

**Baity v Burke**

2019 NY Slip Op 30702(U)

March 20, 2019

Supreme Court, Kings County

Docket Number: 501025/2017

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**DAYSHAWN BAITY, a Minor Under The Age of  
Eighteen Years Old, By his Aunt and Legal Guardian  
THERESA MENEFFEE,**

**Plaintiff,**

**-against-**

**JAMES BURKE and ALSIEG'S FOOD CORP.,**

**Defendants.**

X

**DECISION / ORDER**

**Index No. 501025/2017  
Motion Seq. No. 2, 3  
Date Submitted: 12/13/18  
Cal No. 3, 4**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment on liability and defendants' cross motion for summary judgment dismissing the complaint.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>24-30</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>31-41</u>
Affirmation in Opposition to Cross Motion and Reply to Motion...	<u>42-43</u>
Reply Affirmation.....	<u>45-46</u>

**Upon the foregoing cited papers, the Decision/Order on these motions is  
as follows:**

This is a personal injury action arising out of a motor vehicle accident that took place on November 20, 2016 at around 6:00 A.M. on the Southern State Parkway. Plaintiff testified at his EBT that he was a passenger in a vehicle driven by non-party Malik Rose. During their trip, the car had a flat tire, and so his friend was traveling in the right lane of the westbound Southern State Parkway, looking for a gas station. Plaintiff claims he fell asleep, but woke up when the vehicle was struck in the rear by an unidentified vehicle. Plaintiff testified that he and his friend Malik Rose got out of the car to look for damage.

The car that hit Rose's car did not stop. The Rose car was still in the right travel lane.

Plaintiff said he was in the process of walking toward the back of the Rose vehicle when he was hit by defendants' vehicle, operated by defendant James Burke and owned by defendant Alsieg's Food Corp. [incorrectly sued as *Alsiegs Food Corp.*]. Plaintiff testified that it was raining heavily at the time and that he knew Rose's hazard lights were on as he observed Rose press a red button on the dashboard to turn them on.

Defendant Burke testified at his EBT that it was slightly misty while he was driving in the right lane of the Southern State Parkway. He was driving below the speed limit as he approached his exit, when he came upon two men standing behind a stopped vehicle with no lights or hazard lights on. He testified that he first saw them when he was only about one car length away. He braked hard and veered to his right, onto the grass. He couldn't move left, as that would cause a potential collision with vehicles in the center lane. Burke said one of the two men jumped out from behind the vehicle and moved to the right, and Burke then "clipped him" with his car. Burke testified he did not hit the Rose vehicle.

Defendants contend that they are entitled to summary judgment dismissing the complaint because Burke was completely free from fault under the emergency doctrine insofar as he was traveling within the speed limit on a dark roadway when he came upon a stopped vehicle in an active traffic lane of a highway without its brake lights or hazard lights on. Thus, he was forced to take sudden evasive action to avoid contact with the disabled vehicle, which he did successfully, but he struck plaintiff when plaintiff suddenly moved into his path.

Plaintiff contends he is entitled to summary judgment on liability because Burke was negligent in the operation of his vehicle and was solely responsible for the plaintiff's

accident. Plaintiff claims Burke failed to observe the disabled Rose vehicle and the plaintiff standing behind it in time to safely navigate around it or stop behind it, and that the emergency doctrine is inapplicable because it was Burke's failure to observe the stopped vehicle that caused the accident. Further, plaintiff contends that even if there is some comparative fault on his part, which plaintiff disputes, he is nevertheless entitled to summary judgment on liability based upon *Rodriguez v City of New York* (31 NY3d 312, 318 [2018]).

"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" (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, there are disputed issues of fact as to whether the Rose vehicle had its lights or hazard lights on, what the lighting and weather conditions were at the time, and whether plaintiff was walking along on the side of the Rose car or was at the rear of the car and suddenly jumped to the right immediately before he was hit by defendant. These disputed factual issues prevent the court from determining how the accident occurred. As far as the emergency doctrine goes, if defendant Burke was faced with an emergency situation, and then acted reasonably under the circumstances, this is generally an issue of fact for a jury and is not appropriate for a motion to the court. (see *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444 [2d Dept. 2005] ["As a general rule, the questions of the existence of an emergency and the reasonableness of the response to it is an issue for the trier of fact"]);

see generally *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991] ["when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context"]; cf. *Marsch v Catanzaro*, 40 AD3d 941, 942 (2d Dept 2007) [driver is not obligated to anticipate that vehicle traveling in opposite direction will cross over into oncoming lane of traffic; defendant's reaction in emergency situation, swerving out of path of oncoming vehicle, was reasonable as matter of law].

Additionally, as the certified police report (E-file Doc # 39) does not reference the Rose vehicle at all, except to say plaintiff was a passenger in an unidentified vehicle that was "disabled" and "uninvolved," there is an issue of fact with regard to whether the Rose vehicle was disabled.

Accordingly, it is

**ORDERED** that the motion and cross motion are both denied.

Further, as plaintiff is no longer a minor, and the defendant corporation's name is mis-spelled, the caption is hereby amended to read as follows:

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**DAYSHAWN BAITY,**  
**Plaintiff,**

**-against-**

**JAMES BURKE AND ALSIEG'S FOOD CORP.,**  
**Defendants.**

-----X

This shall constitute the decision and order of the court.

Dated: March 20, 2019

**ENTER:**



**Hon. Debra Silber, J.S.C.**

Hon. Debra Silber  
Justice Supreme Court