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SHORT FORM ORDER

INDEX No. 06-3266
CAL. No. 13-02175MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-20-14 (009)
MOTION DATE 4-4-14 (010)
ADJ. DATE 5-8-14
Mot. Seq. # 009 - MD
010 - MD

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BRETT J. BALLIET,

Plaintiff,

- against -

NORTH AMITYVILLE FIRE DEPARTMENT, PUBLIC ADMINISTRATOR OF SUFFOLK COUNTY, FRANKLYN A. FARRIS, TAQIYYA M. JENKINS and LL COOL J., INC.,

Defendants.

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Upon the following papers numbered 1 to 46 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (009) 1-14; (010) 15-27; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 28-40; 41-42; Replying Affidavits and supporting papers 43-44; 45-46; 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 motion (009) by defendants North Amityville Fire Company, Inc. s/h/a North Amityville Fire Department, and Public Administrator of Suffolk County, Franklyn A. Farris, pursuant to CPLR 3212 and 5102 for summary judgment dismissing the complaint on the basis that the cervical spine injuries alleged by the plaintiff, Brett J. Balliet, are not causally related to the accident of November 12, 2004, is denied; and it is further

ORDERED that motion (010) by defendants Taqiyya M. Jenkins and LL Cool J., Inc., pursuant to CPLR 3212 and 5102 for summary judgment dismissing the complaint on the issue of liability, is denied.

On December 4, 2004, at approximately 4:27 p.m., plaintiff, Brett J. Balliet, was a pedestrian crossing Northern Boulevard at or near its intersection with Northgate Road, North Hempstead, New York, when he was struck down by the vehicle operated by defendant Taqiyya M. Jenkins and owned by defendant LL Cool J., Inc. On November 12, 2004, at approximately 7:00 p.m., plaintiff, Brett J. Balliet, was operating his automobile on Route 110, at or near Marilyn Avenue, North Amityville, New York, when it was involved in a collision with a fire truck allegedly owned by defendants North Amityville Fire Department and the Town of Babylon, and operated by John M. Daley. As a result of these two incidents, the plaintiff has pleaded two separate causes of action premised on the alleged negligence of the defendants involved in each accident, and seeks damages for serious personal injuries allegedly caused by the accidents. By way of a stipulation of discontinuance dated June 29, 2012, and signed by all parties to this action, the action as asserted against the Town of Babylon was discontinued with prejudice by the plaintiff.

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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]**;** ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 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 N.Y.U. Medical Center***, *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]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (009), defendants North Amityville Fire Company, Inc., and Public Administrator of Suffolk County, Franklyn A. Farris, submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer with cross claim asserted against co-defendants, Town of Babylon, Taqiyya Jenkins, and LL Cool J.; answer served by Taqiyya Jenkins and the amended verified answer of LL Cool J.; stipulation of discontinuance dated June 29, 2012; plaintiff's verified bill of particulars, amended bill of particulars, and supplemental verified bill of particulars as to Amityville Fire Dept.; transcript of the hearing conducted pursuant to General Municipal Law §50-h on March 9, 2005 for plaintiff; transcripts of the examinations before trial, and as continued, of plaintiff; and letter dated November 20, 2013 which makes reference to the independent medical examination of plaintiff by Dr. S. Murphy Vishnubhakat, which has not been provided.

In support of motion (010), defendants Taqiyya M. Jenkins and LL Cool J., Inc. submitted, inter alia, an attorney's affirmation; copies of the complaint, answers with cross claims served by North Amityille Fire Department and John M. Daly, answers with cross claims served by defendants Jenkins and LL Cool J., verified

answer of defendant Jenkins and amended verified answer of LL Cool J; plaintiff's bill of particulars; transcript of the examination before trial and continuing transcript of plaintiff, transcript of the examination before trial of defendant Jenkins; and an uncertified copy of a police MV 104 accident report dated December 5, 2004 which is hearsay and is not in admissible form (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

By way of plaintiff's verified bill of particulars dated June 6, 2006, plaintiff alleged injuries identified on an MRI of the lumbar spine dated November 29, 2004, consisting of small broad based disc herniation at the L5-S1 level and L4-5 annular tear and protrusion superimposed on facet arthrosis causing a mild stenosis; MRI of December 17, 2004 of the right knee which demonstrated a mild sprain of the medial collateral ligament with no meniscal tears, thickened medial patella and infrapatellar plicae; MRI of the right shoulder dated December 16, 2004 showing a tiny interstitial tear of the supraspinatus, lateral downward slanting of the acromion; and an MRI of the cervical spine dated January 3, 2005 revealing multilevel degenerative change with a combination of disc bulging and disc herniations.

By way of plaintiff's supplemental amended bill of particulars dated June 20, 2013, plaintiff claimed the following injuries to his cervical spine: left-sided protrusion at C3-4; C4-5 and ventral cord compression with cord flattening and left foramina compromise; C5-6 herniated disc with annular tear and bilateral foramina compromise; C6-7 protrusion with annular tear; post-traumatic cervical herniated disc with cord compression; cervical radiculopathy; cervical sprain/strain; C5-6, C6-7 nerve dysfunction; spinal facet joint dysfunction; cervical epidural steroid injection on January, February and March 2010 at C6-7 levels; pain, reduced range of motion, stiffness, numbness, and tingling in the upper extremities; surgery on October 16, 2012 consisting of an anterior complete discectomy at C4-5, with iliac crest graft harvesting from the left hip; anterior arthrodesis at C4-5; bioimplantation at C4-5; and anterior instrumentation at C4-5 due to posttraumatic left C4-5 herniated disc with left hemi-cord compression.

It is noted that by order dated December 8, 2009 (Pitts, J.), defendant North Amityville Fire Company, Inc. was denied summary judgment pursuant to CPLR 5102 (d), with leave to renew upon appointment of a legal representative on behalf of defendant John Daley, who died on December 20, 2008. Thereafter, Franklyn A. Farris, Public Administrator of Suffolk County, was substituted for decedent John Daley. By notice of motion dated June 14, 2012, North Amityville Fire Company, Inc., and Public Administrator of Suffolk County, Franklyn A. Farris, renewed their application for summary judgment pursuant to CPLR 5102 (d) on the basis that plaintiff did not sustain a serious injury. By order dated January 9, 2013 (Pitts, J.), defendants' motion was denied on the merits upon consideration of the medical reports and evidentiary proof submitted. Thereafter, a notice of appeal dated February 19, 2013 was filed by defendants North Amityville Fire Company, Inc., and Public Administrator of Suffolk County, Franklyn A. Farris, but was withdrawn, as indicated by letter dated July 15, 2013 by counsel.

While defendants North Amityville Fire Company, Inc., and Public Administrator of Suffolk County, Franklyn A. Farris, now seek summary dismissal of the complaint asserted against them on the basis that plaintiff's claim of injury to his cervical spine, as pleaded in his bills of particulars, is not causally related to the accident of November 12, 2005 when plaintiff was struck by defendants' fire truck, no evidentiary medical proof has been submitted by these moving defendants. No copies of the MRI studies performed on plaintiff after either accident, or medical records, or report from defendants' examining physicians have been submitted in support of their motion. The moving defendants base the requested relief on plaintiff's prior testimony and do not seek

dismissal as to the claim of injury relating to plaintiff's cervical spine on a serious injury threshold basis. In reviewing plaintiff's bill of particulars, it is noted that plaintiff does not separately set forth the injuries claimed in the accidents of November 12, 2004 and December 4, 2004. The moving defendants have not indicated that they served a demand upon plaintiff for a bill of particulars clarifying which injuries are being claimed relating to each accident. Thus, it is determined that this is not a successive motion for summary judgment pursuant to CPLR 5102 (d), and the application is considered herein to determine whether or not plaintiff sustained an injury to his cervical spine in the accident of November 12, 2004, which accident involved these moving defendants.

The plaintiff testified at his 50-h hearing held on March 9, 2005 that at the time of the accident involving the North Amityville Fire Department fire truck on November 12, 2004, he sustained an injury to his right knee, right shoulder, lower back and pain from his lower back down through his right leg. He testified that he had not previously sustained any type of injury to his right shoulder or right knee, but in 1998, he had a boating accident and herniated two discs in his back. The plaintiff continued that following the accident of November 12, 2004, he saw Dr. Skurka and Dr. Enker and was sent for MRIs of his right shoulder, right knee, cervical spine and lower back, and to Dr. Schneider, a neurologist, for EMG studies. He was told that he had a bulging disc in his cervical area, a slight tear to his right shoulder, and something with his right knee. As a result of the accident of December 4, 2004, he testified that he reinjured his right knee, lower back, and right shoulder.

At his examination before trial on December 7, 2007, Brett Balliet testified that following the automobile accident of November 12, 2004, he experienced pain in his right knee, possibly in his right shoulder, but he could not recall at this point, and received medical care and treatment from Drs. Skurka, Litman, Illman, and Enker. He had a prior injury to his back in about 1998 for which an MRI was performed, but did not have treatment for that back injury for two years prior to this accident. Following the subject motor vehicle accident, he experienced pain in his lower back radiating into his leg, right knee pain, and right shoulder pain. Dr. Skurka ordered an MRI of his back, which was performed prior to his accident of December 4, 2004. He saw Dr. Enker for complaints of pain in his lower back, right knee and right shoulder, but did not know if it was prior to December 4, 2004. MRIs of his right knee and right shoulder were ordered. Balliet testified that he did not make any complaints regarding his cervical spine until after the pedestrian accident on December 4, 2004, and he did not have any complaints of pain in his cervical spine following the November 12, 2004 accident. Following the December 4, 2004 accident, he experienced pain in his right knee, right hip, right shoulder, neck, and had some bruises on his left side, and was treated by Drs. Skurka, Enker, Columbo, and Schneider, as well as at South Bay Physical Therapy.

Based upon the foregoing, it is determined that defendants North Amityville Fire Company, Inc., and Public Administrator of Suffolk County, Franklyn A. Farris have established prima facie entitlement to dismissal of any claims of cervical spine injury resulting from the accident of November 12, 2004.

In opposing this motion, the plaintiff submitted the report of Arthur Bernhang, M.D., dated March 19, 2008, wherein Dr. Bernhang set forth that plaintiff related that as a result of the first accident on November 12, 2004, when his vehicle was broadsided by a fire truck, he sustained injuries to his right shoulder, right knee and lower back. The second accident occurred when he was a pedestrian hit by a truck on December 4, 2004, and sustained bruises to his left knee, right hip, left hip, and injuries to his neck and upper back. Dr. Bernhang also noted Dr. Skurka indicated in his medical record that "[t]he past medical history does reveal that the patient had some prior spinal injuries. He has had a prior motor vehicle accident, as well as a prior Workers' Compensation

injury. The patient does feel significant increase in spinal pain and extremity pain following the trauma of 12/4/04...." Dr. Bernhang continued that Dr. Skurka diagnosed the plaintiff with, inter alia, cervical sprain/strain and cervical radiculopathy.

By affirmation dated September 6, 2012, Vincent Leone, M.D. affirmed that he is a physician licensed to practice medicine in New York and is board certified in orthopedic surgery. He affirmed that the plaintiff, Brett Balliet, presented to his office for surgical consultation and treatment, and gave a history of being involved in a motor vehicle accident in November 2004, and a subsequent accident in December 2004 where he was a pedestrian struck by a vehicle. Dr. Leone stated that he reviewed Dr. Skurka's narrative dated November 18, 2004, which indicated that following the accident of November 12, 2004, the plaintiff had pain in his neck radiating into his right arm, low back pain radiating into his right lower extremity, right knee, and right shoulder. Dr. Leone also reviewed the neurosurgical report of Dr. Salvatore Palumbo concerning his evaluation of the plaintiff on January 20, 2004, which indicated that the second accident, which occurred on December 4, 2004, re-exacerbated the pain in plaintiff's right knee and right shoulder from the accident that took place on November 13, 2004, and that the December accident left the plaintiff with further complaint of pain radiating into his right upper extremity with paresthesia in the tips of the first and second fingers of the right hand and weakness. He indicated that Dr. Palumbo stated that "[t]he patient had worsened pain in his neck and back. Dr. Leone continued that it is his opinion within a reasonable degree of medical certainty that the motor vehicle accidents that occurred on November 12, 2004 and December 4, 2004 were the competent producing cause of Mr. Balliet's neck condition and current need for surgery. There is no evidence that Mr. Balliet ever suffered from prior neck conditions or injuries which predated these accidents. Furthermore, the onset of Mr. Ballet's neck and upper extremity pain and weakness, as well as the physical limitations resulting therefrom, started directly after these motor vehicle accidents. He continued to state that any degenerative conditions which may have existed in this patient's neck were exacerbated and aggravated by these motor vehicle accidents, and accelerated the degenerative process in the patient's cervical spine.

The plaintiff also submitted the affidavit of Dr. Skurka dated September 16, 2009, wherein he set forth that on November 18, 2004, Mr. Balliet complained of right knee, right shoulder pain radiating down his right arm, numbness in his right hand and fingers, lower back pain, burning down his right leg, and neck and upper thoracic pain. He conducted range of motion tests on plaintiff's cervical spine, inter alia, and found limitations in cervical flexion and extension, right and left lateral flexion, and left and right rotation, compared to normal range of motion values. Dr. Skurka opined that because of his prior history treating the plaintiff, that he is of the opinion that the injuries to Mr. Balliet's cervical spine were caused by both the November 12, 2004 and December 4, 2004 accidents.

Based upon the foregoing, plaintiff has raised sufficient factual issues which preclude summary judgment on the issue that the injuries to plaintiff's cervical spine are not causally related to the accident of November 12, 2004.

Accordingly, motion (009) is denied.

Turning to motion (010), defendants Jenkins and LL Cool J. seek summary dismissal of the complaint as asserted against them on the basis that they bear no liability for the accident of December 4, 2004 on the bases

that plaintiff was jaywalking and walked into the path of the vehicle being operated by Jenkins and owned by LL Cool J., and that they are protected from liability by the emergency doctrine.

As set forth in ***Bello v Transit Authority of New York City***, 12 AD3d 58, 783 NYS2d 648 (2d Dept 2004): "[N]egligence involves the failure to exercise the degree of care that a reasonably prudent person would exercise in the same situation. It is not a fixed concept, but is shaped by time, place, and circumstance. The common-law emergency doctrine does not define an exception to those principles but rather fits neatly within their framework. The doctrine recognizes that, faced with an emergency, even a reasonable person might choose a course of action which, in hindsight, proves to have been mistaken or ill-advised."

The emergency doctrine holds that those faced with sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency (***Pickering v Woolley***, 2010 NY Slip OP 30417 [U] [Sup Ct, Nassau County]). The essence of the emergency doctrine is that, where a sudden and unexpected circumstance leaves a person without time to contemplate or weigh alternative courses of action, that person cannot reasonably be held to the standard of care required of one who has had a full opportunity to reflect, and therefore should not be found negligent unless the course chosen was unreasonable or imprudent, in light of the emergent circumstances (***Mendez v City of New York***, 2012 NY Slip Op 32096 [U] [Sup Ct, New York County]; ***Bello v Transit Authority of New York City***, *supra*). This is not to say that an emergency automatically absolves one from liability for his conduct (***Waldenmayer v Shechter***, 2008 NY Slip Op 30376 [U] (Sup Ct, Queens County]). The emergency doctrine does not apply to a driver who created the emergency (***Marcinkowski v Capra***, 2011 NY Slip Op 31319 [U] [Sup Ct, Queens County]). 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 (***Bello v Transit Authority of New York City***, *supra*). In the within action, it is determined that there are factual issues which should be determined by the trier of fact as they cannot be determined as a matter of law.

A review of Brett Balliet's deposition testimony reveal that he has a associate's degree in automotive technology and is employed as an automotive service manager by PS Honda, located in Manhasset. On December 4, 2004, he started work about 7 or 7:30 a.m. He drove to work and parked his car on Northern Boulevard, in one of about eight parking spots located across from PS Honda, in front of the funeral parlor. He left work that day at approximately 4:30 p.m., from the first entrance of the building, and began to cross Northern Boulevard at its intersection with Northgate, a side street. He stated that there was no traffic signal device or crosswalk at the intersection where he crossed. It was his intention to walk straight across Northern Boulevard to the other side of the road. There were two eastbound and two westbound travel lanes, with a center multidirectional turning lane between. Balliet testified that he waited for the traffic light, located just east of the intersection, to turn red. He indicated that westbound traffic was heavy and eastbound traffic was stopped. He could see the traffic "pretty much down the hill" to the west, and "up the hill going east." When the traffic light turned red, and traffic was stopped in both directions, he crossed the first lane of traffic which was traveling from the west to the east; that is, traffic that was going up the hill. He indicated that traffic was empty in the two lanes moving westbound at the time he first began crossing. He crossed the two eastbound lanes by stepping between two vehicles in the first eastbound lane, then behind a vehicle which was to his right in the second eastbound lane. He walked about three to four steps out of the second lane into the middle multi-turn lane when he was struck

by a big SUV. He did not see defendants' vehicle prior to being struck. The left side of his body and the bumper and grill on the SUV made contact. He was thrown to the ground about ten feet away, landing on his right side, in front of the vehicle, in the middle of the center lane. He felt pain all over, and was bleeding from his right knee.

Taqiyya Jenkins testified on August 20, 2013, to the extent that she was working for LL Cool J. Inc. since 2001 as a nanny, seven days a week, every other week. During her employment with LL Cool J., she had permission to use its Lincoln Navigator. On December 4, 2004, at the time of the accident, it was light out. She was operating the Lincoln Navigator en route to Louie's Restaurant, and had just left the car wash located somewhere on Northern Boulevard. She was traveling in an eastbound direction on Northern Boulevard, in the turning lane, near the intersection where the funeral home is located, when the accident occurred. She described Northern Boulevard as having two lanes in each direction, east and west, with a turning lane in the middle. She stated that there were no parking lanes on her side of the roadway. She was in the middle turning lane and was approaching a traffic light which had turned red. It was her intention to turn left onto Plandome Road. There were no vehicles in front of her. She testified that her speed was "crawling." She had her right directional on because, as she was approaching the light in the middle turn lane, she realized she had to get back to the right lane because she was not in the correct turning lane. The left turn lane for Plandome Road was the next turning lane, not the lane she was in. There were cars to her right. She stated she was looking straight ahead when the contact occurred. She did not get to enter the lane to her right to continue on Northern Boulevard when the accident occurred. She described traffic as heavy. Jenkins then testified, "[o]kay. So I was trying to get to my right lane from the turning lane and I'm moving up and a guy ran into the car....And when I seen him, I stopped." He was on the right side of her car, right before the turning lane before the line, or by the lane." She then indicated that the plaintiff was in the turning lane, to the right of the car by "the right front light." As soon as she saw him, the contact came as she applied her brakes. She stated that it was like a "boom." Jenkins also testified that the plaintiff was "jay running" based upon the position she saw him in immediately before the contact, although she did not indicate she saw him running or moving.

Vehicle and Traffic Law § 1146 imposes a superseding duty on a motorist to exercise due care to avoid hitting a pedestrian. Under New York law, a driver is under a duty to keep a reasonably careful look out for pedestrians, to see what is there to be seen, and to use reasonable care to avoid hitting any pedestrian on the roadway (***Deitz v Huibregtse***, 25 AD3d 645, 808 NYS2d 737 [2d Dept 2006]). As set forth in ***Hayes v State of New York***, 80 Misc2d 385, 362 NYS2d 994 [Ct. Claims of New York 1974], "[a] motorist has a duty to exercise ordinary reasonable care in the operation of an automobile to prevent injury to those lawfully on the highway. Since an automobile is potentially a great danger to a pedestrian, a motorist must use that care which is commensurate with the dangers to be anticipated. Furthermore, he must exercise that care which a reasonably prudent man would use under similar circumstances. Yet, for actionable negligence to result, a pedestrian must show that he exercised due care and that his injury is proximately caused by the motorist's negligence. A motorist is not an insurer of a pedestrian's safety and ordinarily, the mere fact that a pedestrian is injured raises no presumption of negligence." A pedestrian has a responsibility to use her eyes when crossing the street and to keep herself from danger (***Kaminsky v New York City Transit Authority***, 2009 NY Slip Op 32576 [U] [Sup Ct, New York County]).

Based upon the foregoing, there are factual issues concerning the circumstances surrounding defendant Jenkins' attempt to maneuver back into the right eastbound lane of Northern Boulevard from the middle turn lane

when she realized she was in the wrong turning lane for Plandome Road. Traffic was stopped in the right lane which she was signaling to move into when she saw the plaintiff and the contact occurred. She did not see the plaintiff until a split-second before the contact. She did not testify as to the road conditions in the westbound travel lanes or indicate that her view of oncoming traffic and the pedestrian crossing the westbound lanes was obstructed in any way. While she testified that at the time the accident occurred, she was looking straight ahead, there are factual issues concerning how long she had been looking ahead, and what direction she was looking immediately before looking ahead. There are also factual issues concerning why the plaintiff did not see the defendants' vehicle prior to impact, and whether there was anything obstructing his view at the time. Whether plaintiff exercised reasonable care is also a triable issue of fact for the jury (***Hoffman v Huang***, 42 Misc3d 1238 [A], 986 NYS2d 865 [Sup Ct, Queens County 2014]). Such factual issues preclude summary judgment.

Accordingly, motion (010) is denied.

Dated: September 5, 2014

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION