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SHORT FORM ORDER

INDEX No. 12-37773

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-25-13 (#001)
MOTION DATE 1-9-14 (#002)
MOTION DATE 2-10-14 (#003)
ADJ. DATE 2-13-14
Mot. Seq. # 001 - MD
002 - MG
003 - MG

HOWARD ABSELET,

Plaintiff,

- against -

EVELYN HORN, DEOLINDA M. SABINO and CARLOS SABINO,

Defendants.

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Attorney for Defendants Sabino
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Upon the following papers numbered 1 to 33 read on these motions for joint trial and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8, 9 - 18, 23 - 29; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19 - 20, 30 - 31; Replying Affidavits and supporting papers 21 - 22, 32 - 33; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the unopposed motion (#001) by the defendants Deolinda M. Sabino and Carlos Sabino for an Order, pursuant to CPLR 602 (a) and (b), setting this action down for joint trial with an action entitled *Sabino v Horn*, Supreme Court, Suffolk County, Index No. 12-06756, is denied; and it is further

ORDERED that the motion (#002) by the plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in his favor as to the defendant Evelyn Horn's liability, for a special preference pursuant to CPLR 3212 (c), and setting this matter down for an assessment of damages is granted; and it is further

ORDERED that the motion (#003) by the defendants Deolinda M. Sabino and Carlos Sabino for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against them is granted.

For reasons that will become obvious, the Court will address the plaintiff's motion for summary judgment (#002) and the defendants Deolinda M. Sabino and Carlos Sabino's motion for summary judgment (#003) before it reviews said defendants' motion (#001) for joint trial.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained by him in a motor vehicle accident that occurred on January 20, 2012 on County Road 83 at or near its intersection with Route 112 in Coram, New York. The accident allegedly happened when the vehicle operated by the plaintiff was hit in the rear after it had stopped at a red light. It is undisputed that this accident involved a three-car collision, that the vehicle behind the plaintiff's vehicle was owned by the defendant Carlos Sabino and operated by the defendant Deolinda M. Sabino (collectively "Sabino"), and that the Sabino vehicle was the vehicle that came into contact with the plaintiff's vehicle. Despite the fact that the Sabino vehicle struck his vehicle, the plaintiff contends that the vehicle owned and operated by the defendant Evelyn Horn ("Horn") is the sole proximate cause of the accident.

The plaintiff now moves for partial summary judgment as to Horn's liability. 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In support of his motion, the plaintiff submits, among other things, his sworn affidavit, a copy of Horn's affidavit and a Court Order in a related action, and an unauthenticated copy of a police accident report (Form MV-104A). The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]).

In his affidavit, the plaintiff swears that he was the operator of a motor vehicle stopped at a red light at the intersection of County Road 83 and Route 112, that he was completely stopped, and that he was the "second car in line." He states that he observed a white Nissan Maxima behind his car, that he observed a "red Chevy ... strike the rear of the stopped Maxima, which was pushed by the Chevy into the rear of my stopped vehicle." He indicates that the impact forced his car to impact the car in front of his, which then fled the scene "and is not involved in this lawsuit." The plaintiff further swears that "it is clear from defendant Horn's actions that she was the sole cause of the accident ...," and that the issue of Horn's negligence has been litigated in the related action *Sabino v Horn*, Supreme Court, Suffolk County, Index No. 12-06756 ("Action 1").

It is well-settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Carhuayano v J & R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS.2d 86 [2d Dept2004]; ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also* Vehicle and Traffic Law § 1129 [a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Carhuayano v J & R Hacking***, *supra*; ***Rainford v Sung S. Han***, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2d Dept 2005]; ***Gaeta v Carter***, *supra*).

The plaintiff contends that Horn is precluded by the doctrine of collateral estoppel from re-litigating the issue of her liability in causing the "subject motor vehicle chain collision." By Order dated June 17, 2013 in Action 1, this Court granted Sabino summary judgment on the issue of Horn's liability and set that action down for an assessment of damages. Said Order provides in pertinent part that: "the Court finds that [Horn] has not proffered a non-negligent explanation for the happening of the accident." The two basic requirements of the doctrine of collateral estoppel are that the party seeking to invoke the doctrine must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664, 563 NYS2d 24 [1990]; ***Matter of New York State Site Dev. Corp. v New York State Dept. of Envtl. Conservation,*** 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). Here, the documentary evidence clearly indicates that the identical issue has been determined and that Horn had a full and fair opportunity to contest the matter.

In any event, the plaintiff has established his *prima facie* entitlement to summary judgment herein and it is incumbent upon Horn to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the plaintiff's motion, Horn submits an affirmation by her attorney. In her affirmation, counsel for Horn merely sets forth the standards applied in determining a motion for

summary judgment. She does not set forth facts or any factual issues regarding the happening of this accident. In addition, the affirmation of an attorney who has no personal knowledge of the facts herein, is insufficient to raise an issue of fact on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]).

Accordingly, the plaintiffs' motion for partial summary judgment as to Horn's liability and setting this matter down for an assessment of damages is granted.

Sabino now moves (#003) for summary judgment dismissing the complaint and all cross claims against them. In support of their motion, Sabino submits the affirmation of their attorney, the pleadings, and a copy of the Court Order in Action 1 dated June 17, 2013. In his affirmation, counsel for Sabino contends that his clients established in Action 1 that Horn was the sole proximate cause of the subject accident, and that the defendant Deolinda M. Sabino was not negligent in causing the accident. He further contends that Horn is precluded by the doctrine of collateral estoppel from re-litigating the issue of her liability in this action. Counsel for Sabino notes that the plaintiff has moved for summary judgment on the ground that this accident was caused "100% by the negligence of co-defendant Horn."

A review of Horn's verified answer reveals that she has asserted a cross claim against Sabino alleging negligence on their part, and seeking judgment for contribution and/or indemnification. The "critical requirement" of a valid claim for contribution is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997] *quoting* ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp***., 71 NY2d 599, 528 NYS2d 516 [1988]; *see also* ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Similarly, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; quoting ***Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola***, 134 NY 461 [1892]; *see also* ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]).

For the reasons stated above, Horn is precluded by the doctrine of collateral estoppel from re-litigating the issue of her liability in causing the subject accident, and the issue of Sabino's freedom from negligence regarding the accident. Here, Sabino has established their entitlement to summary judgment dismissing the cross claim against them. In opposition, Horn submits the affirmation of her attorney who has no personal knowledge of the facts herein, is insufficient to raise an issue of fact on a motion for summary judgment.

A review of the record indicates that the plaintiff has based his theory of the case on the proposition that Horn is the sole proximate cause of this accident and his alleged injuries. In addition, the plaintiff does not oppose Sabino's motion to dismiss the complaint. Accordingly, Sabino's motion for summary judgment is granted.[1]

The Court now turns to Sabino's unopposed motion (#001) joining for trial this action with Action 1. A motion pursuant to CPLR 602 to consolidate actions or to join separate actions for trial rests within the sound discretion of the trial court (*see* ***Alizio v Perpignano***, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]). Generally, a joint trial on liability is appropriate, where two actions arise out of the same motor vehicle accident and involve common questions of law and fact (*see* ***Whiteman v Parsons Transp. Group of N.Y., Inc.***, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; ***J & A Vending Corp. v Eagle & Fein***, 268 AD2d 505, 703 NYS2d 53 [2d Dept 2000]). Here, the plaintiff's action against Sabino has been dismissed, the issues regarding liability have been resolved, and the only remaining issues are the injuries to the plaintiff herein and Sabino as the plaintiff in Action 1. The Court cannot discern any common questions of law or fact which would arise in separate trials involving an assessment of damages only. However, it is certainly a possibility that one or more of the parties would be prejudiced by such a joint trial. Accordingly, Sabino's unopposed motion is denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Upon service of a copy of this Order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for the next available trial date.

Dated: April 21, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

[1] Sabino's notice of motion (#003) includes a request for attorneys' fees. However, the motion papers do not address the issue, and the record does not provide any basis for the request. To the extent that the motion can be deemed to seek a recovery of attorney's fees, it is denied.