Faust v Gerde
2015 NY Slip Op 30458(U)
March 31, 2015
Supreme Court, Suffolk County
Docket Number: 07-32125
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX No. 07-32125
CAL No. 14-00841MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 10-23-14 (009)
MOTION DATE 10-30-14 (010)
ADJ. DATE 12-4-14
Mot. Seq. # 009 - MD
010 - MG

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BRIAN FAUST,

Plaintiff,

- against -

LYNNE F. GERDE, FELIX A. CASARES and GEORGE F. CASARES and LIBERTY MAINTENANCE,

Defendants.

---X

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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18-32, 33-34; Replying Affidavits and supporting papers 35-37; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Liberty Maintenance, Inc. ("Liberty") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against it and any cross-claims is granted.

This action arises from a three vehicle motor vehicle accident which occurred on June 19, 2007, on the Robert Moses Causeway in the Town of Islip, County of Suffolk. Plaintiff Brian Faust ("Faust") alleges that his vehicle was struck in the rear, resulting in serious personal injuries. Defendant Lynne F. Gerde (Gerde") operated one of the vehicles involved in the accident, defendant George F. Casares ("Casares") operated a vehicle owned by the defendant Felix A. Casares. It is further alleged that defendant Liberty, a contractor with the State of New York, failed to adequately and safely direct traffic at the site of the accident, permitting a trap to exist at the site.

Defendant Liberty now moves for summary judgment dismissing the complaint and any cross- claims. In support of the motion defendant submits, *inter alia*, its attorney's affirmation, copies of the pleadings, plaintiff's verified bill of particulars, the deposition transcript of the plaintiff, the deposition transcripts of defendants Casares and Gerde, the deposition transcript of a Nikolaos Frangos as a witness for defendant Liberty, and the affidavit of Michael Salatti, P.E., sworn to September 24, 2014. In opposition, plaintiff submits, *inter alia*, his attorney's affirmation, the pleadings, the deposition transcript of the plaintiff, the deposition transcripts of defendants Casares and Gerde, and the affidavit of Richard M. Balgowan, P.E., sworn to October 16, 2014. In opposition, defendant Gerde submits her attorney's affirmation.

Plaintiff testified that the accident occurred on June 19, 2007, at about 8:40 a.m. on a sunny day. He was operating his motor vehicle southbound on the Robert Moses Causeway (a bridge over the Great South Bay), in the Town of Islip, County of Suffolk. The two lane southbound Causeway had been reduced to one lane due to construction. Plaintiff observed orange cones that indicated that you could not go into the left lane. The left lane was closed off and plaintiff was driving in the right lane. After traffic merged, he was in the right lane from the time he entered the Causeway until the occurrence of the accident. He did not see any cars traveling in the left lane. He saw cones as the single lane started. The accident occurred approximately one mile onto the causeway. Plaintiff's vehicle was stopped from the time he first saw the orange cones until the moment of impact. The car behind (defendant Casares) him struck him in the rear and a third vehicle (defendant Gerde) struck the second vehicle. Plaintiff claimed that there were two impacts to the rear of his vehicle. Finally, he testified that the way the cones were placed did not effect the operation of his vehicle in any way.

Defendant Casares testified that he was involved in an accident on June 19, 2007. He was driving his 2004 Jeep Wrangler and had one passenger with him. It was dry and clear. The accident occurred while he was driving southbound "on the bridge" (the Robert Moses Causeway). The accident occurred about "a quarter way" onto the bridge. Leading up to the bridge he saw signs indicating that the road was switching to a single lane. He first saw orange cones approximately 200 yards from the bridge. They were within the roadway on the bridge. The orange cones indicated that the left lane was closed the entire length of the bridge. There were signs indicating that drivers should reduce their speed. When he first saw traffic was

stopped, he was back about 120 yards and traveling roughly 40 miles per hour. He applied his brakes and came to a stop. When he came to a stop, no part of his vehicle was in the other lane. The vehicle driven by the defendant Gerde was behind him. His vehicle was struck in the rear by the Gerde vehicle, with a hard impact. Thereafter, his vehicle struck the Toyota Corolla vehicle in front of him, with a light to medium impact. The construction on the bridge did not impede his ability to see the vehicles in front of him in any way.

Defendant Gerde testified that on the day of the accident she was driving a 1997 Ford Explorer and had one passenger. The day was sunny, the roads were dry. She had been having trouble with her vehicle's brakes during the week prior to the accident. They "weren't the best." The accident occurred about one mile onto the Causeway. She observed orange cones dividing her lane, the right, from the left lane. The cones started before the entrance of the bridge and ended about midway through the bridge. She was driving behind the vehicle of her friend, defendant Casares. Both she and defendant Casares remained in the right lane from the time they first entered the Causeway until the time the accident occurred. No other vehicle passed between the two cars while they were on the Causeway prior to the accident. Traffic slowed and stopped in front of defendant Casares vehicle. When she saw his brake lights in front of her, she braked hard and slowed down to about 10 miles per hour. She was, however, unable to stop and struck the rear of the Casares vehicle, causing it to strike the rear of the plaintiff's vehicle.

Nikoloas Frangos, a vice president of the defendant Liberty, testified on its behalf. Liberty had a contract with the New York State Department of Transportation with regard to the removal of lead, paint, sandblasting and painting the Causeway. He was the supervisor of the project. If lanes needed to be closed, they would use barrels or cones. They would employ various signs to warn motorists of the lane closure and direct them to reduce their speed. Liberty used short term traffic control set-ups that were placed and taken down on a daily basis.

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 (***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 N.Y.U. 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 N.Y.U. 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]).

As a preliminary matter, the court will exercise its discretion and consider the affidavit of defendant Liberty's expert, although the parties dispute whether the expert was properly disclosed pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness, or prior to the making of the instant motion. The Second Department has clarified that precluding an expert's affidavit solely on the ground that the expert was not disclosed during pretrial discovery, is not consistent with the purpose and procedural posture of a motion for summary judgment (***Rivers v Birnbaum***, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]).

As a further preliminary matter, plaintiff argues that defendant Liberty's motion must be denied as untimely, because it was filed more than 120 after the filing of the note of issue. The note of issue herein was filed May 28, 2014, and, thus, the motion had to be served by September 25, 2014. CPLR § 3212 (a) provides that summary judgment motions must be made no later than the date specified by the Court, or, if no date is specified, then no later than 120 days after the filing of the note of issue. Regardless of the merits of the motion, the Court has discretion to extend this deadline only if good cause for the delay is shown. Good cause necessary for filing late summary judgment motion requires a showing of good cause for the delay in making the motion, a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, nonprejudicial filings, however tardy (***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261[2004]; ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]). Absent a showing of good cause, "a court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion" (***Hesse v. Rockland County Legislature***, 18 AD3d 614, 614 [2d Dept 2005]; ***Rivera v Toruno***, 19 AD3d 473, 796 NYS2d 708 [2d Dept 2005]; *see, also,* ***Mayorquin v AP Development, LLC***, 92 AD3d 849, 939 NYS2d 129 [2d Dept 2012]). The "courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure" (*see* ***Quinones v Joan and Sanford I. Weill Med. Coll.*** **Graduate Sch of Med. Sciences of Cornell Univ.**, 114 AD3d 472, 473 [1st Dept 2014]; ***Azcona v Salem***, 49 AD3d 343, 343, 852 NYS2d 767 [1st Dept 2008]). In determining whether motion for summary judgment was timely made within 120 days after the filing of the note of issue, the motion is deemed made on date it was served, not the date it was filed (*see* CPLR 2211; ***Derouen v. Savoy Park Owner, L.L.C.***, 109 AD3d 706, 971 NYS2d 2 [1st Dept 2013]). The court has considerable discretion in determining whether the party seeking summary judgment has shown "good cause" for an untimely motion (*see* ***Fahrenholz v. Security Mut. Ins. Co.***, 32 AD3d 1326, 1328, 822 NYS2d 346 [4th Dept 2006]; ***Filianno v Triborough Bridge and Tunnel Authority***, 34 AD3d 280 [1st Dept 2006]); *see* CPLR 3212[a]). Liberty initially served the motion by mail on September 25, 2014. However, due to an error in postage, the papers were returned by the Post Office. Liberty immediately re-noticed and reserved the motion papers on the parties by overnight delivery on Monday, September 29, 2014, two business days later. The affidavit of Liberty's counsel establishes that the motion papers were prepared for service on each of the

parties, they were weighed on their postal scale, the indicated amount of postage was applied and the packages placed in the mail. Unfortunately, the post office found the postage to be wanting and returned the packages. The Court finds the defendant's explanation establishes good cause for their de minimis four day (two business day) delay in serving the motion and the Court will consider the motion. (*see* ***Nisimova v Starbucks Corp.***, 108 AD3d 513, 514, 967 NYS2d 838 [2d Dept 2013]; ***Matos v Schwartz***, 104 AD3d 650, 652, 960 NYS2d 209 [2d Dept 2013]; ***Valenzano v Valenzano***, 98 .D3d 661, 662, 950 NYS2d 150 [2d Dept 2012]; ***Popalardo v Marino***, 83 AD3d 1029, 1030, 922 NYS2d 158 [2d Dept 2011]; ***Castro v Homsun Corp.***, 34 AD3d 616, 617, 826 NYS2d 89 [2d Dept 2006]).

Turning now to the motion for summary judgement, defendant Liberty has sustained its burden of establishing a prima facie case that the accident herein was not a result of any negligence on its part. A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (***Tutrani v County of Suffolk***,10 NY3d 906, 861 NYS2d 610 [2008]; ***Cortes v Whelan***, supra; ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; ***Volpe v Limoncelli***, 73 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Ditrapani v Marciante***, 10 AD3d 628, 781 NYS2 d 611 [2004]). The presumption of negligence in rear-end cases arises from the duty of the driver of the vehicle behind to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129[a], providing that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway"). Liberty has submitted the deposition of each of the parties to the accident. The plaintiff and the individual defendants have each set forth their explanation with regard to how the accident occurred. In none of their versions of the accident is there any claim that the accident was in any way a result of the orange cones blocking off access to the left lane. The parties' vehicles were directed by the cones into the right lane at the start of the bridge where they remained. The accident occurred in the right lane, as a result of the negligence of one or more of the parties thereto. The cones themselves had no involvement.

Liability may not be imposed upon a party who "merely furnished the condition or occasion for the occurrence of the event" but was not one of its causes (*see* ***Lee v D. Daniels Contracting, Ltd.***, 113 AD3d 824, 978 NYS2d 908 [2d Dept. 2014]; ***Roman v Cabrera***, 113 AD3d 541, 979 N.Y.S.2d 310 [1st Dept 2014]; ***Rattray v City of New York***, 123 AD3d 688, 997 NYS2d 707 [2d Dept 2014]***; Batista v City of New York***, 101 AD3d 773, 778, 956 NYS2d 85 [2d Dept 2012]; ***Sheehan v City of New York***, 40 NY2d 496, 503, 387 NYS2d 92, [1976]). Thus, the actions of the defendant Liberty are not a proximate cause of the accident herein.

In response, the plaintiff and the defendant Gerde have failed to raise an issue of fact. The speculative, conclusory affidavit of plaintiff's expert is insufficient to raise an issue of fact (*see* ***Roman v Cabrera***, *supra;* ***Lescenski v Williams***, 90 AD3d 1705, 935 NYS2d 828 [4th Dept 2011]; ***Brennan v Gagliano***, 71 AD3d 620, 896 NYS2d 398 [3d Dept 2010]; *see also*

Castillo v Wil-Cor Realty Co., Inc., 109 AD3d 863, 972 NYS2d 578 [2d Dept 2013]; ***Martin v Village of Tupper Lake***, 282 AD2d 975, 723 NYS2d 715 [3d Dept 2001). The expert bases his argument on a drawing from the police report of the accident. However, the report has not been submitted to the Court and even if it was, it would be insufficient to raise an issue of fact since it recites hearsay and was prepared, including the drawing relied on by plaintiff's expert, by an officer who had not observed the accident (*see* ***Roman v Cabrera***, *supra*; ***Nisimova v Starbucks Corp.***, 108 AD3d 513, 514, 967 NYS2d 838 [2dDept 2013]; ***Singh v. Stair***, 106 A.D.3d 632, 965 N.Y.S.2d 716 [1st Dept. 2013].)

Accordingly, the motion by defendant Liberty Maintenance, Inc. for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against it and any cross-claims is granted.

Dated: 3/31/15

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**