SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

RICHARD T. MCNAMARA,

Plaintiff,

-against-

TREVOR S. GALVEZ, RICHARD S. HUGHES, and JESSE R. DEMERS,

Defendants.

Index No.
612068/17

Motion Seq:
001 MG
002 MG

Decision/Order

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	16-24; 25-38
Answering Papers.....	4346; 47-49; 52
Reply.....	50; 56
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	27

Plaintiff, a New York State Department of Environmental Conservation (DEC) police officer brings this action to recover for injuries he sustained on March 13, 2016, while he was on duty in the wooded area west of Defense Hill Road, north of New York State Route 25A, in Shoreham, New York. Plaintiff's assignment that day was to deter illegal off-road activity. Plaintiff was dressed in plain clothes and was riding on an unmarked All-Terrain Vehicle (ATV). During the course of his duties, the plaintiff was injured when the left front tire of Galvez's vehicle came into contact with the plaintiff's left ankle.

Two of the three co-defendants named in this action each move for summary judgment dismissal of all of the claims asserted against them (Motion Sequence 001 by defendant Richard S. Hughes; Motion Sequence 002 by defendant Jesse R. Demers). Demers submits an affirmation in partial support of Hughes' motion, as Hughes places no liability on Demers for the subject incident. Hughes executed a stipulation of discontinuance in favor of Demers, but

plaintiff and co-defendant Galvez refused to also execute the stipulation. Plaintiff opposes both motions.

Hughes and Demers each assert that they are entitled to summary judgment dismissal of the claims against them because the evidence presented demonstrates that the actions of co-defendant Trevor S. Galvez are the sole proximate cause of the incident that resulted in the plaintiff's injuries.

The Pleadings

The complaint dated June 27, 2017 alleges one cause of action against all of the defendants sounding in negligence. Specifically, plaintiff alleges that the vehicle operated by Galvez struck the plaintiff. There are no allegations in the complaint stating that either of the other two vehicles operated respectively by Hughes and Demers ever contacted the plaintiff.

The Bill of Particulars dated January 22, 2018 and the Supplemental Bill of Particulars dated April 20, 2018 assert, in sum, that the defendants were negligent in the operation of "their vehicle," in failing to keep a proper lookout, in operating "their motor vehicle" in a dangerous and negligent manner, and by failing to comply with statutes and/or ordinances pertaining to vehicular traffic.

The Undisputed Facts

As established by the deposition transcripts submitted by each of the moving defendants, the subject incident occurred on March 13, 2016, at 6:00 p.m., in a wooded area on PSEG property in Shoreham, New York. Each of the defendants was present on that property, each in their own vehicle, for the purpose of "exploring" the trails and rough terrain of the area. Galvez operated a Ford pick-up truck; Hughes operated a Jeep, and Demers operated a separate Jeep. Based upon the testimony offered by each of them at deposition, it appears that they had arranged to meet at the location at approximately 5:30 p.m. to explore the rough terrain, each in their separate vehicles. Galvez is apparently the individual who went to high school with Demers and Demers knew Hughes through Galvez.

The plaintiff was present at the subject location to deter what he testified to as "illegal off-road activity." He was dressed in plain clothes, with no badge visible, and the was riding an unmarked ATV.

The plaintiff first approached Galvez, who was seated in his pick-up truck alone. At no time during the incident did Galvez have a passenger in his truck. Hughes was alone in his Jeep, and Demers was alone in his Jeep. During the encounter with plaintiff, Galvez put his truck in reverse gear and backed up to leave the area. While he was backing up, his left front truck tire struck plaintiff's ankle, causing injury.

Neither Galvez, Hughes or Demers ever left their respective vehicles during the short time period of the encounter, and neither the Hughes vehicle nor the Demers vehicle ever struck or otherwise made contact with the plaintiff.

Further undisputed is the fact that Demers was located at some distance from the location where the plaintiff first approached Galvez, approximately 100 yards away according to plaintiff's own testimony. Further according to the plaintiff, from the time he first observed the three vehicles until the incident was over, he did not hear any communication between the defendants in their respective vehicles. Plaintiff also testified that he did not have any physical or verbal contact with Demers.

Each of the named defendants in this action left the area, in their respective vehicles. A short while later, Galvez and Hughes were stopped by police and taken into custody. The plaintiff did not participate in the arrest because he was injured and in pain. Demers was not apprehended on March 13, but he was taken into custody on March 14, 2016. None of the parties to this action has offered certificates of disposition as to the outcome/status of the criminal matters, although Hughes testified that he received a "disorderly conduct."

Summary Judgment Standard

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]). "The Supreme Court's function on a motion for summary judgment is issue finding, not issue determination" (***Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Public Accountants, LLP***, 164 AD3d 864, 865 [2d Dept 2018]).

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (***Boulos v. Lerner-Harrington***, 124 AD3d 709, 709 [2d Dept 2015]). "Although, in general, the issue of proximate cause is for the jury [internal citations omitted], liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" (***Ely v. Pierce***, 302 AD2d 489, 489 [2d Dept 2003]; ***Kante v. Ton Fei Chen***, 176 AD3d 928, 929 [2d Dept 2019]).

Motion Sequences 001 and 002

Where, as here, the submitted deposition testimony establishes that neither the operation of Hughes' vehicle, nor the operation of Demers' vehicle caused or contributed in any way to Galvez backing up his truck and striking plaintiff, these moving defendants have each established their *prima facie* entitlement to summary judgment as a matter of law.

According to plaintiff's own testimony, he first observed two stopped vehicles, Galvez's and Hughes', and then he saw a third stopped vehicle "off to the side," that vehicle being the one belonging to Demers. Plaintiff testified that before he even stopped his unmarked ATV, the Hughes Jeep began to move forward. Galvez's truck remained stopped and the plaintiff brought his ATV to a stop near the front left, driver's side quarter panel/left driver's side tire. Plaintiff's

ATV was "fairly close" to Galvez's truck. Hughes Jeep "was out of visual by the time [plaintiff] stopped the ATV." Demers was located "approximately 75 to 120 yards" to the east of where Galvez was stopped.

When the plaintiff brought his ATV to a stop, he testified that he dismounted the vehicle and spoke to Galvez who remained seated in his truck. Plaintiff did not recall what he said to Galvez, but he testified that "either before [Galvez] started to move or as he was starting to move, I stated that I was Officer McNamara, and to stop, or it was police. . . Something along those lines." Plaintiff testified that he was within two feet of the Galvez truck when he said that, and that he touched the Galvez truck with his hand, grabbing the shift lever located inside the truck, on the steering column. The plaintiff further testified that he did not remember if he pulled the shift lever into park or if he just held the shift lever. Plaintiff did not know what gear the truck was in before he reached inside to grab the shift lever. Plaintiff then testified that he instructed Galvez to put his hands into his lap and stop attempting to leave, to which Galvez stated something "along the lines of show me your badge if you're a cop." As plaintiff went to retrieve his shield from the left front pocket of his jeans, plaintiff stated that he displayed his shield to Hughes' Jeep from fifteen (15) feet away and told him to stop, but that Hughes did not stop, and Hughes did not say anything to plaintiff. After the Hughes vehicle passed plaintiff, plaintiff testified that he turned back to the Galvez truck, which then began to move in reverse. Galvez did not stop his truck, but he continued to travel in reverse and Galvez's left driver's side tire contacted plaintiff's lower left leg and foot/ankle. Galvez's truck is the only vehicle that plaintiff reached his arm into at the location of the subject incident.

After plaintiff was struck by the Galvez truck, he observed the other Jeep (Demers) move from the spur trail and proceed to leave the location. As noted, the plaintiff did not hear any of the three individuals in the three separate vehicles communicating with each other while the incident unfolded. Eventually, the plaintiff was shown three photographs and he identified Galvez as the individual who struck him with the truck.

Based upon all the submitted testimony, especially that of the plaintiff, it has been demonstrated that each of the named defendants individually chose to leave the location in their respective vehicles, whether or not they believed plaintiff was a member of law enforcement,[1] and that they did not have any communication with each other as the incident unfolded. Although the moving defendants are not to be commended for their conduct in leaving the scene, they did not strike the plaintiff, nor did they cause or contribute to Galvez's actions in backing over the plaintiff's lower leg/ankle/foot. Their vehicles were not positioned so as to cause Galvez to travel in reverse; they apparently did not communicate with each other as to how to escape the area, nor is there any evidence that they intended, either individually or collectively, to cause the plaintiff harm. Accordingly, Hughes and Demers have each established their *prima facie* entitlement to summary judgment as a matter of law.

[1] Hughes testified that he did not know plaintiff was a police officer and thought he was "getting mugged," and Demers testified that he saw a "commotion" from a distance but did not see any police lights or hear any police sirens.

Plaintiff's Opposition and Concerted Action Liability

In opposition, plaintiff asserts a new or amplified theory of recovery, namely "concerted action liability." The theory is that, "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person" (***Restatement 2d of Torts, § 876***). Plaintiff now claims that, because the defendants were collectively engaged in "illegal off-roading" and fled the scene, the moving defendants are also responsible for the injuries sustained by the plaintiff.

This theory was not pled in the complaint, nor was it alleged in the Bill/Supplemental Bill of Particulars. Plaintiff filed his note of issue on July 18, 2019, and this new theory of liability is asserted for the first time in plaintiff's opposition papers dated November 18, 2019; therefore, it is improperly raised for the first time in opposition to the defendants' motions (***Fox v. Saloon***, 166 AD3d 950, 951 [2d Dept 2018]; ***Mezger v. Wyndham Homes, Inc.***, 81 AD3d 795, 796 [2d Dept 2011]).

In any event, the submitted deposition testimony demonstrates that there was no agreement between the defendants concerning fleeing the location of the incident; rather, the defendants acted in their own individual interests, as in each man for himself. Furthermore, there is no evidence that the moving defendants acted in concert to commit a tortious act upon the plaintiff. Here, Galvez is the undisputed tortfeasor who ran over the plaintiff's leg/foot/ankle with his truck.

"[T]he accepted tort doctrines of alternative liability and concerted action are available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible…This doctrine. . .provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in 'a common plan or design to commit a tortious act' [internal citations omitted]. . . Parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim" (***Hymowitz v. Eli Lilly & Co.***, 73 NY2d 487, 505-506 [1989]; *see also* ***Rastelli v. Goodyear Tire & Rubber Co.***, 79 NY2d 289, 295 [1992]). There is simply no evidence that the moving defendants participated in a common plan or design, implicitly or expressly, to commit a tortious act .

Plaintiff's reliance upon ***Herman v. Westgate*** (94 AD2d 934 [4th Dept 1983]) is misplaced. In that case, the conduct of the defendants alleged to be dangerous and tortious was the pushing or throwing of guests, against their will, from the barge into the water. Thus, the Herman Court determined that the liability of an individual defendant did not depend upon whether he actually propelled plaintiff into the water; the fact that he participated in the concerted activity, intentionally throwing people off the barge against their will, is equivalent to participation in the specific accident resulting in the injury.

In this case, as noted, there is no evidence at all that any of the defendants intended to commit an intentional tort against the plaintiff, let alone the moving defendants who had no contact with the plaintiff.

The police reports submitted by plaintiff in opposition to the instant motions constitute hearsay and are insufficient to raise a triable issue of fact sufficient to defeat these motions. Even if the Court were to consider those documents there is nothing therein, including in the statements of Hughes and Galvez given to the police, indicating that there was any common scheme or plan to commit a tort against the plaintiff, or encouragement for assistance to do so.

Accordingly, Motion Sequences 001 and 002 are granted, and the complaint and all cross-claims asserted against defendants Richard S. Hughes and Jesse R. Demers are dismissed. Trevor S. Galvez is the remaining defendant.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 12, 2020
Riverhead, NY

/S/
CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]