SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** **IAS MOTION 22**
Justice

----------X

CESAR FERNANDEZ,

Plaintiff,

- v -

JOSE ARAGON, CC VENDING, INC.

Defendant.

----------X

INDEX NO. 161295/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER) .

Upon the foregoing documents, it is hereby ORDERED that the plaintiff's motion for summary judgment, pursuant to *CPLR §3212*, is denied on the issue of liability against defendants Jose Roberto Aragon and CC Vending, Inc. Plaintiff contends in his motion, *inter alia*, that he suffered serious injuries when defendants' vehicle collided with his vehicle after the defendant pulled out of a parking spot, without ensuring that it was safe to do so. Defendants' counsel filed a cross-motion to consolidate this action with a related action. In addition, defendants' filed opposition papers to the plaintiff's summary judgment motion on the issue of liability. Plaintiff's counsel submitted a reply.

This Decision/Order will be outlined in two-parts. First, the plaintiff's motion for summary judgment on the issue of liability, and second, the defendant's cross-motion for consolidation.

I. Plaintiff's Motion for Summary Judgment on the issue of liability and Defendants' Cross-Motion for liability.

In support of his motion for summary judgment on the issue of liability, plaintiff argues that defendants are in violation of *VTL §§1162 and 1128(a)*. Pursuant to *VTL §1162,* "no person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety." Pursuant to *VTL §1128(a)*, "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Plaintiff relies on his own sworn deposition testimony and the sworn testimony of defendant, Jose Roberto Aragon. Plaintiff testified that he was driving on East 45th Street when defendants' truck moved quickly out of the parking lane on the left side of the street, and struck plaintiff's vehicle on the left side of the front bumper. Plaintiff also testified that he saw the truck approximately two seconds before impact, and he attempted to press the brakes to avoid the impact but was unable to stop. The plaintiff testified that defendant, Jose Roberto Aragon, admitted liability for the collision.

Plaintiff also relies on defendant Aragon's deposition testimony where he testified that within one minute prior to the accident, [defendants'] truck was moving into the lane of traffic when the accident happened. *See, Exh. E, pp. 22, lines 18-24*. Defendant Aragon testified that at the moment of impact, he was looking forward and checking for oncoming traffic in the right-side mirror. *Id at pp. 23, lines 7-10.* Defendant Aragon testified that he did not see the other vehicle before the accident. *Id at. pp 22 lines, 8-10*. Defendant further testified that the last time he checked for oncoming traffic was 20 to 30 seconds before he exited the parking lane. *Id. at pp. 23 lines 7 - 18.*

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of

credibility." *Garcia v J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), *citing*, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See*, *Ugarriza v. Schmieder*, 46 N.Y2d 471, 475-476 (1979). Here, Plaintiff has made a *prima facie* case of negligence since defendants' vehicle was stopped at a parking spot and should not have moved unless it was reasonably safe, and the burden now shifts to defendants to raise a triable issue of fact. *See, Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985).

In opposition, defendants' counsel argues, *inter alia,* that the plaintiff's summary judgment motion is premature because plaintiff is named as a defendant in a related action pending before this court, and defendants in this action are entitled to depose the parties in the related action. This court rejects defendants' argument that this motion is premature because discovery is outstanding. Since defendant is a party with knowledge of the factual circumstances as to how…[the accident occurred], discovery would serve no purpose." *Johnson v. Phillips*, 261 A.D.2d 269 (1st Dep't 1999).

Further, defendants have submitted the affidavit of defendant-driver, Jose Roberto Aragon. Defendant Aragon states, in his affidavit, that prior to the collision, he looked into his right passenger side mirror for oncoming traffic, and he observed no vehicles approaching East 45th Street. Defendant Aragon contends that he pulled the front most part of his vehicle into the moving lane of traffic, and remained in that position for about twenty to thirty seconds with his right foot on the brake, when the plaintiff's vehicle struck the front right passenger side of the defendants' vehicle.

Here, the defendants raise genuine issues of fact regarding plaintiff's *prima facie* case of negligence with regards to the subject motor vehicle accident in that plaintiff argues that defendant

collided with plaintiff's vehicle when defendant pulled out of the parking lane, and defendant argues to the contrary that when defendant pulled out of his parking spot, the plaintiff hit the front passenger side of defendants' truck. The issue remains to be determined as to whether defendant, while stopped and parked, safely moved from the parking spot and whether defendant ascertained whether it was safe to move by observing oncoming traffic, in accordance with *VTL §§1162 and 1128(a)*.

Furthermore, plaintiff's motion to strike the defendants' affirmative defenses that allege plaintiff's culpable conduct, comparative negligence and contributory negligence is denied. Here, there are issues of fact as it pertains to whether plaintiff was free from negligence. Accordingly, the plaintiff's motion for summary judgment on the issue of liability against defendants, and to dismiss all of defendants' affirmative defenses alleging culpable conduct, comparative negligence and contributory negligence is denied.

II. Defendants' Cross-Motion for Consolidation

In addition to submitting opposition to the plaintiff's motion for summary judgment, defendants cross-moved to consolidate this action, Index No.: 161295/2018 (Action #1) with a related action pending in the Supreme Court, New York County, bearing Index No.: 160571/2019 (Action #2) pursuant to *CPLR §602(a)*. Defendants argue that both actions arise out of the same motor vehicle accident that took place on September 18, 2018, and involve the same witnesses and raise identical issues of fact and law. No opposition has been filed to defendants' cross-motion to consolidate.

Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to *CPLR §602(a)* should be granted absent a showing of prejudice to a substantial right by the party opposing the motion." *Perini Corp. v. WDF, Inc.,* 33 A.D.3d 605, 606, 822 N.Y.S.2d

295 (2d Dep't 2006). Here, both actions involve common questions of law and fact and a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts. *See*, *Gutman v. Klein,* 26 A.D.3d 464, 465, 811 N.Y.S.2d 413 (2d Dep't 2006). Thus, the defendants' motion to consolidate is granted.

Here, although the defendants have moved to consolidate the actions, the more appropriate method to hear the matters is to join them, particularly since the two actions involve different plaintiffs. *Mas-Edwards v. Ultimate Servs.*, Inc., 45 A.D.3d 540, 540–41, 845 N.Y.S.2d 414, 415 (2d Dep't 2007) citing, *Perini Corp. v. WDF, Inc.,* 33 A.D.3d at 606–607, 822 N.Y.S.2d 295 (2d Dep't 2006). As such, the defendants' motion seeking consolidation is granted to the extent that the actions will be joined for trial and discovery.

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment is DENIED on the issue of liability as against Defendants Jose Roberto Aragon and CC Vending, Inc., and it is further

ORDERED that the Plaintiffs' motion to dismiss all of Defendants' affirmative defenses alleging culpable conduct, comparative negligence and contributory negligence is DENIED; and it is further

ORDERED that the defendants' cross-motion to consolidate is GRANTED, and the action *Cesar M. Fernandez v. Jose Roberto Aragon and CC Vending, Inc.*, Index No.: 161295/2018 (Action #1), shall be joined in this Court with action *Jose De Los Santos Diaz Garcia and Martin Alexander Capellan Flores v. CC Vending, Inc., Jose Roberto Aragon and Cesar M. Fernandez*, Index No.: 160571/2019 (Action #2). Therefore, Action #1 and Action #2 shall each retain their

original index numbers, Index No.: 161295/2018 and Index No.: 160571/2019, respectively, and the joined actions shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____x

CESAR M. FERNANDEZ,

Plaintiff, Index No.: 161295/2018

-against-

JOSE ROBERTO ARAGON and CC VENDING, INC.,
Defendants.

_____x

JOSE DE LOS SANTOS DIAZ GARCIA and
MARTIN ALEXANDER CAPELLAN FLORES,
Plaintiffs,

-against- Index No. 160571/2019

CC VENDING, INC., JOSE ROBERTO ARAGON, and
CESAR M. FERNANDEZ,
Defendants.

_____x

And it is further

ORDERED that the pleadings in the actions are hereby joined for the purposes of trial and discovery; and it is further

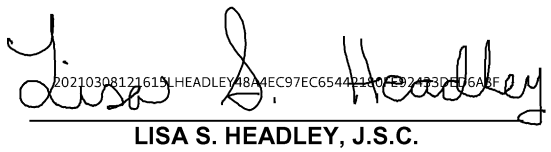
ORDERED that within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon all parties, on the Clerk of the Court (60 Centre Street, Room 141 B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) who shall join the documents in these actions and shall mark the court's records to reflect the same; and it is further,

ORDERED that service of this order upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

This constitutes the Decision/Order of this Court.



3/8/2021
DATE

LISA S. HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE