a U-turn and head west on Ocean Parkway. He turned right into the acceleration lane, moved into the right travel lane and then into the left travel lane, intending to enter the U-turn lane. His speed was about 30 to 35 miles an hour. He testified that he checked his blind spot prior to moving from the left travel lane to the U-turn lane, but did not see any cars behind him to the left. He had no recollection of his vehicle being rear-ended. The last thing he remembered was beginning to move into the U-turn lane and a car passing him in the right lane. He lost consciousness for a period of time, but did not know how long. His next memory was waking up in his vehicle, facing east in the U-turn lane. When he got out of his vehicle, he observed damage to the rear of his vehicle.

Marie Bonazinga testified as a witness for the defendant Accurate. She was a passenger in defendant Rosenberg’s vehicle when the accident occurred on January 18, 2010. At the time of the accident, she was an employee of Accurate and a close friend of the defendant Rosenberg. She was familiar with Ocean Parkway, as she would often go with him to his house in Oak Beach. She testified that the defendant Rosenberg came to a full stop prior to entering Ocean Parkway. While the vehicle was stopped, she leaned forward and looked to the left, but did not see any cars traveling eastbound on Ocean Parkway. She further testified that she saw defendant Rosenberg check his rear and side mirrors

prior to switching from the right travel lane to the left travel lane. She thought his speed was never more than 30 miles per hour. They were in the left lane for a few seconds before she felt the impact to the rear of the vehicle. The only car which she saw prior to the accident was the one that passed them on the right. She heard a second accident, but did not see it, because she was still in the vehicle. She heard the second accident a few seconds after she saw a man approach their vehicle.

Defendant Howes testified that he was involved in a motor vehicle accident on January 18, 2010, at approximately 7:00 p.m. He was traveling eastbound on Ocean Parkway driving a Dodge Durango, which was owned by the defendant Meekins. Prior to heading home he purchased a cup of coffee. He was traveling at 60 to 65 miles an hour on the parkway. In the last half mile prior to striking the decedent, Jeffrey McGuire's, vehicle he picked up the coffee. As he put the coffee cup down, he looked up and saw the McGuire vehicle. Seconds later he struck the vehicle. The collision forced him across the right lane onto the grass and he hit another vehicle (belonging to the nonparty witness Eric Swanger). When the accident occurred, he only had his left hand on the wheel. He was in the left lane and attempted to swerve right to avoid the McGuire vehicle, the rear passenger side of which was angled into the left lane of travel. As he swerved, he saw the decedent standing in the roadway on the passenger side of his vehicle. He further testified that he struck the right, passenger, side of the McGuire vehicle. He had previously seen the McGuire vehicle pass him, "going rather fast", but it was a number of miles back from where the accident occurred.

Eric Swanger appeared as a nonparty witness. On January 18, 2010, at some time between 6:30 and 7:00 p.m., he was traveling eastbound, in the right lane, on Ocean Parkway, when he came upon the accident which is the subject of this action. He testified that, prior to coming upon the accident, he was traveling about 60 miles per hour. Two vehicles passed him. One of the vehicles was a black pickup truck that he saw later after it was involved in the accident. The pickup had its lights on. He drove for at least another three quarters of a mile before he reached the accident scene. During that time he lost sight of the pickup. He first became aware of the accident when he saw debris in the road. At this point, he looked around and saw the black truck, which appeared to have been in an accident. It further appeared to be stopped on top of the line that separated the left and middle travel lanes. A blue minivan was stopped in the left turning lane. He did not see or hear the initial accident. Upon seeing the accident, he pulled off onto the grass on the right shoulder, parallel to the blue minivan, which was approximately one hundred feet ahead of the black truck. He exited his vehicle, checked that no traffic was coming, and crossed the parkway to the minivan. He went to the driver side window and asked the occupants, an elderly couple, if they were alright. After speaking to the couple, he headed towards the back of the minivan. He heard the screeching of breaks for two to three seconds and heard a collision of metal against metal. He saw a burgundy Dodge Durango slide off the road and collide with his vehicle, causing it to be propelled approximately 20 feet before it stopped. Shortly thereafter, a passerby stopped and asked him if he had a flashlight. After searching among the tools that had been thrown to the ground by the accident, he found the flashlight. He turned it on and noticed a man lying in the roadway, in the right lane, near the shoulder. He was at the accident scene for three or four hours and gave a statement to the police.

The accident reconstruction report prepared by the New York State Police was submitted on the motion. The report concludes that the primary causative factor in the fatal collision was the exiting of

the decedent, Jeffrey McGuire from his vehicle and then standing in the roadway. It further noted that the evidence indicated that decedent was struck by the front of the vehicle driven by the defendant Howes. Also of note is the statement taken from Eric Swanger at the accident scene. He stated that he was traveling eastbound on Ocean Parkway in the right lane when he observed a dark colored pickup pass him at a high rate of speed. Approximately one mile up the road, he observed debris from the accident involving the same dark colored pickup.

Plaintiff also submitted an expert affidavit from John A. Serth, Jr., P.E., who concluded, among other things that if the defendant Rosenberg had looked over his left shoulder before pulling out onto the parkway or at any time before attempting to enter the left through lane, the headlights of the McGuire vehicle were in his view. A review of the affidavit, however, reveals that Mr. Serth ignores the deposition testimony and the police statement of the nonparty Eric Swanger, who observed the McGuire vehicle pass him at a high rate of speed and disappear from sight, somewhere between three-quarters of a mile and a mile from the scene of the accident. The expert's affidavit fails to take into account the possibility that the McGuire vehicle was moving at a high rate of speed prior to the collision with the Rosenberg vehicle. Thus the expert's opinion is speculative and conclusory and insufficient to raise any issue of fact (*see Terwilliger v Dawes*, 204 AD2d 433, 611 NYS2d 646 [2d Dept 1994]; *see also Conning v Dietrich*, 105 AD2d 884, 962 NYS2d 707 [2d Dept 2013]).

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The moving defendants have submitted sufficient evidence to establish their entitlement to summary judgment herein. While the parties expend the majority of their arguments attempting to establish whether the defendant Rosenberg or the decedent was negligent in causing the first accident, that issue is not dispositive.

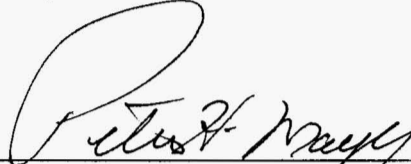
Although, in general, the issue of proximate cause is for the jury, liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event, but is not one of its causes (*Renteria v Simakov*, 109 AD3d 749, 972 NYS2d 15 [2d Dept 2013]; *Akinola v Palmer*, 98 AD3d 928, 950 NYS2d 569 [2d Dept 2012]; *Iqbal v Thai*, 83 AD3d 897, 920 NYS2d 789

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[2d Dept 2011]; *Ely v Pierce*, 302 AD2d 489, 755 NYS2d 250 [2dDept 2003]). An illustrative case is *Saviano v City of New York*, 5 AD3d 581, 774 NYS2d 82 [2d Dept 2004]. In that case, the Appellate Division held that any alleged negligence of the City and its police department in failing to properly secure the area of a first automobile accident was not the proximate cause of, but merely set the scene for, a second accident in which the driver fell asleep and his car struck the rear of vehicles which were present at the scene of the first accident. Thus, whatever the relative negligence, if any, of the defendant Rosenberg in the first accident, no liability can be imposed on him or defendant Accurate, because that accident merely set the scene for, but was not the cause of, the second, fatal, accident which occurred.

In light of the foregoing, the motion by the defendants Rosenberg and Accurate for summary judgement dismissing the complaint and any and all cross-claims is granted.

Dated: 3/10/14

  
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PETER H. MAYER, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION