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| Ramirez v Elias-Tejada |
| 2017 NY Slip Op 30918(U) |
| April 28, 2017 |
| Supreme Court, Bronx County |
| Docket Number: 300174/2012 |
| Judge: Lucindo Suarez |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X
PILAR RAMIREZ, YEDMY BATISTA PERALTA and
DELIO POLANCO, as administrator of the estate of
PAULINA CORTORREAL HICIANO,

Plaintiffs,

- against -

JOSE ELIAS-TEJADA, MICHAEL P. THOMAS and
PAUL CHARLES YOVINO,

Defendants.
-----X

DECISION AND ORDER

Action #1

Index No. 300174/2012

-----X
JOSE A. CORCHADO,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.
-----X

Action #2

Index No. 300885/2013

PAUL CHARLES YOVINO,

Third-Party Plaintiff,

- against -

JOSE ELIAS-TEJADA,

Third-Party Defendant.
-----X

Third-Party Index No.
83861/2013

-----X
JOSE ELIAS TEJADA,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.
-----X

Action #3

Index No. 21702/2013E

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated December 8, 2016 of defendant Jose Elias-Tejada and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated December

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27, 2016 of defendant Paul Charles Yovino; the affirmation in opposition dated January 19, 2017 of plaintiff Jose A. Corchado and the exhibit submitted therewith; the affirmation in opposition dated January 31, 2017 of Delio Polanco and the exhibit submitted therewith; the affirmation in opposition dated February 28, 2017 of defendant Michael P. Thomas and the exhibit submitted therewith; movant's affirmation in reply dated March 10, 2017; the affirmation in opposition dated March 16, 2017 of plaintiffs Pilar Ramirez and Yedmy Batista Peralta and the exhibits submitted therewith; the notice of cross-motion dated March 7, 2017 of plaintiffs Pilar Ramirez and Yedmy Batista Peralta and the affirmation and exhibits submitted in support thereof; the notice of cross-motion dated March 9, 2017 of plaintiff Jose A. Corchado and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated March 10, 2017 of defendant Jose Elias-Tejada and the exhibit submitted therewith; the affirmation in partial opposition dated March 21, 2017 of defendant Michael P. Thomas; the affirmation in partial opposition dated March 24, 2017 of defendant Paul Charles Yovino and the exhibit submitted therewith; the affirmation in opposition dated March 27, 2017 of defendant Paul Charles Yovino; the affirmation in reply dated March 29, 2017 of plaintiffs Pilar Ramirez and Yedmy Batista Peralta; and due deliberation; the court finds:

Defendant Jose Elias-Tejada, the front-most driver in a three-vehicle motor vehicle accident, moves for summary judgment, arguing that his disabled vehicle merely furnished the occasion for plaintiffs' injuries. Tejada's vehicle, containing plaintiffs Pilar Ramirez, Yedmy Batista Peralta, Jose Corchado and Paulina Cortorreal Hiciano, stalled on a highway and was struck from behind by the vehicle driven by defendant Michael P. Thomas. Defendant and third-party defendant Paul Charles Yovino attempted to evade the Thomas vehicle but clipped its left rear corner.

Tejada testified that he had never previously encountered mechanical difficulties with the vehicle, including the day of the accident. He stopped at and proceeded through a tollbooth for the

Throgs Neck Bridge without difficulty but the vehicle “just slowed down and it just stopped” within a quarter of a mile, at the crest of a small incline. He attempted to accelerate by depressing the gas pedal, because he was aware that there was no shoulder in that particular area. The vehicle did not respond, however, so he applied his brakes, put the vehicle in park, shut it off, and turned on the hazard lights. The vehicle came to rest in the right-most travel lane.

The opposition raises a question as to whether Tejada adequately warned other drivers of his disabled vehicle. The testimony indicates that the collision with the Thomas vehicle occurred as many as five but as few as two minutes after Tejada’s vehicle stopped. He did not have flares or reflectors and did not sound his horn upon becoming aware of oncoming vehicles. Tejada and Corchado testified that Tejada activated the hazard lights. Although Thomas testified that he did not see Tejada’s lights after the accident because he was shaken up, elsewhere he testified to not seeing lights on Tejada’s vehicle at any time. This raises an issue of fact. *See Pinilla v. City of New York*, 136 A.D.3d 774, 24 N.Y.S.3d 710 (2d Dep’t 2016); *cf. Zbock v. Gietz*, 145 A.D.3d 1521, 44 N.Y.S.3d 302 (4th Dep’t 2016). “Generally, when one causes a public road to become obstructed, there is a duty to ‘exercise[] the care that a reasonably prudent person should have under all the circumstances.’” *Pinilla*, 136 A.D.3d at 777, 24 N.Y.S.3d at 714. The fact that two tractor trailers successfully passed the Tejada vehicle before the accident, as testified to by Corchado, does not align this case with *Doria v. Cassamajor*, 36 A.D.3d 752, 829 N.Y.S.2d 166 (2d Dep’t 2007), cited by movant, given the conflicting testimony as to Tejada’s efforts to warn other drivers.

The court’s role on a motion for summary judgment is merely the identification of issues of fact, and not the determination of factual questions requiring an assessment of witness memory or credibility. *See Lindgren v. New York City Hous. Auth.*, 269 A.D.2d 299, 704 N.Y.S.2d 30 (1st Dep’t 2000). Given the differing testimony regarding Tejada’s use of hazard lights, and the questions of visibility presented by fact that the accident happened before dawn, plaintiffs raised

questions of material fact as to whether Tejada's actions were reasonable under all of the attending circumstances, *see Mahar v. US Xpress Enters., Inc.*, 688 F. Supp.2d 95 (N.D.N.Y 2010), whether they constituted evidence of negligence, and whether they may have contributed to the accident, *see Newell v. Rodriguez*, 300 A.D.2d 258, 751 N.Y.S.2d 365 (1st Dep't 2002).

Ramirez, Peralta and Corchado cross-move for summary judgment on the issue of liability. Ramirez and Peralta additionally cross-move for summary judgment on the issue of serious injury. The cross-motions, served on March 7, 2017 and March 10, 2017 are untimely, the notes of issue having been filed on September 9, 2016 and October 21, 2016, *see CPLR 3212; Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004), the time in which to interpose dispositive motions not having been extended, and cross-movants not having shown good cause for the untimeliness of the applications, *see Puello v. Georges Units, LLC*, 146 A.D.3d 561, 46 N.Y.S.3d 28 (1st Dep't 2017).

Furthermore, the issues of plaintiffs' comparative negligence, whether their injuries were "serious" within the meaning of the Insurance Law and Thomas's negligence were not the subjects of any timely-made motions; accordingly, cross-movants may not be granted summary judgment upon a search of the record. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244, 246 (1st Dep't 2006), *appeal dismissed*, 9 N.Y.3d 862, 872 N.E.2d 878, 840 N.Y.S.2d 765 (2007). The cross-motions improperly sought relief against Thomas, a non-moving party, *see Hennessey-Diaz v. City of New York*, 146 A.D.3d 419, 44 N.Y.S.3d 404 (1st Dep't 2017), and as to him are thus not true cross-motions to which the *Filannino* savings provision would apply, *see Borges v. Placeres*, 123 A.D.3d 611, 2 N.Y.S.3d 75 (1st Dep't 2014); *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 978 N.Y.S.2d 13 (1st Dep't 2013).

The cross-motions did not affirmatively establish the liability of any defendant, instead relying on plaintiffs' status as "innocent passengers." Such status may not prevent the granting of

summary judgment against a negligent defendant, even when there are other defendants who could have contributed to the accident, *see Johnson v. Phillips*, 261 A.D.2d 269, 272, 690 N.Y.S.2d 545, 548 (1st Dep't 1999); *see also Garcia v. Tri County Ambulette Serv.*, 282 A.D.2d 206, 723 N.Y.S.2d 163 (1st Dep't 2001),¹ but it does not relieve plaintiffs of their affirmative burden on a summary judgment motion. Furthermore, the hospital records relied on were neither sworn nor certified. *See Sutton v. Yener*, 65 A.D.3d 625, 884 N.Y.S.2d 163 (2d Dep't 2009); *McNeil v. New York City Tr. Auth.*, 60 A.D.3d 1018, 877 N.Y.S.2d 351 (2d Dep't 2009).

Accordingly, it is

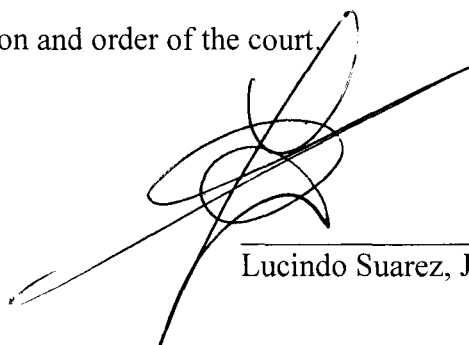
ORDERED, that the motion of defendant Jose Elias-Tejada for summary judgment is denied; and it is further

ORDERED, that the cross-motion of plaintiffs Pilar Ramirez and Yedmy Batista Peralta for summary judgment is denied; and it is further

ORDERED, that the cross-motion of plaintiff Jose A. Corchado for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: April 28, 2017



Lucindo Suarez, J.S.C.

¹ It is otherwise "inappropriate" to rule as a matter of law that one party caused the injury where more than one party's negligence may have caused the injury. *See Maniscalco v. New York City Tr. Auth.*, 95 A.D.3d 510, 512-13, 943 N.Y.S.2d 486, 488 (1st Dep't 2012).