

Webster-Cato v Tuccillo
2018 NY Slip Op 34323(U)
January 29, 2018
Supreme Court, Westchester County
Docket Number: Index No. 61464/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
DONNA WEBSTER-CATO,
Plaintiff,

-against-

Action No. 1
Index No. 61464/2015

JAMES TUCCILLO,
Defendant.
-----X

Sequence Nos. 2, 3 and 4

JAMES TUCCILLO,
Third-Party Plaintiff,

DECISION and ORDER

-against-

ROBERT BREESE,
Third-Party Defendant.
-----X

JAMES TUCCILLO,
Second Third-Party Plaintiff,

-against-

LUIS RODRIGUEZ,
Second Third-Party Defendant.
-----X
-----X

LUIS RODRIGUEZ,
Plaintiff,

Action No. 2
Index No. 52063/2017

-against-

ROBERT S. BREESE, GASPER FASULO, ANNA
MIGNOLI, KAREN M. LA POINTE, JOSE T. GUALLPA
and ZOILA NAULAGUARI,
Defendants.
-----X

Sequence Nos. 1, 2, 3 and 4

RUDERMAN, J.

The following papers were considered in connection with the motions in action 1 (Index No. 61464/2015) by plaintiff Donna Webster-Cato for partial summary judgment on the issue of liability as against defendant James Tuccillo (sequence 3), by second third-party defendant Luis Rodriguez for summary judgment dismissing Tuccillo's second third-party complaint as against him (sequence 4), and by third-party defendant Robert Breese for summary judgment dismissing Tuccillo's third-party complaint against him (sequence 2):

<u>Papers - Sequence 2</u>	<u>Numbered</u>
Breese's Notice of Motion, Affirmation, Exhibits A - G	1
Tuccillo's Affirmation in Opposition, Exhibits A - C	2
Reply Affirmation	3
 <u>- Sequence 3</u>	
Webster-Cato's Notice of Motion, Affirmation, Exhibits A - H	4
Rodriguez's Affirmation in Support, Exhibits 1 - 2	5
Tuccillo's Affirmation in Opposition, Exhibits A - G	6
Reply Affirmation	7
 <u>- Sequence 4</u>	
Rodriguez's Notice of Motion, affirmation, Exhibits A - F	8
Tuccillo's Affirmation in Opposition, Exhibits A - C	9
Reply Affirmation	10

The following papers were considered in connection with motions 1 - 4 in action 2 (Index No. 52063/2017): by defendant Robert Breese, for summary judgment dismissing Rodriguez's complaint and all cross-claims against him (sequence 1), by defendants Gasper Fasulo and Anna Mignoli for summary judgment dismissing all claims and cross-claims against them (sequence 2), by defendant Karen LaPointe for summary judgment dismissing all claims and cross-claims against her (sequence 3), and by defendants Jose T. Gualpa and Zoila Naulaguari for summary judgment dismissing all claims and cross claims against them (sequence 4):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Breese's Notice of Motion, Affirmation, Exhibits A - G	1
Rodriguez's Affirmation in Opposition, Exhibits A - D	2
Reply Affirmation	3
 <u>- Sequence 2</u>	
Fasulo/Mignoli Notice of Motion, Affirmation, Exhibits A - L	4
 <u>- Sequence 3</u>	
LaPointe Notice of Motion, Affirmation, Exhibits A - H	5
Rodriguez's Affirmation in Opposition, Exhibits A - K	6
 <u>- Sequence 4</u>	
Gualpa/Naulaguari Notice of Motion, Affirmation, Exhibits A - G	7
Rodriguez's Affirmation in Opposition, Exhibits A - K	8

Facts

These personal injury actions arise out of a chain of motor vehicle accidents that occurred on January 7, 2015 at approximately 6:30 a.m. on the southbound Saw Mill River Parkway in Mount Kisco, New York, on a section that headed downhill and curved to the right. A total of fifteen vehicles were involved in the series of collisions.

From the documents submitted on these motions, it appears that the first in the series of accidents began when third-party defendant Robert Breese lost control of his Chevy pickup truck on an icy portion of the parkway, slid into an embankment and rolled over, coming to rest in an overturned position in the right lane of the parkway. After Breese's vehicle overturned and came to a stop, the Nissan Altima driven by Gasper Fasulo, unable to successfully brake on the icy roadway, struck Breese's overturned pickup truck, with both vehicles remaining in the right lane.

According to the deposition testimony of plaintiff Donna Webster-Cato, she was driving in the left lane when she saw what she called a pile-up directly ahead of her. She safely brought her car to a stop without incident, a few car lengths back from the pile-up. She did not engage her hazard lights. Within a minute of her stopping, her car was hit from behind and pushed into

the guardrail on the left side of the roadway by a car driven by defendant James Tuccillo, then her car was hit again on the driver's side as it rebounded off the rail, causing it to spin around so that it came to a stop northbound, facing Tuccillo's car. While Webster-Cato testified at her deposition that the second hit was by the same vehicle that struck her initially, in the police report she is quoted as saying that after she was pushed into the rail by Tuccillo's vehicle, her car was caused to spin around by an unknown vehicle

Regarding his collision with Webster-Cato, Tuccillo testified at his deposition that he was driving southbound in the left lane on the Saw Mill River Parkway, and that the road had "a layer of frost" and "was pretty slick" when, after the SUV in front of him braked and moved into the right lane, he saw Webster-Cato's vehicle stopping in front of him, but due to precipitation on the roadway he was unable to come to a stop before he struck her vehicle in the rear. He testified that a second vehicle then struck her again, possibly a Honda. However, in the police report Tuccillo is quoted as saying only that he rear-ended Webster-Cato's vehicle, causing it to spin around. In an affidavit submitted with the current motions, and annexed photographs, Tuccillo more specifically identifies the second vehicle that hit Webster-Cato's, causing it to spin, as the one driven by Luis Rodriguez. In any event, the Webster-Cato and Tuccillo cars came to a stop in the parkway's left lane.

Rodriguez's verified complaint in action 2 asserts that his Honda Accord was first struck in the rear by an Acura driven by Jose Gualpa and owned by Zoila Naulaguari, and then struck again by Gualpa when defendant Karen LaPoint's SUV struck the rear of the Gualpa vehicle. At his deposition, Rodriguez testified that he was traveling southbound in the left lane in his Honda Accord when he saw a pile-up ahead of him, and attempted to move into the right lane, when his vehicle was rear-ended twice in succession, which caused him to lose control of his vehicle and rear-end the vehicle in front of him. During his deposition he said he could not

identify whose vehicles were involved in the accident with him. He denied hitting Webster-Cato's car.

Guallpa acknowledged that his vehicle struck a vehicle ahead of him and was struck in the rear by another vehicle, causing his vehicle to again hit the car ahead again of him. Specifically, he testified that he was in the right lane, and had been following the car in front of him for a long time, when the car ahead started to brake, which in turn caused Guallpa to brake, but he nevertheless lightly hit the vehicle in front of him. His vehicle was then hit from the rear, the impact of which caused him to again hit the car ahead of him. However, he denies that the vehicle he hit belonged to Rodriguez. In the police report, he is quoted as saying he was rear-ended by two separate vehicles which caused him to hit the Honda in front of him. In his deposition testimony, though, he said he was not sure of the make of the vehicle he hit. He also testified regarding two photographs. In one of them, Rodriguez had identified his vehicle with the word "me," and Guallpa denied that the photograph portrayed the vehicle he hit. In the second photograph, Guallpa's red Acura could be seen, and Guallpa testified that it did not include the vehicle that had been in front of him.

Similarly, La Pointe acknowledged in her deposition testimony that she hit vehicles, but denied that she was involved in the accident with Rodriguez. Specifically, she testified that she hit a vehicle that was up against the left-hand guard rail, then hit the rear of the Guallpa vehicle. She also acknowledged that the Guallpa vehicle, which she struck in its rear, had been involved in a collision before she struck it. Nevertheless, like Guallpa, she contends that the vehicle Guallpa hit, the second time because of La Pointe, was *not* Rodriguez's car. In an affidavit by Rodriguez prepared for these motions, he asserts that he is certain it was Guallpa's vehicle that struck his.

In action number 1, Webster-Cato sued only Tuccillo. Tuccillo brought two third-party defendant claims. One of his third-party complaints is against Breese, whose alleged negligence in driving on the icy road, Tuccillo asserts, caused the original pile up that, in turn, led to his accident with plaintiff. Tuccillo's second third-party complaint is against Luis Rodriguez, whom Tuccillo claims also hit Webster-Cato's car.

In action number 2, Rodriguez sued the drivers and owners of the two cars he claims were the ones involved in hitting his: Karen La Pointe, Jose Gualpa and Zoila Naulaguari; he also sued Breese, Fasulo, and Anna Mignoli as the owner of Fasulo vehicle.

Two motions addressed herein were marked submitted for decision on November 15, 2017 in action 1:

- motion sequence 3, Webster-Cato asserts that she is entitled to summary judgment on liability as a matter of law against Tuccillo. Tuccillo opposes.
- motion sequence 4, second third-party defendant Rodriguez moves for summary judgment dismissing Tuccillo's third-party complaint against him. Tuccillo opposes.

Five more motions decided herein were marked submitted on December 20, 2017:

- a motion by Robert Breese filed in NYSCEF as sequence 2 in action 1, in which Breese moves for summary judgment dismissing Tuccillo's third-party complaint against him,
- a motion by Breese based on the same moving papers, but filed as sequence 1 in action 2, for summary judgment dismissing Rodriguez's complaint as against him,
- motion sequence 2 in action 2, by defendants Gasper Fasulo and Anna Mignoli, for summary judgment dismissing all claims and cross-claims against them,
- motion sequence 3 in action 2, by defendant Karen La Pointe for summary judgment dismissing all claims and cross-claims against her, and
- motion sequence 4 in action 2, by defendants Jose Gualpa and Zoila Naulaguari for

summary judgment dismissing all claims and cross claims against them.

Analysis

Webster-Cato's motion (action 1, sequence 3)

Webster Cato moves for summary judgment against Tuccillo on the issue of liability, on the ground that he struck her stopped vehicle from behind and is therefore liable as a matter of law.

Drivers must maintain safe distances between their cars and the cars in front of them (Vehicle & Traffic Law § 1129[a]). “A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence” (*Cruz v Finney*, 148 AD3d 772, 773 [2d Dept 2017]). “A nonnegligent explanation includes, but is not limited to, ‘sudden or unavoidable circumstances’” (*D'Agostino v YRC, Inc.*, 120 AD3d 1291, 1292 [2d Dept 2014], quoting *Gambino v City of New York*, 205 AD2d 583, 583 [2d Dept 1994]). Moreover, to prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault (*Sorocco v Meglio*, __ AD3d __, 2018 NY Slip Op 00325 [2d Dept January 17, 2018]; see *Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]).

Plaintiff's deposition testimony and supporting exhibits establish a prima facie showing of liability against Tuccillo. The questions to be addressed are whether Tuccillo presented a viable non-negligent explanation for his car striking Webster-Cato's, such as sudden or unavoidable circumstances, and whether there is evidence supporting his assertion that Webster-Cato was comparatively negligent.

Tuccillo cites *Youssef v Siringo* (151 AD3d 911 [2d Dept 2017]), where a defendant was found non-negligent because his car slid on black ice over the center line and collided with the plaintiff's vehicle (*see also Kandel v FN; Taxi/ Inc.*, 137 AD3d 980 [2d Dept 2016]). He argues that he was presented with an unavoidable emergency when plaintiff stopped her car on a slippery section of the road. Webster-Cato argues that, unlike the defendant in *Youssef*, Tuccillo knew that the road might be slippery before the accident occurred.

Tuccillo testified that when he noticed Webster-Cato's car in front of him, after the vehicle between them moved into the right lane, Webster-Cato's car was about six car lengths ahead of him, and that he was moving at a rate of 50 miles per hour. He referred to precipitation, slickness on the road and an icy condition to explain his inability to stop before hitting Webster-Cato's car. His claim that he was driving non-negligently, and that his inability to stop was entirely attributable to an unavoidable emergency given the road conditions of which he was not fully aware, presents an issue of fact here. Webster-Cato's argument that Tuccillo's inability to stop establishes his negligence, since she was able to stop her car under the same weather conditions, that argument fails to establish Tuccillo's liability as a matter of law. Since Webster-Cato testified that there was no vehicle in front of her, she is unable to establish that she brought her car to a stop within the distance a vehicle properly maintains from the car ahead of it. All of the foregoing leaves as a question of fact Tuccillo's claim that an emergency created by the condition of the portion of the roadway where he was unable to stop in time caused his inability to stop in time, rather than due to any negligence on his part.

Moreover, Webster-Cato cannot establish as a matter of law that she is free from comparative negligence. Tuccillo argues it was negligent for Webster-Cato to stop her car in the left travel lane of the parkway, observing that other evidence establishes that plaintiff could have passed the "pile-up" she saw by proceeding in the left lane. He cites the rule that

“Except when necessary to avoid conflict with other traffic, or when in compliance with law or the directions of a police officer or official traffic-control device, no person shall ... [s]top, stand or park a vehicle ... [o]n a state expressway highway or state interstate route highway, including the entrances thereto and exits therefrom, which are a part thereof, except in an emergency” (*Marsicano v Fabrizio*, 61 AD3d 941, 941 [2d Dept 2009], quoting Vehicle and Traffic Law § 1202 [a] [1] [j] [internal quotation marks omitted]).

Tuccillo points to the deposition testimony of Breese and of Gasper Fasulo, the driver whose car hit Breese’s overturned vehicle. Both of them testified that when their cars came to rest, the left lane was clear, and, indeed, that another car was able to pass on the left, albeit after fishtailing. In contrast, Webster-Cato testified that she stopped because she perceived the pile-up to be directly in front of her in the left lane, which would, if an accurate perception, make the stop “necessary to avoid conflict with other traffic” in comportment with Vehicle and Traffic Law § 1202 (a)(1)(j). She did not testify regarding whether or not she was able to perceive a clear path past the pile-up in front of her, or whether the curve of the road to the right at that point prevented her from seeing that. Since there is evidence that, contrary to Webster-Cato’s testimony, the left lane was clear, a question of fact is presented as to whether plaintiff acted reasonably in coming to a full stop in the left lane of the parkway, based on what occurred and what Webster-Cato could perceive from her vantage point.

The Rodriguez Motion (action 1, sequence 4)

Luis Rodriguez moves to dismiss the second third-party claim brought against him by Tuccillo based on the allegation that Rodriguez’s vehicle also struck Webster-Cato’s. Rodriguez points out that both his own testimony and that of Webster-Cato asserts that he was not involved in the collision between Tuccillo and Webster-Cato.

It is true that Tuccillo’s deposition testimony failed to provide a factual basis for the claim he asserts against Rodriguez, since he merely testified that there was a second vehicle that hit Webster-Cato’s after he did, and that it may have been a Honda. Nor did Webster-Cato’s

reported statement to the police officer that an unknown car hit hers after Tuccillo did, provide sufficient support to justify Tuccillo's claim against Rodriguez. However, in an affidavit submitted in opposition to Rodriguez's motion, and the photographs discussed therein, Tuccillo specifically identifies the Honda operated by "Lois" Rodriguez as the vehicle that struck Webster-Cato's car immediately after Tuccillo's did and caused Webster-Cato's car to spin around to face northward.

Tuccillo's affidavit and exhibits are sufficient to create an issue of fact precluding summary judgment on the second third-party claim brought against Rodriguez.

Breese's Motion (action 1, sequence 2 and action 2, sequence 1)

Breese raises the question of whether he may be found to have been a proximate cause of the other accidents, observing that none of the other vehicles were involved in his collision with Fasulo, and that Webster-Cato's ability to stop without colliding with the Breese-Fasulo collision establishes that any negligence on his part cannot be considered a proximate cause of the other parties' collisions. In opposing the branch of Breese's motion seeking to dismiss Tuccillo's third-party claim against him, Tuccillo points to the deposition testimony of Karen LaPointe, who testified that shortly before the accidents, she observed the Breese vehicle swerving around vehicles and passing her on the right, at a speed that she estimated at over 70 mph. However, while this is evidence that Breese was driving in a negligent manner, the pertinent question is whether any such negligence may be found to be a proximate cause of the other accidents.

Breese relies on a long line of Second Department cases in which a negligently-driven vehicle could not be considered the proximate cause of collisions behind it, because the vehicle immediately behind it was able to stop without a collision. They are illustrated by *Good v Atkins* (17 AD3d 315 [2d Dept 2005]), where the Court explained why it dismissed the claims against a negligent driver because the vehicle immediately behind it was able to stop without a collision:

“The defendant William A. Atkins, Jr., alleged that as he switched lanes, the vehicles in front of him in the new lane stopped, causing his vehicle to strike the vehicle which was immediately in front of him in the new lane. Behind Atkins was a Nissan Pathfinder (hereinafter the Pathfinder), which stopped without striking Atkins’ vehicle, and behind the Pathfinder was the vehicle containing the plaintiffs, which stopped without striking the Pathfinder. The defendant Kathryn LaRosa, who had been driving behind an SUV, alleged that the driver of the SUV suddenly applied his brakes and swerved out of the lane. The SUV had been trailing the plaintiffs’ vehicle, and soon after the SUV swerved out of the lane, LaRosa struck the rear of the plaintiffs’ vehicle, causing the plaintiffs’ vehicle to strike the rear of the Pathfinder. Atkins alleged that the collision between the plaintiffs’ vehicle and the Pathfinder, in turn, caused the Pathfinder to strike the rear of his vehicle.”

(*Good v Atkins*, 17 AD3d 315, 315-316 [2d Dept 2005]). The Second Department granted Atkin’s motion for summary judgment dismissing the claims against him, holding that “Since the plaintiffs’ vehicle was able to stop without hitting the Pathfinder, any purported negligence on the part of Atkins was not a proximate cause of the collision between the plaintiffs’ vehicle and LaRosa’s vehicle” (*Good v Atkins*, 17 AD3d at 315-316 [2d Dept 2005]; *see also Ianello v O’Connor*, 58 AD3d 684 [2d Dept 2009]; *Hyeon Hee Park v Hi Taek Kim*, 37 AD3d 416 [2d Dept 2007]; *Calabrese v Kennedy*, 28 AD3d 505 [2nd Dept 2006]).

However, notwithstanding the foregoing line of cases, the success of the second car in avoiding striking a negligent car in front of it does not always entitle the first, negligent vehicle to avoid liability toward the injured parties behind it. In *Tutrani v County of Suffolk* (10 NY3d 906 [2008]), a police officer’s sudden lane change and stop on a highway was found to be one of the proximate causes of a collision even where the vehicle immediately behind it was able to brake in time to avoid hitting it, because the next vehicle in line was unable to avoid colliding with the second vehicle. The Court of Appeals reversed the Appellate Division’s holding that the officer’s conduct could not have been a proximate cause of the plaintiff’s accident, and reinstated the finding that the officer was 50% liable for the plaintiff’s injuries, holding that the lack of

contact between the second vehicle and the officer's vehicle did not preclude liability on the part of the officer (*id.* at 907). "That a negligent driver may be unable to stop his or her vehicle in time to avoid a collision with a stopped vehicle is a normal or foreseeable consequence of the situation created by" the officer's dangerous actions, because those actions "created a foreseeable danger that vehicles would have to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear-end collisions" (*id.* at 908 [internal quotation marks and citation omitted]).

It may also be useful to examine the reasoning of other cases involving separate accidents. In *Mikelinich v Giovannetti* (239 AD2d 471 [2d Dept 1997]), the first driver lost control of her vehicle on an icy road, and came to a stop straddling the northbound and southbound lanes; she was then hit by a second car that had been driving behind her. A third car, trying to avoid the collision, skidded into a utility pole. A fourth car then skidded on the ice and struck the third car. The first driver was held to be entitled to summary judgment dismissing claims against her, as she was not driving negligently, and could not be charged with negligence regarding the third driver's accident based merely on her failure to remove her car from the roadway within one minute. By the time the fourth car hit the third car, fifteen minutes had elapsed and the first car had been removed from the roadway. Accordingly, the second accident "arose from a new and independent cause and not as the consequence of [the first car's] original acts,' even had those acts been negligent" (239 AD2d at 472, quoting *Hellett v Akintola*, 178 AD2d 744, 745 [3d Dept 1991]). In *Hellett*, two vehicles skidded on a slippery roadway and had a minor collision, and both vehicles were pulled over onto the shoulder out of the roadway, and uninjured, when a third vehicle hit the first driver, who was walking on the shoulder of the road. In dismissing the claim made by the injured plaintiff against the second car's driver based on the injuries caused by the third vehicle, the Court explained,

“When the second accident occurred, the situation resulting from the first accident was a static, completed occurrence with both vehicles parked safely on the shoulder and with plaintiff’s position normal for a pedestrian. The foreseeable peril inherent in the first accident ceased when the vehicles were safely on the shoulder with all parties uninjured. The second accident arose from a new and independent cause and not as the consequence of [the second driver’s] original acts” (178 AD2d at 744-745).

Here, the relevant events happened within a few minutes. While Fasulo states that he moved his vehicle to the shoulder “almost immediately,” the overturned Breese vehicle, with or without Fasulo’s, and the Webster-Cato/Tuccillo collision, remained present on the roadway, potentially preventing the vehicles behind them from finding a clear path through and contributing to the need to stop short. Unlike *Hallett*, there was no cessation of the possibly foreseeable peril inherent in Breese’s allegedly negligent driving, including Breese’s single-car accident, a collision between his pickup truck and another car, and a subsequent chain of resulting accidents. And unlike *Mikelinich*, no vehicles (except possibly Fasulo’s) had been removed from the roadway and very little time had elapsed.

The basic principles governing determinations of proximate cause hold that “[t]ypically, the question of whether a particular act of negligence is a substantial cause of the plaintiff’s injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences” (*see Hain v Jamison*, 28 NY3d 524 [2016]).

“[W]here the acts of a third person intervene between the defendant’s conduct and the plaintiff’s injury, the causal connection is not automatically severed. Rather, the mere fact that other persons share some responsibility for plaintiff’s harm does not absolve defendant from liability because there may be more than one proximate cause of an injury. It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct, that it may possibly break the causal nexus” (28 NY3d at 528-529 [internal quotation marks and citations omitted]).

Breese’s alleged negligent driving may have contributed to causing his own accident, and,

in turn, Fasulo's and the ensuing collisions. Assuming that Breese's allegedly negligent driving was a cause of his own accident and the ensuing collisions, we must ask whether any such negligent driving may have "created a foreseeable danger," as in *Tutrani*, that other vehicles driving behind him would have to brake suddenly, causing other collisions in turn. Although, as Breese observes, Webster-Cato was able to come to a stop several car lengths before his and Fasulo's collision, this Court cannot reject as a matter of law the assertion that Breese's alleged negligence created a foreseeable danger of a chain reaction as occurred.

Accordingly, Breese's motion, both the portion that relates to action 1 (sequence 2), and the portion that relates to action 2 (sequence 1), is denied.

The Fasulo/Mignoli Motion (action 2, sequence 2)

As to the motion brought by defendants Gasper Fasulo and Anna Mignoli for summary judgment dismissing all claims and cross-claims against them, Rodriguez does not oppose. Rather, in the affirmation submitted on his behalf in opposition to the Gualpa and La Pointe motions, it is stated that Rodriguez "provided a Stipulation of Discontinuance to defendant, Fasulo." Accordingly, in the absence of a filed, executed stipulation of discontinuance, this motion is granted as unopposed in favor of Fasulo and Mignoli, dismissing the complaint against them.

The La Pointe and Gualpa Motions (action 2, sequences 3 and 4)

Initially, Rodriguez may not rely on the Trial Readiness Order in action 1 to argue that defendants' summary judgment motions in action 2 are untimely. The two actions were not consolidated under the earlier index number, and there is no Trial Readiness Order in action 2. The note of issue and certificate of readiness in action 2 was filed on September 20, 2017, and

defendants' motions for summary judgment are not untimely.

The deposition testimony of La Pointe and Guallpa, denying that their collision involved Rodriguez, and the photographs they rely on, merely create a question of fact; they do not entitle these defendants to summary judgment as a matter of law. Moreover, in the affidavit by Rodriguez submitted in opposition to these two motions, he states that he is certain that it was the red Acura driven by Guallpa that struck his car in the rear, which further requires that this issue be tried. Notably, the photographs portraying the positions of vehicles after they came to rest does not necessarily establish as a matter of law the vehicles' position at their moment of impact, since it is not clear how far and in what direction each vehicle moved after the impact.

Finally, Guallpa contends that even if there is a fact issue regarding contact between his car and Rodriguez's, summary judgment should be awarded to him based on the emergency doctrine. However, as the discussion above regarding Tuccillo's arguments establishes, that claim that he was driving non-negligently, and that his inability to stop was entirely attributable to an unavoidable emergency given the road conditions of which he was not fully aware, presents an issue of fact.

Accordingly, it is hereby

ORDERED that motion sequences 2, 3 and 4 in action 1 are all denied; and it is further

ORDERED that motion sequence 2 in action 2 (by Fasulo and Mignoli for summary judgment) is granted, and the Rodriguez complaint as against them is dismissed; and it is further

ORDERED that motion sequences 1, 3 and 4 in action 2 are all denied; and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part on Tuesday, March 27, 2018 at 9:15 a.m., at the Westchester County Courthouse located at 111 Dr.

Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 29, 2018


HON. TERRY JANE RUDERMAN, J.S.C.